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13 February 2012

Attention: Honourable Speaker: Mr. Rudolf Phala
Limpopo Provincial legislature
Private Bag X 9309
Polokwane
0700

Dear Mr. Phala

**SUBMISSION OF THE LIMPOPO PROVINCIAL TCB COMMUNITIES TUSK TEAM ON
THE TRADITIONAL COURTS BILL, 2012**

Introduction

This memo serves to confirm that a national workshop on the Traditional Court Bill was held on the 16-17 of January 2012. It is therefore that we, the concerned group, being representatives of communities of Makuleke, Phaphazela, Mahonisi, Mahatlane, Peninghotsa, Molemole Landless Movement, Opret Legal Advise Centre, Shigalo CPA, noted that the existence of the Traditional Courts Bill (B15-2008) has been introduced to parliament in March 2008 and met with much resistance in respect of its allegedly inconsistency with both the Customary law and the Constitution. We have in the workshop familiarized ourselves with the contents of the Bill and we have noted a lot of problematic aspects with respect to its purpose, scope, and the position of women and the composition of the traditional Courts. Subsequent to this National Workshop, we had our provincial workshop held on the 27 January 2012 at the Oasis Lodge in Polokwane to further discuss this Bill. It is important to note that it is in accordance with the purpose of this submission that the analysis of public policy process should be read equal so with the analysis of the legislative framework and its formulation processes.

Purpose

This memo serves as a submission by the Limpopo Provincial communities to the provincial legislature, National Council of Provinces (NCOP) and/or select committee on the Traditional Court Bill as

introduced in the National Assembly (proposed section 76): explanatory summary of Bill published in Government Gazette, No.30902 of 27 March 2008 (B15-2008).

The rationale and the model

In the light of the above, the Limpopo Provincial communities like to indicate that: the planning and the drafting of the Traditional Court Bill as published in Government Gazette; No 30902 of 27 March 2008 (B15-2008) could not have been achieved without a model. As Dunn aptly states, each of us uses models constantly. Every person in his private life and in his business life instinctively uses models for decision-making. The mental image of the world around us, which we can carry in our head, is a model. One does not have a city or a government or a country in his head as he or she has only selected concepts and relationships, which he/she uses to represent the real system. A mental image is a model and all the decisions are taken on the basis of the model.

Like in what Dunn (1994) defines policy-making process as a simplified representative of selected aspects of a problem situation constructed for particular purposes, so as with the formation process of the laws. This submission also observes that the formation and the management processes of the legislation, especially the public law analysis and the model used for such an analysis are divided into two categories. These are models that are appropriate for analyzing the process of Bill making processes which are generally referred to as the descriptive approach and the model appropriate for analyzing the content, results, impacts and likely consequences of the law and this is referred to as prescriptive in nature.

A prescriptive approach focuses on the analysis of policy and/or law is intended to establish whether a particular legislation has had the desired results and what potential results and consequences will become as a result of this legislations. The most prevalent of the prescriptive models include the rational-comprehensive model, the incremental model and the mixed-scanning model. With regard to the descriptive model of legislative framework and its analysis, the focus is on the legislations-making process and it is the method or methods used to solve problems. According to Hanekom (1987), descriptive approach to public policy and legislative framework analysis is based on the functional efficiency and some models which include the following:

The Functional Process Model

This model focuses on the functional activities involved in the process of formulating the legislative and emphasizes the “how” and “who” aspects. This model lends itself more to a comparative study of formulating legislations

The Elite/Mass Model

The elite/mass model is well known in policy analysis literature (Anderson: 1979; Dye: 1978; Henry: 1975) and is based on the assumptions that a small elite group (usually government) is solely responsible for legislative decisions and that this group governs the ill-informed public (the masses).

Legislative decisions of the elite flow downwards to the population at large and are executed by the bureaucracy. Henry (1992) points out that the emphasis represented by the elite/mass model may be among the most germane of public administrators. He pointed out that, increasingly, public administrators appear to be perceived less as “servant of people” and more as “the establishment”. In cursory form, the elite/mass model contends that a legislative making and policy executing elite is able to act in an environment characterized by apathy and information distortion and thereby governs a largely passive mass. With this model, elites share common values that differentiate them from the masses, and prevailing public policies reflect elite values, which may be summed up as preserving the status quo (Henry, 1992).

Underlying the elite/mass model are considerations such as the elite are fairly in power that they know best. Clearly, this assumption implies that values and interests of the elite are of primary importance and therefore deserve their dominant position. This assumption can also be applied at the organizational level in the private and non-governmental sectors. Recent literature and experiences show that the elite may play a pivotal role in policymaking or formation of legislations and may act as a dynamic catalyst for policy change. Another aspect of this model that is overemphasized is that the masses are regarded as passive and ill-informed.

It is within the above context and the Limpopo Provincial communities believes that a model of this caliber might have been used when drafting this Traditional Court Bill, considering the fact that the time allocated for the public consultation of between the 15th December 2011 and the 15th January 2012 is short that a generic process model could not have been used. This submission would, later in the discuss this model.

Dunn's Model

Dunn's model is generally regarded as being representative of the international experience in policy making and the broader legislative framework (Dunn: 1994). The model shows that the process of policy making should follow the following: agenda setting, policy formulation, policy adoption, policy implementation and policy assessment. Dunn's comments on the process model are of note. He states that the process of policy analysis is a series of intellectual activities carried out within a process comprised of activities that are essentially political. Dunn describes these political activities as the policy making process and he visualizes the process as a series of phases arranged through time.

Dunn's model represents ongoing activities that occur through time. Each phase is related to the next, and the last phase (policy assessment) is linked to the first, (agenda setting), as well as to the intermediate phases, in a non-linear cycle or a round of activities. The application of policy analytical procedures may yield policy relevant knowledge that directly affects assumptions, judgments, and actions in one phase, which in turn indirectly affects performance in subsequent phases (Dunn, 1994).

The international understanding of agenda setting is however largely limited to issues of problem structuring and does not necessarily provide for policy initiation and design of the policy process itself. Dunn (1994) regards “agenda setting” as mainly consisting of problem structuring that can supply relevant knowledge that challenges the assumptions underlying the definition of problems. Forecasting,

according to Dunn, can provide policy relevant knowledge about future states of affairs, which are likely to occur as a consequence of adopting alternatives (Dunn, 1994).

Recommendations, as part of the policy adoptions phase, yields policy relevant knowledge about benefit and cost of policy alternatives, thus aiding policy makers in the policy adoption phase. In the policy assessment phase, Dunn regards evaluation as policy relevant knowledge about discrepancies between expected and actual performance. Dunn's model is one of the recognized international process models and some of its useful phases and elements warrant further attention. As stated earlier on, international models like Dunn's focus mainly on policy processes found to have a fairly technical approach to process management and it is believed that this model is compatible with the elite/mass model; however, specific requirements and key considerations are not clearly spelt out.

Stage Model

A South African contribution to process models worth noting is the stage model of policy making by Henry Wissink (Fox et al, 1991). The authors note that an alternative approach to developing a policy-making model is to break down the policy into descriptive stages that correlate with the real dynamics and activities, and that the process is viewed as being sequential in nature and policy is often initiated at different stages and bypasses many activities. The stage model views the policy-making process as consisting of activities which are often present but ignored in contemporary models. These activities include, first, initiation or becoming aware of a public problem through civic, political or stakeholder action; second, agenda setting or placing the issues on the policy agenda and determining priorities. Processing the issue therefore involves identifying the problem and major stakeholders, and considering the options. In making the choice, a selection is made of an alternative while publication makes the decision public (De Coning: 1985). The author makes special provision for allocating resources as part of implementation (designing and initiating a programme of action). He also provides for adjudication, which includes enforcing the policy through administrative and legal means before impact evaluation (Fox et al, 1991).

Process Model

In practical or theoretical terms, the major shortcomings of the above models can be summarized as not providing sufficient detailed requirements for the phases, the lack of focus on the participatory design of the process and lack of attention to management capacity to facilitate policy and or legislative processes.

Besides the above, this submission would like to present the process model developed in the last ten years in South Africa. The principles, key considerations and phases of this generic model are not the invention of a single individual, but products of wide consultations among various scholars/practitioners. In this context, the generic model is an attempt to redefine the existing process models so as to develop a model which is able to accommodate the demands for a comprehensive process model which is specific enough to act as a practical guide, thus identify the key considerations in the legislative planning and policy-making processes (De Coning, 1994).

The general agreement on the various broad phases of the generic process model in the South African context, according to De Coning, is largely a result of recent political, constitutional and developmental experiences. Paradigm shifts have occurred in terms of the general understanding of key issues such as democracy, participation, reconstruction and development, political reconciliation and nation building, legitimacy, technical support, political leadership, and accountability. This submission is tempted to question how this is applied to the development of a generic model. South Africa's limited experiences on legislative framework and/or policy-making processes in the context of the new dispensation, a rich source of political, developmental, and other experience has culminated in a range of general accepted values. In general terms, these experiences fostered a culture in which the expectation has been created where the issues mentioned above (participation, development objectives, etc) would be recommended in the facilitation of the legislative framework and/or policy processes.

The general consideration, which is believed to be a common quest across the globe, is to establish a process which has generic application potential, that is, a process that applies not only to all levels of government but also to the level of local communities, private sectors, non-governmental organizations and or community-based organizations. Moreover, a generic process model should have the ability to accommodate the reality that a particular policy process may in fact consist of several, often interlinked policy process. Legislative framework and/or policy process should seek alignment with symbiotic processes such as strategic and business planning, developmental planning, programming and budgeting. In the context of the discussion of the process models and particularly the need for a comprehensive model, the generic process model should be viewed against the following requirements:

- A comprehensive approach is needed that provides for guidance to the policy in macro context, and is generically applicable to the public, private, non-government sectors and community-based organizations, while at the same time being relevant at all levels of policy-making (De Coning, 1994).
- A generic process should specify essential phases, which should necessarily not be regarded as sequential. These critical considerations and requirements of each phase must be specified.
- The need exists to determine a framework that is of direct value in the operational environment, specifically for the purposes of planning, appraising, implementation and evaluating policy process.

In policy terms, Dunn (1994) defines a policy model as "a simplified representation for a selected aspect of a problem situation constructed for a particular purpose". The generic model can indeed be regarded as a simplified representation of the legislative and policy processes and is specifically aimed at identifying critical elements for actual policy process facilitation. Dunn's further perspective on models is worth noting. He observes that, like policy problem, policy models are artificial devices for imaginatively ordering and interpreting our experience of problem situations. He states that "policy models are useful and even necessary. They simplify systems of problems by helping to reduce and

make manageable the complexities encountered (Dunn, 1994). He notes that by simplifying problem situations, models inevitably contribute to the selective distortion of reality. Models themselves cannot tell us how to discriminate between essential and non-essential questions.

Dye (1987) defines a model as a simplified representation of some aspects of the real world. He refers to policy making models such as functional, elite/mass, group, the process model and others already discussed above as conceptual models which have the objective to simplify and clarify our thinking about policies and public policy, identify important aspects of policy problems; help us to communicate with each other by focusing on essential features of political life; direct our efforts to understand better what is important and what is unimportant; and suggest explanations for specific and predict its consequences (Dye, 1987).

In essence, according to De Coning (1994), the generic process model provides for both a comprehensive set of phases while also proposing that specific requirements and key issues be addressed during each of the phases. This generic model comprises of the following phases: policy initiation and review; policy process design; policy analysis; policy formation; decision making; policy dialogue; statutory phase; policy implementation; policy evaluation, with monitoring as a crosscutting issue.

In conclusion, it worth noting that the rural livelihood strategies are often heavily reliant on the customary law base and this submission had examined livelihood strategy choices along gradients running from relatively high to low customary laws endowments and the community's involvement in the planning, development and implementation of the Traditional Court Bill. Socioeconomic differences, of course, exist within any site, and these also have a major impact on the composition of livelihood portfolios. A wide number of axes of difference are relevant, including contrast of asset ownership, income levels, gender, age, religious affiliation, and caste, social or political status and so on.

In the light of the above, the Limpopo Provincial TCB communities Task Team here by affirm the following:

- That the traditional courts are a standard feature of the customary rural South African's life compared with state courts.
- That the traditional courts cannot be understood in isolation from package of other laws dealing with the powers of Traditional leadership. The first of these laws are the Traditional Leadership and Governance Framework Act of 2003 which has been complemented by provincial laws dealing with traditional leadership enacted in the different provinces. The second and major law is the controversial and stripped Communal Land Rights Acts (CLARA) of 2004.

It is worth mentioning that the Bill is being justified as urgently necessary so that the provisions of the discriminatory 1927 Bantu Administration Act dealing with the tribal courts can finally be repealed. B that as it may and In this urgency, the Limpopo Provincial TCB communities Task Team are in support

of the view that losing sight of the reasons that some sections of the Bantu Authority Act of 1951 would be the worst thing to do.

We also believe as the affected communities of Limpopo that it is instructive that the South African Law Commission's 2003 recommendations in respect of the customary courts and its draft Bill are not reflected in the current bill as they were rejected by the Traditional leaders who seemed to have been the only stakeholders consulted during the 2008 consultation process.

In the context where the so called senior Traditional leaders would be authorised by this Bill who to ultimately determine the content of the customary law and at the same time be the only one to preside over its compliance leaves very much to be desired as it undermines the democratic potential inherent in current processes of mutual accommodation taking place in rural areas, where men and women negotiate and develop ways of combining the underlying values of customary laws with the principle of the Constitution. Moreover, presiding officers will have powers over every one within traditional council jurisdiction area and to make matters worse, no functions, powers, or recognition given to role played by traditional council or councillors in customary dispute resolution process. The lack of separation of powers is in contrary with our Constitution as we are aware that Constitutional doctrine that those who administer, reinforce the laws cannot be same people as those who make cannot be the same as those who make the laws, and that separate people must adjudicate the disputes arising from the administration of law . Therefore, we call upon this Bill to canter for the mediate abuse of power.

By contrast, the SALRC recognised the role of the councils as intrinsic to customary disputes resolution. It suffices to mention that living customary law grows out of the processes of adaptation and change that reflect the voices, views and struggles of a range of different interest and sectors in rural society. The powers contained in the Bill who will be vested upon the senior Traditional Leaders are not consistent with the underlying practices and values of customary law leaves very much to be desired.

The Limpopo Provincial TCB Communities Task Team is of the view that the content of the TCB is very undesirable, unexpected and very controversial. While we expected that this TCB will act as vehicle to deepen our young democracy, but instead is taking us back to the barriers. To make matters worse, the TCB is very controversial to our Constitution especially in areas such as criminal cases and its procedures; its power and functions of the senior Traditional leadership to be appointed as presiding officers where they can impose fines and damages, order any person to perform unpaid labour, depriving of customary entitlements and of land rights.

The Limpopo Provincial TCB communities Task Team are of the view that the TCB is in contrary with various and existing legislative framework, to mention but few, the South African Restitution of Land Rights Act, Act. 22 of 1994 as amended.

In conclusion, we would like to call upon our government to create more space for engagement in accordance with the generic model here above. This is in view of the fact that time allocated for the public consultation was very short.

We hope that you will receive this in order, and we are looking forward of hearing from you soon.

Thanks,

Yours Faithfully

Patrick Mashego