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Mr. Gurshwyn Dixon
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Select Committee on Security and Constitutional Development
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4th September 2012

Re: Submission to the National Council of Provinces Select Committee on Security and Constitutional Development on the Traditional Courts Bill - B1-2012

This submission accords with the position of the Alliance for Rural Democracy.

Despite our ultimate view that the Traditional Courts Bill ('the Bill') should be withdrawn due to its substantive unconstitutionality and procedural defectiveness, we make submissions to the Select Committee on Security and Constitutional Development ('the Committee') in the interest of public participation and in an effort to advance the constitutional imperatives to human dignity, equality and freedom for all South African citizens.

In summary, we oppose the Traditional Courts Bill ('the Bill') and request that it be rejected and withdrawn in its entirety. We recommend that the Bill be re-drafted after thorough consultations with community members, particularly rural women, on whom the Bill has a disproportionate and adverse impact.

Our reasons for opposing the Bill are based on the fact that several of the provisions of the Bill are unconstitutional and undermine women's constitutional rights to equality on the basis of gender. We are further of the view that the procedure followed in drafting the Bill, which excluded consultations with women from traditional communities, indicates that the Bill does not reflect the needs and wants of majority of the population and undermines the values of the Constitution Act 108 of 1996 ('the Constitution')

Issues with the Provisions of the Bill

All of the issues set out below either directly contravene the provisions of the Constitution or undermine the core values of the Constitution including justice, equality, fairness, openness and transparency:

- Section 4(1) of the Bill centralises power to a single 'senior traditional leader' in a manner that is inconsistent with living customary law which means that customary law changes and adapts to the lived situations and changing morals of the community it governs including participation in the application and execution of living customary law. The language of the TCB allows the presiding officer to effectively decide independently on the content of customary law.
- Section 5(1) and 6 of the TCB gives traditional courts the power to settle various kinds of civil and criminal disputes **that are not clearly defined**. The right of parties to a dispute to review and appeal cases is however extremely limited as set out in Sections 13 and 14 of the Bill respectively.
- Section 9(3)(a) provides that parties to a dispute are not entitled to legal representation. Despite the fact that Section 9(3)(b) of the Bill states that women can represent a party to a

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dispute before a traditional court “in accordance with customary law and custom,” the latter part of provision undermines the supposed gender-equitable nature of the statement, as most customary law and custom requires that men represent women in traditional courts. In denying women the right to legal representation and the right to represent themselves, women have no choice but to seek representation from men.

- Section 20(c) of the Bill makes it an offence for anyone that falls within the jurisdiction of a traditional court not to appear before the traditional court if so summoned. This entails that an individual summoned to appear in the traditional court does not have the option to refer the case to a state court.
- The Bill complies with the jurisdictional boundaries set out by the Black Administration Act of 1951, an apartheid-era statute. The Bill accordingly applies apartheid principles that historically forced people to be subject to a traditional leader they may not recognise as legitimate, and to customary laws they may not accept as their own or practice.
- Although the Bill does not legalise traditional levies, its silence on the issue tacitly allows for the introduction of more and heavier levies.

Additionally, The Bill will not only adversely affect women but will also negatively impact on certain categories of men located within rural communities. These categories of men include gay men and men who have sex with men. In the recent past for instance, we have heard several traditional leaders making homophobic statements in public. It is obvious that men whose sexual orientation and/or gender identity do not conform to socially constructed gender norms, will not receive fair treatment in these courts. It is also likely that other groups of gender non-conforming people such as lesbians, bisexuals, and transgendered and intersex people may suffer similar unfair treatment at the hands of traditional courts.

Furthermore, the Bill threatens gender transformation in South Africa. It perpetuates patriarchy that is passed down through generations in regard to men as decision makers and women assuming submissive identities in traditional court proceedings. If the customary laws and customs applied and processes followed by traditional courts are gender equitable, it could benefit both men and women by setting gender equitable standards that can filter through into rural communities that could positively impact on the way that rural communities and families to manage their affairs.

A further issue that seems to have been overlooked is the fact that many towns – and therefore shops, businesses and local government offices – exist within the demarcated “rural” areas. Obviously, all persons residing in those towns would therefore have to conform to the proposed TCB. Although the various kinds of disputes and offences proposed to be covered by this Bill have not been at all clearly defined, it causes one to wonder if the logistics have been fully thought through. For example, if a retail store such as Shoprite is vandalised or burgled, or if someone is found shop-lifting, would the shop management have to report to a Traditional Leader? Or if a businessperson living in the centre of Thohoyandou has a dispute with his neighbour, s/he must present the case to a Traditional Court?

Procedural issues leading to the drafting of the Bill

The lack of consultation with rural communities is evident from Section 4 of the Department of Justice and Constitutional Development’s 2008 memorandum on the objects of the Bill. This is proof that the Bill represents the interests of traditional leaders exclusively and that had rural women been consulted, the content of the Bill may be very different and constitute a true reflection of what communities want and need.

The TCB serves the interests of those who were consulted in its drafting i.e. the traditional leaders of whom the majority are men. The Bill accordingly seeks to promote men’s power and dominance

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whilst failing to protect and advance the rights and interests of women, who constitute a marginalised and historically disadvantaged category of people in South Africa.

The "public hearings" held in Vhembe, for example, were a) advertised extremely late, b) were not promoted to anyone other than Traditional Leaders, who were even provided with transport, and c) were held at a luxury lodge far from town, making it impossible for the average person to attend.

We trust that the Committee will consider our position on the Bill seriously.

Finally, ***we request to be given the opportunity to make oral submissions to the Committee at the public hearings scheduled to take place on 18, 19, 20 or 21 September 2012.*** We hope that our request will be considered favourably.

Yours sincerely



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On behalf of the TVEP Team

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