INDIGENOUS AND TRADITIONAL LEADERS INDABA
WITH GOVERNMENT AND STAKEHOLDERS

29 May to 02 June 2017

BIRCHWOOD HOTEL, JOHANNESBURG

SOUTH AFRICA
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CONCEPT PAPER

NATIONAL INDABA FOR TRADITIONAL LEADERS WITH GOVERNMENT

29 May to 02 June 2017

Theme: “Unity in Diversity – Together moving South Africa Forward for an inclusive prosperous future”

1. BACKGROUND

In South Africa, various interested parties have extensively debated the relevance and place of traditional leadership in a democracy. At the core of the debate is the notion of incompatibility of this institution with democracy and human rights.

South Africa, as part of the greater African continent, has scars and bruises caused by decades of slavery, colonisation and apartheid. The democratic government has, since its inception twenty-two years ago, adopted programmes to deal with the legacies of the above systems which undermined and marginalised the majority of people of this country. In an attempt to eradicate the triple challenges of unemployment, inequality and poverty facing the country, government continues to mobilise all sectors of society, including traditional leaders and communities, to work together to create a better life for all, in line with the call to move South Africa forward.

In order to deepen democracy through public participation, government and traditional leaders have agreed to host a dialogue with all other key stakeholders on matters of common interest, to move this country forward. The call for a dialogue started some time ago and a commitment was made to host it on 28 May to 1 June 2017.

The discussions during the scheduled Indaba will focus mainly on matters related to:

- Land Ownership, Tenure Rights and Radical Socio-economic Development
- Institutional Capacity (Support and Budget)
- Nation building and Social Cohesion in the context of Ubuntu
- Constitutional and Legislative mandate
Traditional Leaders, land and development

The impact of historical land dispossession and displacements of rural communities dislocated the indigenous populations from their cultural roots. Loss of land also meant loss of physical cultural properties, which led to the loss of access to the attached tangible and intangible forms of heritage.

At regional level, in several African countries, the post-colonial states continue to struggle to determine the place and the appropriate developmental role of the institution of traditional leadership in a democratic configuration. Several states regard contradictions between modernity and tradition as a problem that must be solved instead of embracing diversity and work-out an appropriate and inclusive local government model.

Needless to say that traditional leaders have always played a critical role in the development of society. Throughout the ages, they have served as a steady, guiding force for societal progress. Decisions in communities regarding conflict resolution and matters that relate to social issues, welfare and many others are often placed under the guidance of traditional leaders.

Matthew Augustine (2016) makes some observations about traditional leadership in other parts of Africa, especially in our region. He maintains that in Botswana, traditional leaders have been stripped of some of their powers and subjected to government support and economic dependency, and can be removed from their legitimate positions. Despite this, Botswana has passed several laws to recognize the authority of traditional leaders.

The question is whether these pieces of legislation really made positive impact on the evolution of the institution of traditional leadership.

In Ghana, chieftaincies survived after the end of colonial rule, as traditional leaders remained a powerful authority in the mediation between the state and the communities. After independence, Ghana continued with colonial administrative boundaries and traditional leaders maintained the role and power at local level especially in rural areas.

The colonial government did not succeed in changing traditional ways as it encountered resistance. When the Convention People’s Party (CPP) came to power in the 1950s, the government revised the system by removing the Native Courts, in an attempt to reform the judicial system. The aim of the post-colonial regime was to destroy the independence of traditional leaders. Despite the wrangles between the state and the traditional leadership in Ghana, traditional leaders, after standing firm to fight for their recognition, now enjoy the following roles in local governance and development:
1. Custodians of natural resources, such as land;
2. Fighting for social development of their people;
3. Dispute resolution in communities; and
4. Guardianship of traditional heritage, norms, values and principles.

On the other hand, in Zimbabwe, traditional leaders are said to have “a connection to the land in the eyes of the public and are often seen as the traditional custodians of the land, customs and societal values.” Traditional leaders have been accorded several roles, which include, among other things, the following:

1. Protecting the land against deforestation and degradation;
2. Preparing traditional rituals for the rains with the communities;
3. Protection of species of wild animals of the land in their areas; and
4. Preserving holy groves in the forests in the country; and so on.

In both cases, partiality entered in the exercise of their duties, especially in the rural and remote places of the country. Realizing the importance of the traditional leaders in the country, especially as custodians of customs, culture and values, the government of Zimbabwe is now giving back power to traditional leaders to restore their dignity and role in the communities, especially in remote and rural areas.

Land reform is considered an essential program, especially if it is meant to address the inequality of land ownership, due to the discriminatory system of the past colonial regimes. It is claimed that traditional leaders have been used by the ruling party and the liberation war veterans, to forcibly take back the parcels of land from commercial farmers and to redistribute them to the rural communities for their subsistence farming and grazing land, in order to regain the people’s confidence.

Traditional leaders played a key role during the pre-independence period of the African countries, and still continue to, but the subject of traditional authority seems to have been neglected, as many of the previous roles have now been entrusted to local state officials.

The relationship between local authority and traditional authority remains complicated and can also be confrontational.

On the other hand, loss of trust of the traditional authorities by citizens contributes to the toxic relationship in some areas, despite traditional authorities being the custodians of the African customs and values. Furthermore, overlapping responsibilities especially on land issues has resulted in conflicts between the elected and traditional leadership.

Some governments in the colonial and post-colonial eras have made traditional leaders ‘civil servants’, with the leaders losing their intermediary role between the
society and the government. Traditional leaders who resisted this change were shoved aside, and replaced by others who accepted to be agents of the government.

2. PROBLEM STATEMENT

Slavery, colonialism and apartheid have eroded the dignity and stature of indigenous communities and leadership which exacerbate the triple challenges of poverty, hunger and inequality experienced in South Africa. It is high time that South African role-players are engaged in a dialogue with regard to the institution of traditional leadership to affirm, define and clarify its role in a democratic governance system, to restore its dignity and credibility.

3. HISTORICAL OPPRESSIVE LEGISLATIVE FRAMEWORK

Several pieces of discriminatory legislation were passed prior to 1913 to dispossess indigenous South Africans of their land rights as early as the 1400’s. Then came the ‘Caledon Code’ of 1809, which attempted to force all the Khoi-San communities to reside in a ‘fixed place of abode’ as servants to white farmers. This was strengthened by another law passed in 1812 that required the “apprenticeship” to settlers of the Khoi-San children living on farms until they reached the age of 18. Following these Acts, the 1856 Kaffir Pass Act, 1866 Orange Free State Occupation Law, 1884 Native Location Act in the Cape Colony, and the 1887 Squatter Laws in the Transvaal were promulgated in order to restrict the movements and various freedoms of indigenous South Africans, especially in prohibiting their residence on certain lands and forcing them into labour arrangements with white farmers. The promulgation of these pieces of legislation had far reaching implications, the impact of which are the order of the day.

Systematic processes of land alienation from indigenous South Africans began long before the promulgation of the Natives Land Act, 1913. Such dispossession began as early as the 1400’s. The South African traditional leadership institution, just like in other parts of Africa, has a history which requires a debate to determine how traditional leaders could contribute or help government in rural development programmes and projects to deliver more effective services and improve the quality of life in rural communities which are plagued by worst concentration of poverty, inequality and unemployment.

Apartheid and homelands’ legislative frameworks eroded the foundation upon which the institution was founded. It altered the roles, powers and functions of traditional leaders and was systematically weakened, gradually eroding the bond between leaders and their communities.

Different stakeholders on the continent generally concede that the institution is part and parcel of modern governance and can therefore not be ignored. Therefore,
there is a need to deal with how the institution could function in a modern system of governance.

The Constitution of 1996, Section 151, establishes three spheres of government, with the sphere of local government consisting of municipalities established throughout the country including rural areas, led by elected Councillors.

**The objects of local government are to:**

1. Provide democratic and accountable government;
2. Ensure the provision of sustainable services;
3. Promote socio-economic development;
4. Promote safe and healthy environment, and
5. Encourage the involvement of communities in local government matters. All of the objects, except (a) were the domain of the institution of traditional leadership.

Developmental local government coordinates all development activities within their areas of jurisdiction and perform integrated development planning involving the active participation of citizens within these areas.

It is important to note existing legislative framework stating that no national and provincial government may compromise or impede a municipality's ability to exercise its powers or perform its functions.

Traditional leadership is a creature of custom and carries customary functions, whilst local government is a creature of statute. Government carries out powers and functions "which are governmental in nature", while indigenous and traditional leadership institutions are expected to execute functions that are "indigent and customary in nature". This conceptualization of the roles assigned to municipalities and to traditional leadership bodies is clearly outlined in Chapter 7 and 12 of the Constitution, which recognizes both that traditional councils are subject to the Constitution, while also stipulating that “national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities." Subsequent to promulgation of the Constitution, several pieces of legislation were developed to strengthen and regulate all matters pertaining to traditional leadership.

4. **PRIMARY FOCUS OF THE NATIONAL INDABA**

4.1 **LAND OWNERSHIP, TENURE RIGHTS AND RADICAL SOCIO-ECONOMIC DEVELOPMENT**

Colonial conquests, annexations and pre-1913 discriminatory legislation transferred land rights to the Crown or the state ensuring that all future land
holdings derived their rights from colonial authorities while ensuring permanent loss of lands for these indigenous populations. This process rendered indigenous communities, including the KhoiSan impoverished, as they no longer possessed hunting or grazing lands for their livestock, as well as causing their almost complete political disintegration.

As their culture and economic sustenance are deeply rooted in the land and their basic natural resources and dispossession were impacted by immense cultural loss over several centuries. Therefore, the links between tenure reform, land restitution, identity, culture and development are inextricably intertwined spheres of human livelihoods. By 1900, over the course of two centuries, South Africa’s original inhabitants and their descendants, who had lived in the region for more than 150,000 years, lost not only their lands, but also experienced almost complete destruction of their social, political and cultural organization.

The present day communal land areas are actually a product of centuries of settler colonial and apartheid land dispossession. The various pieces of racially discriminatory legislation empowered the state to both appoint and remove resistant indigenous and traditional leaders at will, to determine their jurisdictions and related territorial boundaries, and to forcibly relocate the entire communities in the name of “betterment planning”. Such gross distortions to the indigenous, traditional and customary systems have posed enormous socio-economic challenges in today’s communal land areas. As a result of the pre-and post-1913 Acts and other related legislation, South Africa’s settlements through land dispossession and former “homelands”, are marked by overpopulation, underdevelopment, land scarcity, tenure insecurity, environmental degradation and an absence of democratic and harmonized systems of governance. The destruction of the social and economic fabric of the lives of millions of households in areas mentioned above is part of South Africa’s unpleasant legacy from the past that must be overcome.

During the post-apartheid epoch, the Department of Rural Development and Land Reform (DRDRL) has developed land tenure policy to reverse the legacy of apartheid. Communal Land Tenure Policy (CLTP) seeks to address issues, which affect one third of South African citizens who currently reside in the country’s Communal Areas. The land questions addressed go beyond the communal tenure issues per se to cover a wide range of policy issues including the exclusion of certain historically marginalized citizens from the restitution process, unbridled foreign interests in and ownership of communal land and the promotion of effective land use regulation and investment incentives in Communal Areas. As such, the formulation of this policy forms part of Government’s undertaking to review all land
reform policies as enunciated in the 2011 Green Paper on Land Reform, aimed at addressing issues relating to historical exclusion, equitable access to land, and participation in the optimal utilization of land; as well as to address challenges relating to food access and production at both household and national levels to bring about household food security and national food self-sufficiency.

The Communal Land Tenure Policy aims at instituting tenure reforms within a developmental approach built upon a land redistribution programme to complement land access and development, particularly in the traditional Communal Areas in order to decongest these areas and to create wider scope for land tenure reforms.

4.2 INSTITUTIONAL CAPACITY AND SUPPORT

Over the years, the institution of traditional leadership has received very little support from government to enable it to function efficiently and effectively. In the past twenty-three years, the impact of the institution of traditional leadership has been minimal. Only few South Africans know what this institution is about despite its centrality in the reconstruction of the democratic South Africa and its growth and development. This sector therefore cannot be wished away. South Africa has to find an eclectic and inclusive approach to deal with the intractable issues within the spirit of "unity in our diverse forms".

Furthermore, traditional communities must hold traditional leaders accountable through regular report-backs to their communities.

4.2.1 Remuneration, allowances and benefits of Traditional Leaders

Over the years, traditional leaders have been consistently raising the issue of the inadequate salary levels, benefits and allowance gaps between kings and senior traditional leaders. However, all levels from the kings, and the queens to senior traditional leaders and headmen and women are remunerated equitably. The main intractable issue is being able to appropriately determine and benchmark the differentiation of the remuneration levels of traditional leaders given the fact that they are revered for who they are and what they represent in their own communities.

4.2.2 Enabling Resources and Tools of Trade

Traditional leaders have an important role to play at local government level. In order for traditional leadership institutions to function more effectively, there is a need to provide more resources to enable them to perform their functions.

The functions of traditional councils are among others:
a) supporting municipalities in the identification of community needs;
b) facilitating the involvement of the traditional community in the
development or amendment of the integrated development plan of a
municipality in whose area that community resides.

Traditional leaders are public office bearers. The Remuneration Commission
has by way of Government Notice (No 693 of 29 August 2011) made
recommendations about the nature of appropriate tools of trade for qualifying
traditional leaders and members of houses of traditional leaders.

Subsequently, the Department of Traditional Affairs prepared a framework on
tools of trade, utilizing the Commission’s recommendations and inputs by
provinces.

The framework was adopted at MINMEC in September 2013 whereby all
provinces were required to implement it. The framework provides minimum
norms and standards for the provision of resources and tools of trade, to also
manage inconsistencies.

However, in order to accommodate provincial peculiarities and affordability, a
phased-in- approach was adopted.

The Remuneration Commission after extensive research established the
following standard tools of trade (resources) intended to capacitate traditional
leaders to perform their functions:

- Accommodation and furniture;
- Security;
- Special needs facilities;
- Basic office infrastructure;
- Reading Material;
- Study Assistance;
- Support Staff;
- Official travel facilities; and
- Reimbursement for expenses

It is important to note that the Remuneration Commission has taken a decision
to review traditional leadership remuneration, allowances, benefits and tools of
trade. The intention is to review all aspects pertaining to the traditional
leadership. Traditional leadership structures have been consulted in this regard.
Further consultations and deliberations are necessary to ensure that these
issues are resolved amicably.
4.2.3 **Reconstitution of Traditional Councils**

The Traditional Leadership and Governance Framework Act, 2003 had a provision for the transformation of traditional councils to provide for 40% of the community members who must be elected to serve in traditional councils and a third of women to be elected to serve in the reconstituted structures. The timeframe for the reconstitution of the councils lapsed in September 2011. At the moment, an amendment bill is in Parliament seeking extension for the reconstitution of traditional authorities as some provinces have not complied with the provision of the Framework Act.

Furthermore, in August 2017, the houses of traditional leadership's terms will expire. In this regard, the Department of Traditional Affairs has appointed a service provider to develop a framework for the selection and election of members of the members of various houses of traditional leaders and traditional councils. The Service Provider would submit an analysis of all pieces legislation with recommendations of what must be done, including amendments in due course. This intervention is intended to align on time the terms of houses required by legislation.

4.2.4 **Traditional Courts Bill**

The earlier version of the Bill lapsed in Parliament after criticism by opposition parties and women’s groups. The Department of Justice, together with the DTA, NHTL and CONTRALESA, established a content team to advice the drafters. The Bill was ultimately introduced to Parliament and is now within the parliamentary process.

4.2.5 **Participation of traditional leaders in Municipalities (section 81 of the Municipal Structures Act)**

A Framework on Participation of Traditional Leaders in Municipal Councils was developed based on Section 81 of Municipal Structures Act. Furthermore, extensive consultations with stakeholders were done during 2013/2014 financial year. This Framework was intended to strengthen the participation of traditional leaders in municipal councils. Furthermore, in 2015/16, regulations on the participation of traditional leaders in municipal councils were developed and stakeholders were also consulted accordingly. This was intended to strengthen participation of traditional leaders in municipal councils. Leaders of the National House of Traditional Leaders and Chairpersons of provincial houses and their Deputies resolved that these regulations should be suspended until resolutions are taken at the Traditional Leadership Dialogue.
envisioned to be held on 29 May 2017 to 02 June 2017 as well as after the promulgation of the Traditional and KhoiSan Leadership Bill.

4.2.6 Spatial Planning and Land Use Management Act (SPLUMA)

The SPLUMA has caused serious challenges to traditional leaders in the sense that they view it as removing their powers and giving them to the official of government. The NHTL, together with the Chairpersons Forum established a Task Team that engaged the Department of Rural Development and Land Reform with regard to SPLUMA. Proposals on the amendment of SPLUMA were put on the table for consideration by the DRDLR. In order to streamline and strengthen the spatial planning and land use management in traditional and rural areas, government has taken a decision to streamline some of these functions and move them to the Department of Planning, Monitoring and Evaluation and the Department of Cooperative Governance. It will therefore be easier to deal with issues raised by traditional leaders if some of the functions are located within the Ministry of Cooperative Governance and Traditional Affairs. Draft Regulations regarding transfer of these functions have been drafted for further consideration. This process will also take into account traditional leaders' inputs and submissions.

4.3 NATION BUILDING AND SOCIAL COHESION IN THE CONTEXT OF UBUNTU

South Africa has a history where oppressors sought to obliterate the heritage and identity of the oppressed by affecting their minds. This history has undermined and destroyed traditional forms of life and disintegrated communities. South Africa and its people must be reminded of the terrible past, slavery, colonialism, apartheid, marginalisation and underdevelopment so that it can constructively deal with the painful history, forgiving where necessary but never forgetting lest we reverse the gains of the hard-earned democracy.

Going forward, the country has to build a new nation and the struggle is not over yet. Building a new nation is the cornerstone of building national identity which requires government to radically change the lives of South African people. Building a new nation requires courage to consider the past in order to overcome it and to avoid repeating the mistakes of the past.

It is confirmed that inherited psyche of prejudices, breakdown in values, inequalities, massive poverty and competition for scarce resources, fuel moral degeneration and associated social ills in society as indicated by National Planning Commission. It is concerning that if such a state of affairs continues unattended, it may result in huge unintended consequences that may degenerate into socio-political instability.
It is appropriate to support the views expressed in the NDP that divisions need to be confronted in an attempt to build a new nation around a common purpose, otherwise such divisions will be reproduced and reinforced across generations. It is through the inherited psyche of divisions, breakdown in values, inequality of opportunity and massive poverty, including the limited resources which exacerbate social ills and moral decay/ degeneration in society.

The National Khoi-San Council (NKC) Technical Task Team has been constituted to deal with matters related to the Khoi and San communities whereby it would process and recommend to the NKC Plenary. It was confirmed during its first sitting to consider its Terms of Reference (ToR) that the Constitution deals with matters raised by the Khoi and San communities and leaders. An Action Plan will be adopted by the NKC Plenary indicating programmes and plans by various government departments and entities which confirms that government is attending to matters of the Khoi and San at various levels. The Department of Traditional Affairs (DTA) would then coordinate and communicate government activities on matters related to the Khoi and San communities.

The Constitution of the Republic of South Africa addresses the call for the "first nation" status and related concerns by the Khoi and San communities and the second issue regarding recognition of leaders, structures and communities is addressed through the Traditional and KhoiSan Leadership Bill (TKLB).

The Department has tabled the TKLB in Parliament, to give effect to the recognition of the KhoiSan leaders, structures and their respective communities. The Bill makes provision for all matters related to the recognition of communities and leadership in line with the prevailing recognition criteria for traditional leadership and traditional communities. The proposed legislation would be a milestone in the history of the Republic since it will allow for statutory recognition and participation in the statutory structures and institutions that interface with government in an institutionalized manner. This would complete the call for unity in diversity and nation building.

4.4 CONSTITUTIONAL AND LEGISLATIVE MANDATE

The Constitution as the supreme law of the land provides a framework in which issues affecting the rights and freedoms of all South Africans are addressed and thus ensuring that all South Africans irrespective of colour, race or creed do indeed become members of the new post-apartheid society and to ensure that all communities do play an active role in the activities and development of the new society founded on human dignity, the achievement of equality and the advancement of human rights and freedoms. The Constitution places significant value on the principles of “unity” in our “diverse forms”.
The rights and interests of all South African communities are promoted and protected by the Constitution which is applauded by the international community in a family of nations.

5. NATIONAL DEVELOPMENT PLAN (NDP)

Land reform within the context of the National Development Plan (NDP) is accorded the daunting task of ensuring that economic growth and integration is facilitated as an intended outcome of land and agrarian reform. Poverty alleviation and job creation are therefore key hallmarks that will measure the success of land reform. The NDP’s land reform proposals are aligned with the Medium Term Strategic Framework (2014-19) in terms of:

- Sustainable land reform (agrarian transformation);
- Improved food security; and
- Smallholder farmer development and support (technical, financial, infrastructure) for agrarian transformation.

In attaining its objectives of ending rural marginalization, the NDP proposes a differentiated rural development strategy comprised of the following:

- Agricultural development based on successful land reform, employment creation and strong environmental safeguards. To achieve this, integrated agriculture and dry land production should be expanded, beginning with smallholder farmers where possible;
- Quality basic services (particularly education, health care and public transport) that contribute to well-functioning and supported communities, enabling rural people to develop the capabilities to seek economic opportunities; and,
- In areas with greater economic potential, industries such as agro-processing, tourism, fisheries (in coastal areas) and small enterprise development.

Chapter 6 of the NDP, which focuses on developing an integrated and inclusive rural economy, suggests that improved land use outside and inside the former homelands could enhance livelihoods for a significant number of people as well as contribute to further development in these areas. This is envisioned to occur through securing tenure for Communal Area farmers, especially women by providing clearly defined property rights and working closely with traditional communities to realize such; as well as furnishing support for commercial agriculture production for both successful farmers and under-utilized parcels of productive land. The NDP further notes that failure to adequately address tenure security for black farmers in the Communal Areas and under the land reform programme would pose a major risk to agricultural expansion considering “the fact
that optimal utilization of communal areas could improve the livelihoods of at least 370 000 people”.

6. CONCLUSION

In conclusion, a policy question that begs an answer is: “How do we design a customized local government model or suitable dispensation to ensure that modernity and tradition coexist and are integrated and harmonized to truly reflect our diverse and colorful society underpinned by the Constitution of the Republic of South Africa?”