COMMISSION 4: CONSTITUTIONAL AND LEGISLATIVE MANDATE

1. JUDICIAL POWERS OF TRADITIONAL LEADERS

For the purposes of this presentation the Commission deemed it fit to structure the report-back in the manner laid out hereunder

1.1 Pre-colonial Era

Traditional Courts existed in South Africa from time immemorial. There were courts of law determining all disputes between members of traditional communities in accordance with customary/indigenous law.

The determination of dispute was, and continues, to be based on the principle of reconciliation of parties.

1.2 Colonial and Apartheid Era

Both colonial and apartheid regimes, in their determination of to colonise and suppress African people after conquest, undermined the customary/indigenous legal system and imposed Roman-Dutch legal system and the powers of Traditional Courts were curtailed and the courts were not courts of records, and cases were started afresh at Magistrates Courts that applied the foreign Roman-Dutch legal system in South Africa. In terms of section 11 of the Black Administration Act of 1927 was also recognised subject to the so-called public policy and principles of natural justice based on the foreign Roman-Dutch legal system. Ironically, although the Constitution of the Republic of South Africa, 1996, recognises the customary/indigenous law to be equal to the so-called common law of South Africa (Roman-Dutch law), it is subjected to the Bill of Rights that has entrenched Westernised norms and values at the expense of African norms and values.

Traditional leaders were issued with certificate to try both civil and criminal cases by the Ministry of Justice.

2. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

Schedule 6 of the Constitution of the Republic of South Africa, 1996, provides, in section 16(1) that “Every court of Traditional leaders existing when the new Constitution took effect (Black Administration Act of 1927), in homelands and courts in the former TBVC (Transkei, Bophuthatswana, Venda and Ciskei)
states, continues to function and to exercise its jurisdiction in terms of the legislation applicable to that office subject to—

(a) Amendment or repeal of the that legislation; and
(b) Consistency with the new Constitution, 1996.

However, Chapter of the Constitution of the Republic of South Africa, 1996 (section 106) provides for courts and administration of justice in South Africa provides for the following courts, namely: Constitutional Courts, Supreme Court of Appeal, High Court of South Africa, Magistrates’ Courts and “any other court established or recognised in terms of an Act of Parliament …” When the Congress of Traditional Leaders of South Africa (Contralesa) objected to the certification of the Constitution on the basis that the text did not recognise Traditional Courts, the Constitutional Court held that Traditional Courts are contemplated in the “other court” provision quoted above.

3. SOUTH AFRICAN LAW COMMISSION PROJECT 90

The present Government established a Law Commission to establish to investigate and report on Traditional Courts in South Africa. The Commission conducted its investigation and published its report around January 2002 and proposed that new legislation be processed and passed by Parliament to recognise Traditional Courts in South Africa.

The Traditional Courts Bill was introduced in Parliament around 2008 and has not, to date, been passed. A new version of the Bill in Parliament having been published in the Government Gazette No 40487 dated 9 December 2016, and it contains provisions that are not acceptable to traditional leaders and their communities in that persons are not obliged to subject themselves to such courts and thereby dilute further the powers of traditional leaders in dispensing justice which we believe is accessible to overwhelming majority of persons living in traditional communities and which is cheap and guarantees such persons speedy resolution of disputes in accordance with African norms and values.

Against this background, we recommend the following:

1. The Traditional Courts Bill currently in Parliament be processed and penned into law without any further ado.
2. The Bill must be amended to make it clear that Traditional Courts are courts of law with powers to dispense justice in accordance with the African legal system.
3. Traditional Courts like magistrates be granted immunity from prosecution when dispensing justice.


5. There must be a hierarchy of Traditional Courts as follows:

5.1 **Family Court**

This is a primary structure that deals with all disputes within a family in accordance with the norms and values of the family concerned and to promote unity and peaceful co-existence within the family.

The proceedings here are presided over by the head of the family concerned. In cases where the family head is implicated in the matter, then the next senior person of the family should preside.

Where two or more families are involved in a dispute then the heads of the families concerned determine the dispute with a view to reconcile the parties.

In the case where heads of families fail to resolve the matter, such dispute must be referred to the elderly person(s) in the same area for mediation.

5.2 **Village/Locality Court (Induna)**

Sub-headmen and councillors composed mainly by heads of families within the village determine the disputes and dispense justice in accordance with African legal system.

Some of the disputes end at this level and others are referred directly to the headman/kgosana for consideration. Headmen/kgosana courts are also hearing appeals from such courts. We recommend that such courts must be courts of record and be provided with necessary tools to perform their functions.

5.3 **Headman’s (Kgosana,etc) Court**

This court like that of the sub-headmen is composed of headman, sub-headmen of all localities within the area and wise persons appointed by the headman/kgosana of the area of jurisdiction of the headman.

There are cases that are directly referred to headmen of the area and others by way of appeal from sub-headman’s court. This must be a court
of record and be provided with the necessary infra-structure to dispense justice.

Appeals from headmen’s court must be referred to the Traditional Authority/Council having jurisdiction over the areas administered by headmen.

5.4 Traditional Authority/Council Court

These are courts composed by a senior traditional leader and all headmen mainly belonging to a clan and councillors appointed within the area of jurisdiction of the Traditional Authority/Council concerned. The court has jurisdiction to try all cases reported to it or referred to it directly from headman’s court directly or by way of appeal.

In some traditional authorities eg Barolong in the North-West the court is presided over by a person appointed from amongst the members of the Authority/Council who will lead the proceedings and all concerned participate and watch proceedings and is the one who must pass judgment.

In other Traditional Councils procedure similar to that of a magistrate with assessors is followed with senior traditional leader active in directing the proceedings. We prefer the Barolong practice as it keeps the status of Traditional leader above litigants.

5.5 King’s/Queen’s Council

The King’s/Queen’s Court is composed of the King/Queen as the case may be, senior Traditional leaders and Councillors appointed within the area of jurisdiction of such kingdom.

The court like the Court of Traditional Council must dispense justice in accordance with African legal system.

The proceedings will be chaired by one of the traditional leasers and the King/Queen will oversee the proceedings and pronounce judgment.

5.6 High Courts of Traditional House

The Local House of Traditional Leaders should have power to dispense justice within their area of jurisdiction and must be composed of selected
members of the Local House, who must have necessary qualifications and skills to deal with disputes.

The status of this House should be similar to that of the Local Division of the High Court in the Province. The Court must be provided with the necessary infrastructure and personnel to dispense justice in accordance with African legal system.

5.7 **Provincial Division of High Court of Traditional Leaders**

The Provincial Houses of traditional Leaders in South Africa must be empowered to dispense justice within their areas of jurisdiction. The members of this Court will be selected from members of the House and must have necessary qualifications and skills to deal with disputes.

The Courts must deal with matters from King’s/Queen’s and Local Houses and all matters conferred to it by law. These Courts would be accorded similar status and be provided with similar infrastructure, including personnel like all Provincial Divisions of the High Court in South Africa.

5.8 **Appeals Court of Traditional House Leaders Court**

The National House of Traditional Leaders must be empowered to dispense justice in South Africa and must have powers and functions similar to that of the Supreme Court of Appeal. The Court must deal with matters referred to it by way of an appeal from Provincial Houses.

The Court must be provided with necessary infrastructure including personnel befitting its status. Members of this Court must be selected from members having the necessary qualifications and skills.

5.9 **Constitutional Court**

The Constitutional Court established in terms of the Constitution of the Republic of South Africa, 1996, must continue to have jurisdiction on constitutional matters. However, we are of the view that the Constitutional Court needs to be transformed so as to be able to deal with and be the final arbiter on traditional issues. It goes without saying that Justices must have necessary in-depth knowledge of customary/indigenous law.
5.10 Other Issues for the Consideration

(1) Capacity Building

We recommend that traditional leasers and members of Traditional Courts be capacitated by being provided with training by the South African Judicial Educational Institute (SAJEI) and there must be a unit specifically aimed to train traditional leaders and members of Traditional Courts.

(2) Women Participation

Traditional Courts should promote participation of women at all levels.

(3) Prosecuting Authority

The National Public Prosecutions must also be transformed to prosecute cases before King’s/Queen’s or Local House. In this regard a specialised unit needs to be established.

(4) Traditional Courts Bill

We have considered the provisions of the Traditional Courts Bill, 2017, currently in Parliament and, in our view, it needs to be evaluated and amended to incorporate the recommendations set out above.

We consequently propose that a committee be established to consider the clauses of the Bill, clause by clause, and to make submissions to Parliament as soon as possible.