2012 SUBMISSIONS TO THE NATIONAL COUNCIL OF PROVINCES

TRADITIONAL COURT'S BILL 2012

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Introduction

The Women's Legal Centre ("WLC") welcomes the opportunity to make submissions before the National Council of Provinces on the Traditional Court's Bill (the Bill). The WLC is a public interest law centre started by women to enable women to use the law for advancing and achieving their right to equality, particularly women who are socio-economically disadvantaged. The WLC uses litigation and advocacy in order to fulfil its objectives.

The WLC offers a free legal advice service to women. We have been approached by many clients who seek to negotiate the pathway through the sometimes confusing and conflicting traditional system and customary law and the civil courts.

Over the past ten years the WLC has hosted a number of provincial workshops on the Recognition of Customary Marriages Act (RCMA) in all nine provinces and recently released a report on the 10 years of implementation since the RCMA came into effect. (We have also made submissions to the various project committees of the South African Law Commission on several aspects of customary law, including the harmonisation of the customary law and common law with the Constitution. The Centre represented the *Bhe* family in the Constitutional Court case which dealt with the constitutionality of the primogeniture rule in African Customary Law of Succession and assisted the Supreme Court of Appeal in the *Gasa* matter in relation to dual system polygamous marriages, recognising the customary law duty of support and ordering the state to remove the remnants of racist legislation such as the Black Administration Act. We have also litigated on behalf of clients in relation to the return of lobola and the validity of marriages at customary law.

Briefly, the Bill will affect almost 17 million of South Africa's population of just under 50 million. Customary courts form an important part of the informal South African justice system. They provide accessible and affordable dispute resolution and justice.[1] The TCB seeks to give recognition to traditional leadership and its role in the dispensation of criminal and civil justice. However, the TBC is ineffective in lending support to the progressive development that is occurring to customary law,[2] particularly insofar as women's experience should and do mould the custom and practices.

Women and children make up most rural constituencies, and often find themselves in a vulnerable position in relation to male-dominated traditional institutions.[3] Due to the fact that women face particular problems in customary courts they are the group most vulnerable to the changes that will occur as a result of the implementation of the Bill. It can be agreed that

[1] Sindiso Mnisi Weeks, The Traditional Courts Bill; Controversy around process, substance and implications, 4.
[2] Sindiso Mnisi Weeks, Beyond the Traditional Courts Bill; Regulating customary courts in line with living customary law and the Constitution, p 35.
[3] Sindiso Mnisi Weeks, The Traditional Courts Bill, p 5.

new policies and law should lend support to the positive changes that are occurring on the ground for women, especially in relation to customary law, rather than undercutting them.[4] As was determined by the Constitutional Court in *Tongoane* "[f]ree development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated."

Below, the WLC will make submissions on the Bill in general and subsequently on how the Bill impacts women in particular. As such, the WLC will make submissions in relation to:

1. The process that the Bill has followed.
2. South Africa's international obligations.
3. South Africa's constitutional obligations.
4. Customary law and traditional courts in other African countries.
5. Women and the development of customary law.
6. Approach to the current Bill.
7. The specific provisions of the Bill/ comments on the Bill.
8. Further Comments

[4] LRG, "Single women, customary law and the Constitution: Findings from the rural women and land survey", p 4.

The Process: The Constitutional Obligation to Facilitate Public Involvement

1. The National Assembly is obliged by section 59(1) of the Constitution to "facilitate public involvement in the legislative and other processes of the Assembly and its committees". The Constitutional Court held in the *Doctors for Life* case:[5]

> [129] "What is ultimately important is that the Legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to *provide meaningful opportunities* for public participation in the law-making process. The second is the duty to take measures to *ensure that people have the ability to take advantage of the opportunities provided*…."
>
> [137] "… The opportunity to submit representations and submissions ensures that the public has a say in the law-making process. In addition, these provisions make it possible for the public to present oral submissions at the hearing of the institutions of governance. All this is part of facilitating public participation in the law-making process."
>
> [145] "… Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways …. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a *meaningful* opportunity to be heard *in the making of the laws that will govern them*. Our Constitution demands no less."
>
> [146] "In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, *the nature of the legislation under consideration*, and whether the legislation needed to be enacted urgently."
>
> [Emphasis added]

[5] *Doctors for Life International v Speaker of the National Assembly and others* 2006 (6) SA 416 (CC).

2. Mbatha, Moosa and Bonthuys in their chapter entitled *Culture and Religion in Gender Law and Justice* point out the following:

> "The women to whom customary law applies are African and often live in rural areas. … African women are the most disadvantaged group in the country with the lowest per capita income, the least access to resources like municipal services, the lowest educational levels and the highest rate of unemployment and HIV infection. These disadvantages are particularly prevalent amongst rural African women. African households are more likely than others to depend solely on women's income and they are also more likely to contain dependent children whose fathers do not live with them. This does not mean that all African women who are subject to customary law are poor, but it does alert us to the importance of evaluating the effective customary rules in a context of great female poverty" [6]

3. This Bill intimately affects the daily lives of almost 17 million South Africans. Most of them live in rural areas; many of them are women. The nature of the legislation is such that special care should be taken to ensure that the people affected have been given a meaningful opportunity to be heard in the making of this law. The views of rural women are needed before it can be said that there has been meaningful participation in the passing of this Bill into legislation.

4. When the Bill was introduced in parliament in May 2008 there was an outcry from ordinary rural people and civil society organisations that the rural public had not been consulted. Instead, consultation had focused on traditional leaders. As late as March 2011, public consultations had yet to be held in rural areas,[7]despite the fact that the BAA was extended until December 30th 2012 "for…obtaining greater public input and consensus on contentious issues and allowing traditional courts to continue functioning legally."[8]

5. It is useful to draw from the experience of the process followed by the Law reform Commission in relation to the Recognition of Customary Marriages Act (RCMA).

6. The Commission initially noted that, in the case of African marriages, the tendency in the past was to *assume* that spouses would be more likely to accept a separation of estates. The Commission therefore recommended in its Issue Paper that customary

[6] Bonthuys, E., and C. Albertyn. *Gender, Law and Justice*. Cape Town, South Africa: Juta, 2007, p 162.
[7] Sindiso Mnisi Weeks, The Traditional Courts Bill, p 5.
[8] Id.

marriages be deemed to be out of community (unless the parties chose otherwise by an ante nuptial contract). [9]

7. The Commission was quite unprepared for the strength of opposition to its proposal. The Commission's Provincial Workshops throughout the country, the Rural Women's Movement, the Commission on Gender Equality, the Gender Research Project (CALS), the Women's Lobby, the Legal Profession Workshop and the Department of Land Affairs were agreed that the automatic property regime should be in community. Participants felt that, the out of community regime could condemn women to permanent poverty.[10]

8. In its final report the Commissions main goal was to ensure an equitable distribution of assets on breakup of the marriage. Most respondents, in particular participants in the Law Reform Commission's Workshops across the country conducted with women as well as the Rural Women's Movement, supported this aim.[11]The experience of the Law reform Commission in relation to the RMCA demonstrates the importance of consulting the area of the population who will be most greatly affected by changes in the law. As such, in relation to the TCB it illustrates the need to include the voices of women who have been previously excluded, particularly in the development and recording of codified and historic custom.

[9] South African Law Reform Commission, *Project 90 Report on Customary Marriages*, 1998 at p 115.
[10] WLC submissions on the Muslim Marriages Draft Bill, available at http://www.wlce.co.za/morph_assets/themelets/explorer/relationship%20rights/general/WLC%20final%20submissions%20on%20Muslim%20Marriages%20Bill.pdf, accessed on 15 February 2012, p 40-41.
[11] Id.

International Obligations of the South African State:

9. The ***International Covenant on Civil and Political Rights (ICCPR), 1976***

Article 14 (1)

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a *competent, independent and impartial tribunal established by law…*

10. The ***Convention on the Elimination of All Forms of Discrimination Against Women, 1979*** (CEDAW)

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean *any distinction, exclusion or restriction made on the basis of sex* which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women … of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to en sure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 15

(1) States Parties shall accord to women equality with men before the law.

(2) States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

10. Further, **Article 14(1)** of CEDAW enjoins State parties to "take into account the particular problems faced by rural women" and "to ensure the application of the provisions of the Convention to women in rural areas".

11. The recently formulated ***Protocol to the African Charter on the Human and People's Rights on the Rights of Women in Africa***, which South Africa has ratified, enjoins States parties to "modify the social and cultural patterns of conduct of women and men … with a view to achieving the elimination of harmful cultural and traditional practices."[12] In relation to access to justice, the Protocol specifically states:

> **Article 8**
>
> Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:
>
> a) effective access by women to judicial and legal services, including legal aid;
>
> b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid;
>
> c) the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women;
>
> d) that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights;
>
> e) that women are represented equally in the judiciary and law enforcement organs;
>
> f) reform of existing discriminatory laws and practices in order to promote and protect the rights of women.

[Emphasis added]

> **Article 17**
>
> (1) Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.
>
> (2) States Parties shall take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels.

12. Furthermore, **Article 2** states:

[12] Article 2(2)

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

   a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

   b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

   c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

   d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

   e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

The South African Constitution:

13. The Constitution, the supreme law of the land, is the context in which one should consider the Bill.

14. The fundamental right to equality is protected by **section 9** of the Constitution:

Equality

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, disadvantaged by unfair discrimination may be taken.
3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
4. …
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

15. In relation to this section of the Constitution the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* should be mentioned.

16. Of this Act Section 8 (Prohibition of unfair discrimination on ground of gender) is most relevant.

"Subject to section 6, no person may unfairly discriminate against any person on the ground of gender, including-

…

(d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermined equality between women and men...

(e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;

…"

17. **Section 211(3)** of the Constitution recognises customary law:

"The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

18. The place occupied by customary law under the Constitution must be accorded proper value. As held by the Constitutional Court in *Bhe v Magistrates Court, Khayelitsha* 2005(1) SA 580 (CC) at para 41:

> "Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law, should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.[13] … [Customary law] is protected by and subject to the Constitution in its own right. … It is for this reason that an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of common law or legislation … would be incorrect."

19. All provisions in the Constitution recognising customary laws, the exercise of the rights to culture and powers of traditional leadership recognise these only to the extent that they are not inconsistent with other rights in the Constitution. No other right is limited in this manner throughout the Constitution.

20. The limitation of these rights by definition was deliberate and is indicative of an attempt to eliminate competing interests between the right to culture and other rights in the Constitution.[14] The status accorded to customary law is not indicative of an intention to restore customary law to its former glory or to undo the distortion that it suffered. The Constitution placed the achievement of equality, freedom and dignity as paramount to the pursuit of an equalitarian society.[15]

[13] Particular reference was made to Sections 30 and 31, which entrench respect for cultural diversity. Section 30 protects every-ones right (subject to the bill of rights) to 'participate in the cultural life of their choice'. Section 31 protects the rights of persons belonging to cultural communities to enjoy their culture with other members of that community. Reference was also made to section 39(3) which states that the Bill of Rights does not deny the existence of any other rights or freedoms that are conferred by common law, customary law or legislation, to the extent that they are consistent with the Constitution. Section 211(3) of the Constitution obliges courts to apply customary law when that law is applicable.
[14] Sibongile Ndashe , Putting Feminists on the agenda.
[15] Id. at page 3

Customary law and traditional courts in other African countries

21. The post-colonial states of Africa have each dealt differently with how to "preserve the cultural heritage reflected in their customary law and institutions, even as they attempt to function as modern constitutional regimes."[16]

22. It remains a dilemma to resolve the contradictions between a rights-based legal regime and customary law that privileges traditional understandings. An example hereof is the notion that men are the head of the family.[17]

23. It is crucial then that in affirming the right to culture and creating official Courts which will apply customary law in South Africa, that it be done in a fashion which is sensitive to women's rights to equality as well as empowers women's participation in the processes related to the application of customary law and its development.

24. Following is a brief summary of the situation in various African countries with regard to customary law and traditional courts:

25. In **Tanzania** customary law exists parallel to the formal criminal justice system and Islamic law. Islamic law and customary law are not formally recognised. Customary law is only applicable in matters of a civil nature.[18]

26. Customary law still has an impact on the working of the lower level primary courts, in which assessors can support and even overrule a magistrate's decision, and from which prosecutors and advocates are forbidden as the concerned individuals conduct their case. Assessors are not trained in English law and their adjudication is largely customary in style. Even in the High Court assessors have a limited advisory role in sharing their opinions with the presiding judge.[19]

27. In **Zambia** the courts of chiefs and headmen have no formal status but exist parallel to the formal legal system.[20]

28. When **Zimbabwe** became independent the village and community courts were integrated into the mainstream judicial structure. The *Customary Law and Primary Courts Act* was passed which enhanced their operation. The *Local Courts Bill of*

[16] David Pimentel, Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique, p 3.
[17] Policy Brief Nr 17 Institute for Security Studies, A place for tradition in an effective criminal justice system; Customary justice in Sierra Leone, Tanzania and Zambia, p 3.
[18] Id at p 2.
[19] Id.
[20] Id.

1990 was enacted to streamline the operation of the courts and bring them in line with modern principles of law and administration of justice.[21]

29. The courts were given jurisdiction to hear civil cases provided that: the defendant was a resident within the court's jurisdiction; that the cause of action arose within the jurisdiction; and that the parties *consented* to the court's jurisdiction.[22]

30. **Mozambique** has community courts (hybrid institutions) created by statute but otherwise unfunded and untethered to state organs. In other words, they have been integrated into the formal judicial system through *Ley organica No. 4/92* (Community Courts Act) of May 1992.[23] Mozambique functions as a pluralistic society. Formal recognition of legal pluralism legitimises traditional systems, validating the cultural values that underlie them.

31. The 2004 Constitution embraces legal pluralism. Specifically Article 4 (Legal Pluralism) and Article 212(3) (Relationship between statutory courts and non-state dispute resolution fora).[24]

32. As mentioned, outside the legal framework the state has granted no further support to these courts. In brief the virtues of these courts includes the following:[25]

    a. "They engage in preventive work to resolve "minor" offenses and problems characteristic of extended families (marital disputes, housing problems, division of property, slander, abuse of trust, witchcraft, and some physical and sexual aggressions, etc.) that the official justice system does not consider or cannot resolve, but that may nevertheless lead to more serious conflicts. Cases of rape and violent crime are dealt with only on exceptional occasions.

    b. They are simple mechanisms that are accessible to the most seriously excluded sectors of the population (cheap, with little red tape, disputes settled at a single level, proceedings handled in the local language by people close to the situation who are knowledgeable about the immediate circumstances and the cultural reality of the community in which they work, etc.).

    c. They draw no distinction between civil and criminal matters, and follow no traditional separation of powers, so that there is a blend of morality, law, and legitimacy of their leaders based on a form of social support and control.

[21] African Customary Law, St. Thomas Law Review, Volume 14, 2002, p 507.
[22] Id.
[23] Id. at p 175.
[24] David Pimentel, Legal Pluralism, p 5.
[25] Schärf, Wilfred and Daniel Nina (eds.) 2001 The Other Law: Non-State Ordering in South Africa. Cape Town: Juta Law.3

d. They operate on principles of restorative justice and voluntary jurisdiction. Their goal is to restore the relationship between the parties and the community, and they therefore avoid punitive resolutions (the African culture of Ubuntu, as opposed to the Western culture of imprisonment). Remedies and punishments are based on restitution, on serving the aggrieved party, on compensation, or on community service.

e. They are participative, involve people in community business and therefore help to strengthen grass-roots society with feelings of belonging and empowerment. They are run by volunteers who receive no official financial or material reward for their work. They are generally run by elders, but with the opening up of democracy, women and younger people have begun to take an active part.

f. Community courts are just one of the resources available to the residents of poor, marginal districts to attempt to resolve their conflicts. *The parties in dispute can always resort to other methods*: the police, the official courts, organisations that offer paralegal services, religious and neighbourhood associations, family mechanisms, etc."

33. The system of traditional courts was retained in **Ghana** following its independence in 1957; they were established as so-called lower/traditional courts. The traditional courts are the National House of Chiefs, the regional houses of chiefs, and traditional councils. The traditional courts are constituted by the judicial committees of the various houses and councils. They are not vested with jurisdiction in civil and criminal matters, retaining only the exclusive power to adjudicate any cause or matter affecting chieftaincy as defined by the *Chieftaincy Act* of 2008.[26] This is further articulated in Chapter Twenty-Two of the Ghanaian Constitution discussing matters of Chieftaincy.

34. Such matters of Chieftaincy arise primarily from issues related to the appointment or removal from office of chiefs and the constitutional relations between chiefs under customary law.[27]

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[26] This act was implemented to revise and consolidate the Chieftaincy Act, 1971 (Act 370) to bring its provisions in conformity with the Constitution and to provide for related matters. See Modern Ghana, the Fourth Republic, found at http://www.modernghana.com/GhanaHome/ghana/government.asp?menu_id=6&sub_menu_id=13&menu_id2=0&s=b, accessed on 13 February 2012.

[27] Ghana Justice Sector and the Rule of Law, A review by AfriMAP and The Open Society Initiative for West Africa and The Institute for Democratic Governance, available at http://www.afrimap.org/english/images/report/AfriMAP_Ghana_Justice.pdf, p 51.

35. According to the *Amendment of the Courts Act of 2002 (Act 620)*, concerning the establishment of lower courts, "[t]he following are by this Act established as the lower courts of the country … (d) the National House of Chiefs, Regional Houses of Chiefs and every Traditional Council, in respect of the jurisdiction of any such House or Council to adjudicate over any cause or matter affecting chieftaincy…"

36. In addition to the Courts Act, other constitutional mechanisms realise the integration of traditional courts into the formal justice structure. For example, appeals from decisions of the judicial committee of the National House of Chiefs are launched before the Supreme Court.[28]

37. Correspondingly, the National House of Chiefs also nominates a chief to a seat in the Judicial Council. Chaired by the CJ, the council's main function is to propose judicial reforms to improve the level of administration of justice and efficiency in the judiciary.[29]

38. Similarly the Ghanaian Constitution provides that matters affecting Chieftaincy are to be determined by the National House of Chiefs, the Regional House of Chiefs and the Traditional Councils. It is these institutions that are to settle disputes in accordance with the appropriate customary law and usage.

39. Section 270 of the Ghanaian Constitution provides the following "(1) The institution of chieftaincy, together with its traditional councils as established by customary law and usage, is hereby guaranteed**."**

40. Section 272 (c) states that the National House of Chiefs shall "undertake an evaluation of traditional customs and usages with a view to eliminating those customs and usages that are outmoded and socially harmful." This is in accordance with Section 26 which provides that "(1) [e]very person is entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the provisions of this Constitution. (2) All customary practices which dehumanise or are injurious to the physical and mental well being of a person are prohibited." This should result in expunging many traditional practices that are outmoded and not in conformity with human rights.

[28] Ghana Justice Sector, p 51.
[29] Id.

41. In this manner traditional institutions have received a role in the reform of the law in relation to customary law. Customary law is also enforced in the so-called superior courts depending on the nature of the dispute.[30]

42. Notwithstanding the fact that the *Chieftaincy Act* does not explicitly prevent the parties from opting out of the jurisdiction of the traditional courts the effect of Section 63(d) is similar (see below).

43. As such, Section 63(d) of the *Chieftaincy Act* is a section worthy of note. It states "[a] person who… deliberately refuses to honour a call from a chief to attend to an issue... commits an offence and is liable on summary of conviction to a fine of not more than two hundred penalty units or to a term of imprisonment of not more than three months or to both and in the case of a continuing offence to a further fine of not more than twenty-five penalty units for each day on which the offence continues."

44. Furthermore, Section 63(e) concerns the refusal to undertake communal labour announced by a chief without reasonable cause. This too amounts to an "offence" as defined in the paragraph above.

45. Attention is drawn to similar provisions in the Traditional Courts Bill further down in these submissions (see sections 152 and 154).

46. While the Ghanaian system and the proposed South African system do share similarities a significant difference is that despite the recognition of Chieftaincy, in Ghana, traditional courts ceased to exist *officially* after independence.

47. Although the Constitution does not recognise any traditional court institutions (with the exception of the role of the regional and national houses of chiefs in adjudicating chieftaincy disputes), chiefs' traditional councils have nevertheless extended their jurisdiction beyond strictly chieftaincy-related matters to family and property disputes, including divorce, child custody, and land.[31]

48. It was acknowledged in *Ghana Justice Sector and the Rule of* Law *A review by AfriMAP and The Open Society Initiative for West Africa and The Institute for Democratic Governance* that "[r]ecognising such important de facto jurisdiction, individual institutions such as the World Bank have supported provision of training to traditional chiefs in basic law and ADR mechanisms. There is a need for greater

[30] The Courts of Ghana are grouped into two levels: the superior courts of judicature and the lower courts. The Constitution creates a three-tier structure for the superior courts, comprising, in descending order of superiority, the Supreme Court, the Court of Appeal, and the High Court and regional tribunals. The lower courts of the country are circuit courts and tribunals, the district courts, the juvenile courts, the National House of Chiefs and every traditional council, and any other lower court that Parliament may establish. The Courts Act of 1993 (Act 459) gives detail to the constitutional provisions. See Ghana Justice Sector for more information.
[31] Id. at p 13.

consultation on the role of justice mechanisms under the authority of the chiefs, in order to consider measures to capitalise on the accessibility of these mechanisms, while ensuring that they are respectful of human rights, especially in relation to gender equality."

49. The Ghanaian state is also providing training to chiefs and queen mothers on recognised alternative dispute resolution techniques. While objections have been made to the role of traditional authorities in dispute resolution, citing factors such as conflicts of interest and bias, particularly towards women. The training provided assesses this and reorients the local authorities to remove any bias when adjudicating upon dispute.[32]

50. There is little to draw from these models save:

    a. South Africa is not the first or only country to grapple with how to preserve the value of traditional courts whilst ensuring participation of women and youth and ensuring the realisation of human rights

    b. The traditional courts may provide a useful dispute resolution mechanism;

    c. Eradicating them completely may not be effective, as they may continue to operate parallel to the official system; this is especially true where large populations have no means of getting to urban centres where statutory courts are situated;

    d. Attempts to include women and youth have included training programs and participation in the courts;

    e. The more effective models develop traditional courts into community courts, providing more opportunities for inclusion by participation and in decision-making.

51. While we can learn from the experiences of other countries, particularly what has and hasn't worked well, we will need to meet the challenge to design a system that works in our context.

52. In South Africa, our Constitution expressly recognises customary law, but makes it subject to the rights in the Bill of Rights. It is a form of legal pluralism in which customary law, statutory and common law are balanced with the Constitution. Both civil and customary law are subject to the rights enshrined in the Bill of Rights, including the rights to equality, dignity and access to justice. Our Constitutional Court

[32] Id. at p 148.

has expressed that we should prefer a living customary law as opposed to a stultified one encoded and interpreted under colonialism and apartheid. This means developing the customary law to take account of women's experiences, as it may develop naturally in a more equal society.

53. Prior to commenting on the specific provisions in the Bill, it is important to consider the context in which customary law has developed and how this impacts on women, as this is the law that the Traditional Courts are mandated to apply.

Women, Race and Customary Law

54. It is widely acknowledged by writers in South Africa that like many other aspects of law in our society, customary law has not developed untouched by colonialism or the apartheid regime.

55. The main source of information about indigenous African law before colonisation comes from oral tradition, thereby making it difficult to trace. In its clash with indigenous cultures, the colonial power set about the process of recording official customary rules. This was done by consulting male elders and traditional leaders because they were presumed to be the only people who controlled important information.[33] It is important to note that this approach led to the exclusion of women's views on African culture and to official customary rules which favoured older men:

> "Customary law took on a particularly authoritative and patriarchal cast because it was the product of negotiation between colonial and customary elites. It was in the interests of traditional leaders to provide an account of indigenous law which emphasised the privileges of senior men whose power was under threat, not only from colonial encroachments but also from increased opportunities for youth and women to achieve independence from tribal structures through migrancy and wage labour".[34]

56. Bennett in *Human Rights and African Customary Law under the South African Constitution (1995*),[35] argues that codified versions of customary law are poor versions of women's pre-colonial status which fail to reflect current social practice.[36]

57. Ndashe argues that whilst it has to be conceded that the relationship between customary law and the colonial legal system was by no means symbiotic, together they re-enforced the subjugation of African women. [37]

58. In her paper entitled *The Reconstitution of Customary Law in South Africa*, Zimmerman argues that: [38]

[33] Customary Law and Domestic Violence in Rural South African Communities, Curran & Bonthuys 2005 SAJHR 607.
[34] L Fishbayn, B Goldblatt and L Mbatha - the Harmonisation of Customary and Civil Law Marriage in South Africa, paper delivered at the 9th World Conference of the International Society of Family Law, Durban, 28 – 31 July 1997.
[35] See p 84.
[36] Curran and Bonthuys, p 613.
[37] Sibongile Ndashe, Putting feminists on the agenda.
[38] Jill Zimmerman – the Reconstitution of Customary Law in South Africa: Method and Discord, 17 HARV. Blackletter LJ 197.

> "Much of what is understood today as official customary law was produced through processes that privileged elite male's responses to changing socio-economic conditions as singularly culturally "authentic". In consequence the competing cultural experiences of women and youth found no expression in and even today remain outside of codified customary law. To the extent that the legal system of a new and democratic South Africa absorbs customary law unchanged, it incorporates the historical female exclusion."[39]

59. "Official" customary law has been tainted by its interaction with colonialism, apartheid and its active exclusion of women. In contrast to this "living" customary law takes into account the current social context and is more in touch with the customs of the people, particularly women.

60. The codification of customary law brings with it its own set of problems. Most significantly, it may impede the natural and salutary evolution of customary law toward greater recognition of women rights, because the older values and principles are ossified in written form.[40]

61. As such, "living" customary law lends itself more towards development which recognises the rights of women.

62. The Constitutional Court judgements view customary law as "living law" rather than accepting the unchanged codified version that was written down during historical times. The judgements illustrate that customary law can be flexible.[41]

63. A case in which such a development can be seen is *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwai, 2008.* This case considered whether a woman can become chief. The Constitutional court found that the traditional authorities had the authority to develop their customary law under the Constitution, and that a women could indeed become chief.

64. Specifically, the Constitutional court discussed the power of traditional courts to develop customary law, mentioning that Section 211(2) of the Constitution required courts to respect the rights of traditional communities to develop their own law. The court ruled that in the case of Ms Shilubana the traditional courts had developed customary law in accordance with the constitutional right to equality. The value of recognising the development by a traditional community of its own law in accordance

[39] Jill Zimmerman – the Reconstitution of Customary Law in South Africa: Method and Discord, 17 HARV. Blackletter LJ 197, p 3.
[40] David Pimentel, Legal Pluralism, p 22.
[41] LRGRU Article 7 p 3.

with the Constitution was not outweighed by the need for legal certainty or the protection of rights.

65. The Constitutional Court, in the *Bhe* matter stated as follows:

> "The inherent flexibility of the system is one of its constructive facets. Customary law places much store in consensus seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements."

66. Commentators have suggested the following:

> *"*Women's rights, understood as the rights of women in any given context to determine their own social positioning, can only be incompatible with cultural right if culture is impermeable to their participation. Equality rights make the right to cultural participation meaningful for women and are consistent with a healthy and dynamic culture*"*[42]*.*

67. An advantage of oral law (uncodified law) is that it is flexible and highly adaptable. Another aspect of oral tradition that makes it particularly appealing is that it tend to be far more fully understood and embraced by the community at large. Because the law is recorded only in memory, it must be fully internalised by those who will apply it, and is therefore likely to be more fully internalised by the community as a while. In this way, citizens will abide by such and heed such institutions when they know, understand and collectively embrace them. [43]

68. Pimentel said it well when he wrote "reliance on a codification done in the past will similarly fail to capture "the current position of… Customary Law," and will tie its application to some timeless but never timely written characterization of it."[44]

69. Nonetheless, to the extent that certain principles of customary law are offensive to constitutional and human rights norms, those provisions can and should be formally exercised from a written code.[45]

70. It is submitted that in order to overcome a perceived conflict between women's right to equality and certain customary principles, the traditional courts will need to apply "living" customary law as opposed to the official version.

71. Additionally, it is essential that women should be presiding officers. Bearing in mind that the constitutional right to participate in culture includes women's rights to

[42] Zimmerman, p 6.
[43] David Pimentel, Legal Pluralism, p 19-20.
[44] Id. at p 21.
[45] Id. at p 19.

participate in culture, it would follow then that those who will be bound by this law should be afforded an active role in shaping it.

72. It must be noted then that rural African women are both African and women and the pitting of the right to equality in a westernised sense against the right to culture places these women in a dilemma which results in them being excluded from affirming their own identities as both women and African, participating in and practicing their culture and determining the nature of customary rules that should apply to their very lives.

73. A more democratic conceptualisation of the constitutional right to participate in a cultural life of choice would afford social groups, such as women, as well as individuals, the right to substantively shape, challenge, and selectively confirm cultures and their legal consequences. To the extent that African women articulate interests as women that are not being met within their cultural communities, the right to pursue these interests is in fact integral to and subsumed within the realisation of their right to participate in a cultural life of their own choosing.[46]

74. The participation of women in the traditional courts, as presiding officers, affords women an opportunity to contest prevailing cultural norms that disadvantage them. In applying "living" customary law as opposed to the tainted official version, women may recognise current social practices and more women would be able to articulate their interests and shape African culture from within.

75. Empowering women is also a viable alternative to an otherwise purely top-down approach to the application of customary law, especially in rural communities through the utilisation of "official" customary law, and the codification of certain principles of customary law are offensive to constitutional and human rights norms. As said earlier, those provisions can and should be formally exercised from a written code.

76. Women are also more likely to point to changing social circumstances in order to argue that ancient customs are no longer relevant. Examples of such cases are Court challenges to the law of succession which favour men, and rules prohibiting mothers form receiving the payment of lobolo.[47]

77. One should also be aware of the danger of grouping African women into a hegemonic block. What is important is to empower the diverse groupings within African culture by giving them a voice as members on its traditional courts, bearing in

[46] Zimmerman, p 13.
[47] Curran and Bonthuys, p 614.

mind that African customary law by its very nature is flexible and capable of developing to take into account changing current social values.

Approach to the Current Bill

78. The NCOP need not view the right to equality and the application of customary law as mutually exclusive rights. The legal position is such that customary law forms part of our legal system, to the extent that it does not conflict with the rights in the Bill of Rights. The "living customary" law is capable of development which recognises women's rights to equality.

79. This Bill is an opportunity to develop a court system that will be capable of developing customary law in a manner consistent with the Constitution.

80. It is submitted that only through the participation of women in the application of customary law in the traditional courts can customary law be reconstituted. Reconstituted not to its pre-colonial form but on a trajectory mandated by the Constitution which is one where customary law is developed to incorporate the values of non-racialism, non-sexism and democracy in a new South Africa.

Comments on the Bill

Preamble

81. It is suggested that the preamble, in addition to its affirmation of customary law as recognised by the Constitution and part of our legal system, also set out that:

- customary law has been tainted by its codification, recordal and application during colonial and apartheid times and the historic exclusion of women in its development;
- customary law is subject to the other rights contained in the Bill of Rights;
- customary law is essentially a living set of norms and values which develops in accordance with the cultural practices of the times;
- the participation of women in the application and development of customary law is required by South Africa's international, regional and constitutional obligations.

Objects of the Act

82. It is similarly suggested that the objects of the Act include:

- The development of customary law by the traditional Courts in line with constitutional values by taking into account current social practices, and with the participation of women.

Guiding Principles

83. The starting point of the Bill is the promotion and preservation of African values. It is submitted that, for reasons set out above, the constitution does not seek to restore or preserve "official" customary law principles but rather the application of "living" customary law, constantly developing to take into account the values of the Constitution and the rights enshrined in the Bill of Rights. The Courts should seek to reconstitute customary law, taking into account the experiences of women and children, as well as their rights to equality and to participate in the practice of culture. This section does not make it clear that the application of customary law is subject to compliance with the other rights in the Bill of Rights and this needs to be stated expressly.

Designation and Training of Traditional Leaders

84. Traditionally and historically women play a very small, if any, part in court proceedings.[48]

85. Traditionally, and because of the principle of patrilineal succession, women do not hold positions as traditional leaders, ward heads or family heads and they would not form part of a customary Court. In addition, women were only allowed at court when they were a party to a case and even so, the claim had to be brought by a senior male family member.[49]

86. The Traditional Leadership and Governance Framework Act 41 of 2003 provides that:

> "[a] traditional community must transform and adapt customary principles and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by-
>
> a. Preventing unfair discrimination;
>
> b. Promoting inequality; and
>
> c. Seeking to progressively advance gender representation in the succession to traditional leadership positions."

87. Further, Section 3 (2)(b) of the same Act requires at least one third of members of a traditional council to be women. It is through these traditional councils that the traditional courts will operate. As such, it is crucial that women are given ample opportunity to participate.

88. Phathekile Holomisa stated that as a result of the required composition of the traditional council the traditional courts have been made "gender-sensitive".[50] This is not, however, an automatic truth.

89. The Framework Act requires that traditional councils must incorporate 40% elected members and ensure that 30% of council members are women. However, this means that the senior traditional leader still selects the majority (60%) of the members of the traditional council.[51]

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[48] Phathekile Holomisa, Balancing law and tradition; The TCB and its relation to African systems of justice and administration, p 19.
[49] Curran and Bonthuys at page 633
[50] Phathekile Holomisa, Balancing law and tradition, p 20.
[51] Law, Custom & Rights, Newsletter of the Law, Race and Gender Research Unit August/September 2011, Editorial Note by Mazibuko K. Jara, p 2.

90. When the Framework Bill was first debated one of the objections that arose was the fact that traditional leaders would continue to select the majority of council members. The portfolio committee responded by assuring members of the public that tribal authorities would only have one year in which to hold the necessary elections, elections that would be the beginning of the transformation of traditional courts. Importantly, those tribal authorities who refused to meet the composition requirements would not be converted to traditional councils and would fall away as defunct entities not recognised by law.[52]

91. Basically, the new Act was intended as a reform measure that would fundamentally change the patriarchal learning of pre-existing traditional systems by including women as elected representatives.[53] Unfortunately, eight years later elections still have not taken place in a number of provinces such as Limpopo and a large amount of Mpumalanga. The elections that have taken place have not been concluded as efficiently or effectively as they should have been.[54]

92. Simply put, customary courts must include both men and women in its composition. This finds it basis in Section 8 of the *Promotion of Equality and Prevention of Unfair Discrimination Act of 2000* as to the need for reasonable representation of both men and women in public institutions.

93. The proposed Bill provides for the Minister to designate traditional leaders, kings, queens, headmen, headwomen and members of the royal family (as contemplated in the Traditional Leadership and Governance Framework Act) as presiding officers. This may appear to be gender neutral, but due to these positions following the male line, it effectively means women presiding officers will be a tiny minority. Furthermore, the Bill does not provide for members of the council to be appointed presiding officers, again excluding women and attempts at gender parity.

94. This contravenes South Africa's obligations in terms of the African protocol (see above under international obligations) and goes against the constitutional imperative to develop the customary law in line with the Constitutional right to equality. The fundamental importance of having women as presiding officers is argued above in detail and the provisions as they stand are open to constitutional challenge.

95. Moreover, the Bill gives traditional leaders unilateral powers to apply and interpret customary law within their jurisdictional boundaries. As such, it is imperative that women also receive a real opportunity to attain such positions.

[52] Id.
[53] Id.
[54] Id.

96. Furthermore, and more generally, as the Law Commission pointed out in its Report,[55] there is a good deal of variation and fluidity in the levels of these dispute-resolution systems (starting at the level of the family council), and in the identity of who presides over the dispute-resolution proceedings. At the level of the "Chief's Court", it is often not the chief or headman who presides, but a councillor. This flexibility now has to be increased in order to give effect to the right to equality in respect of gender.

97. The Bill however provides that only a king, queen, senior traditional leader, headman, headwoman or member of the royal family may be designated as presiding officer in a traditional court. This contradicts the multi-layered nature of the system. It also contradicts the inherent fluidity and flexibility in the system, and the further flexibility which is now required by the Constitution. It is also inconsistent with the Traditional Leadership and Governance Framework Act. That Act contemplates that people other than those in the categories to which we have referred, will be members of traditional councils. The Bill however excludes those councillors from being presiding officers.

98. In short, the Bill tends to concentrate at the level of the court senior and traditional leader, disregarding the various other levels above and below it.[56]

99. There is an even more fundamental difficulty. Traditional courts are courts contemplated in section 166(e) of the Constitution. The presiding officers are judicial officers. Section 174(7) requires that they:

> "…must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice."

100. The Bill does not ensure that appointment etc. of these judicial officers will take place in this manner. The appointment is entirely at the discretion of the executive, in the form of the Minister.[57] What is more, the Minister may delegate this power to any official in the Department of Justice above the rank of Director or any official of equivalent rank.[58]

101. We submit that this falls hopelessly short of what is required by the Constitution. The defect is not remedied by the provision that the Minister may make regulations in this

[55] SALC Project 90: Customary Law: *Report on Traditional Courts and the Judicial Function of Traditional Leaders*: Paragraph 2.3 and 2.4.
[56] Phathekile Holomisa, Balancing law and tradition, p 18.
[57] Sections 4(1), 4(2) and 4(4).
[58] S 22

regard,[59] and by the definition of "this Act" to include the regulations.[60] The regulations will be part of the Act *for the purposes of the* Act. However, that does not make them an Act of Parliament in terms of section 174(7) of the Constitution.[61] The Constitution requires that Parliament, and not the Minister, must ensure that judicial officers are appointed in the manner required by section 174(7).

102. In the *Mhlekwa* case, the Transkei High Court found:

> "The provisions of s 174 of the Constitution relating to the appointment of judicial officers are measures introduced by the Legislature to ensure judicial independence. The Regional Authority Courts Act in its present form does not include such measures or any other guarantees to ensure judicial independence. Such Courts can for this reason not be said to be 'an ordinary court' with the qualities of independence as envisaged in s 35(3) of the Constitution."[62]

103. This problem illustrates the tension between on the one hand the need to strengthen effective, flexible and legitimate local conflict resolution institutions; and on the other hand the need to ensure (if they are to be Courts) that they are constructed in a manner which is consistent with the Constitution. It is not easy to reconcile these two needs. It requires careful consideration after hearing the opinions of those affected, and of experts in the field. Currently, this objective has yet to be achieved through the Bill. As it stands, it clearly fails the test of constitutionality in this regard.

104. In light of the above it is submitted that the training of the traditional leaders who will be applying customary law in these Courts is crucial. Traditional leaders should not only be trained on the judicial processes but also on the substantive law surrounding the constitutional rights to equality, dignity, freedom from discrimination and the application of the Constitution in situations where there is a conflict between constitutional rights and a customary law right. It is important to train the judicial officers of the traditional Courts on the history of the development and codification of customary law, particularly on the exclusion historically of women in recording and formulating the rules of customary law and the imperative that the values and norms of women in society form an important part of developing customary law principles in the future.

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[59] S 21(1)(a)
[60] S 1
[61] Compare in this regard *Moodley v Minister of Education & Culture, House of Delegates* 1989 (3) SA 221 (A) at 233E.
[62] At page 615-616.

105. The idea that women be made assessors in the traditional courts also bears consideration. This could be a measure applied until there is more gender equity in amongst traditional leaders. Currently in South Africa the help of assessors is utilized in the High Court and lay assessors are used in the Magistrate Courts.

Jurisdiction: Clauses 5(1) and 6

106. Traditional leaders gain their authority and legitimacy from the people whom they lead. Their authority inevitably has a territorial element, because it covers the area where those who support them live. However, their authority derives from the people who support them rather than from the land on which they live.

107. Traditional communities and customary law are thus consensual in their nature. This is the source of their legitimacy and their strength. It explains how they have survived centuries of colonial and apartheid rule. They have continually adapted to changing circumstances and to the changing needs of the people who are affected.[63] That adaptability, which has at its core the consensual nature of the system, has been a major source of their strength.

108. The Bill, however, starts from the opposite premise. Its premise is that traditional authority is based on territory, rather than on people. From this it concludes that everyone within that territory, and any relevant act or omission within that territory, *must* be subject to the jurisdiction of the traditional Court functioning in that territory.

109. But traditional Courts enforce customary law, which is communally based. Logically, customary law can only bind people who live by its norms.

110. This underlying premise of traditional courts was recognised by a Full Bench (three judges) of the Transkei High Court in the *Mhlekwa* case.[64] There, the Act in question said that Transkei citizens would be subject to the jurisdiction of a Regional Authority Court. The Court commented as follows:

> "The requirement that persons subject to the jurisdiction of regional authority courts are to be Transkei citizens is too wide a concept and it cannot be accepted or assumed that such persons are necessarily adherents of such traditional structures and laws and procedures."[65]

111. We submit that the Bill is fundamentally flawed in placing people under the jurisdiction of a traditional Court simply because they happen to live or be in a

[63] *Alexkor Limited and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) at [53].
[64] *Mhlekwa v Head of the Western Tembuland Regional Authority and another; Feni v Head of the Western Tembuland Regional Authority and another* 2001 (1) SA 574 (Tk).
[65] Page 621; see also at page 629.

particular locality.[66] The jurisdiction of a traditional Court should be limited to those who recognise its authority.

112. It needs to be recognised that the territorial areas of the traditional authorities exist virtually "wall-to-wall" in the former "homelands", because tribal authorities were the primary level of "local government" within the Bantustan political system. The reality of our country, however, is that rural areas are not made up of neatly contiguous and ethnically distinct "tribes". The people in those areas, those who are there permanently and those who are there temporarily, are of diverse ethnic backgrounds.

113. We submit that it is contrary to all principle, and contrary to the fundamental nature of customary law, for all of those people to be made subject to the authority of traditional Courts, regardless of whether they consider themselves "adherents" of that system. This deviates from the fundamental principle that traditional courts and customary law are consensual in their nature.

114. The inability to opt-out is discussed in more detail in a latter section of this response.

Settlement of Certain Civil Disputes of a Customary Law Nature by Traditional Courts (Clause 5):

115. The jurisdiction in civil matters of the traditional Courts excludes the following:

a. any constitutional matter;

b. any question of nullity, divorce or separation arising out of marriage;

c. matters relating to custody and guardianship of minor children;

d. matters relating to validity effect or interpretation of a will;

e. matters arising out of custom where the value of the property exceeds the amount to be regulated.

116. Due to the patriarchal nature of African society and the apparent bias of customary law and practice in favour of males the SALRC suggested that maintenance, along with the categories mentioned above, be excluded from the jurisdiction of the customary courts. The Commission suggested that these matters be dealt with by

[66] Sections 5(1) and 6

the family courts.[67] It is notable that the Bill does not expressly exclude maintenance claims.

117. The Commission believed that these suggestions took into account "the values of equality and non-sexism in the Constitution and the principle of the "best interests of the child."[68] This would be in line with the earlier determination that Courts should seek to reconstitute customary law, taking into account the experiences of women and children, as well as their rights to equality and to participate in the practice of cultural development.

118. Currently, chiefs' courts enjoy jurisdiction in these matters except issues relating to civil marriages and the dissolution of customary marriages registered in accordance with the RCMA.[69] Removing these issues from their jurisdiction can be perceived as a diminution of their powers. As such, traditional leaders are not happy with these exclusions. According to the SALRC women have strongly argued that customary courts should not have jurisdiction over matters maintenance or land on the basis that these courts are biased against women. [70]

119. It is submitted that the issue of maintenance of spouses may fall under the exclusion in Section 5(2)(b) of the Bill as spousal maintenance arises out of a marriage. However, it is unlikely that child maintenance would be excluded.

120. The WLC provides a free advice service to women and our experience has been that the bulk of the queries that we receive relate to divorces, maintenance and domestic violence. These are clearly issues in which women require the protection of the Courts and areas of the law in which their right to equality is profoundly impacted on and should be protected.

121. While it can be determined that extending jurisdiction to traditional courts to handle maintenance claims would significantly increase access to justice to rural women this should be balanced against grave concerns about the capacity of such courts to administer maintenance claims. Additionally, the *Maintenance Act of 1988* provides for only Magistrate's Courts to be Maintenance Courts. The offences in the Maintenance Act related to the failure to pay maintenance also require a fine or imprisonment; the traditional courts would not be able to impose this type of sanction.

[67] SALC Project 90: Customary Law: *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, p 10.
[68] Id.
[69] Section 8(5) RCMA.
[70] SALC Project 90: Customary Law: *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, p 11.

122. As has become apparent from interviews held by the Commission with rural women many women are already taking their cases to magistrates' courts instead of the chiefs' courts. Women prefer to go to magistrate's courts rather than chief's courts because the former have clear legal processes to deal with defaulters while the latter have none and do not have the capacity to enforce payments.[71]

123. It for this reasons that it is submitted that maintenance matters be expressly excluded from the Bill.

124. The Bill allows the traditional courts to hear matters around intestate succession, and it should be noted that the customary principle of primogeniture has been ruled unconstitutional in the *Bhe* case, meaning that the traditional courts will be obliged to apply the *Intestate Succession Act* until customary law of succession is legislated upon.

Settlement of Certain Criminal Disputes by Traditional Courts (Clause 6):

125. While the Court does have jurisdiction to hear matters of assault without the intent to do grievous bodily harm, which may be interpreted to include certain instances of domestic violence, it is submitted for the reasons set out below that traditional Courts should not have jurisdiction to hear domestic violence matters.

126. The SALRC recommended the exclusion of offences relating to domestic violence in terms of the *Domestic Violence Act 116 of 1998* from the jurisdiction of traditional courts. Unfortunately, this has not been expressly articulated in the Bill.

127. Research has shown that customary law lacks specific rules dealing with domestic violence. [72] The same study on traditional courts and domestic violence found that practices around lobolo potentially increased women's vulnerability to domestic violence and decreased their ability to resist or flee abusive situations. This is because the husbands have taken over the payment of lobolo and the payment has become a cash payment, resulting in men sometimes justifying their right to abuse wives by claiming that they have paid for them. The decreased involvement in the payment of lobolo by the husband's family has limited their ability and willingness to intervene in the marriage to stop domestic violence. Furthermore, due to the fact that the lobolo is paid in cash, the wife's family may have spent the money soon after it being received and would be reluctant to allow the wife to return home because of the inability to repay the lobolo to the husband.

[71] Id.
[72] Curran and Bonthuys p 608.

128. The authors of that study state as follows "if people believe that men are entitled to abuse their wives because of the payment of lobolo, wives will tend to accept domestic violence and traditional Courts will not assist them unless their families can return the lobolo".[73]

129. It is to be noted that the customary law precept which allows moderate chastisement is in conflict with women's constitutional right to be free from all forms of violence and for this reason it would not be appropriate for traditional courts to deal with domestic violence matters.

130. Furthermore, while the Bill does make provisions for a traditional court to make an Order prohibiting certain types of conduct, traditional courts would not have the authority to sentence an offender for the breach of a protection order, as the *Domestic Violence Act* provides for sentences of direct imprisonment.

131. It is important to note that in the absence of a provision mandating the composition of the courts to include women, traditional courts would, because of the principle of patrilineal succession, be conducted overwhelmingly by men. Commentators have noted that:

> "These rules mean that a woman who wants to pursue issues of domestic violence in a traditional Court would be surrounded by men, including family members of the perpetrator. As would be the case in all other male dominated Courts, such circumstances would undermine women's confidence and their ability to state their cases, while also decreasing the chances of their claims of domestic violence being understood and taken sufficiently seriously."[74]

132. To allow the traditional courts to hear matters of maintenance and domestic violence would create a system parallel to that created by the *Domestic Violence Act* and the *Maintenance Act* with different rules and sanctions and consequently amount to unfair discrimination on the basis of culture.

133. The SALRC raised the question regarding criminal justice and whether customary courts should have criminal jurisdiction at all.[75]

134. In other African countries the criminal jurisdiction varies. In Zimbabwe courts of traditional leaders (or local courts) have no jurisdiction in criminal matters. However, in Botswana courts traditional leaders have considerable criminal jurisdiction. The

[73] Id. at p 617.
[74] Id. at p 633.
[75] SALC Project 90: Customary Law: *Report on Traditional Courts and the Judicial Function of Traditional Leaders*, p 12.

submissions to the Commission emphasised that customary courts should continue to try only minor or petty offences while more serious offences are tried by magistrate's courts and High Courts.[76]

135. Moreover, it should be noted that there is a glaring absence of crimes committed against women, including those that are already identified in national legislation. Besides domestic violence, issues such as but not limited to; conjugal rape, incest, and statutory rape do not appear in the schedule of the Bill. Thus they cannot be heard in the customary courts and yet they cannot go elsewhere because they fall within the "traditional community". [77]

136. It is for this reason in tandem to the inability of people who live in the areas designated as "traditional communities" to opt out and take the choice of using another court that we believe that all matters pertaining to gender violence, discrimination, dissolution of marriage, and sexual offences should be excluded from the Bill.

137. This approach was undertaken in the draft Bill of the SALRC.

138. Nomboniso Gasa states "[t]he reality is that these courts are not sympathetic to the victims of these crimes, given the patriarchal framework in which they are located. That is not to say that conventional courts do not present their own inadequacies. But they have the potential to offer women better access to justice because they are subject to the constitution and law of the country."[78]

Constitutional requirements for criminal trials: Clause 6

139. Section 35(3) of the Constitution guarantees the right to a fair criminal trial. It sets out certain elements of a fair trial.[79] They include the following:

a. the right to legal representation,[80]

b. the right to be tried by an ordinary Court,[81] and

c. the right of appeal to or review by a higher Court.[82]

140. The Bill raises difficulties with regard to compliance with each of these requirements.

[76] Id. at p 13.
[77] Nomboniso Gasa, The Traditional Courts Bill; A silent coup?, p 28.
[78] Id.
[79] *S v Zuma and others* 1995 (2) SA 642 (CC) at paragraph [16].
[80] Section 35(3)(f)
[81] Section 35(3)(c)
[82] Section 35(3)(o)

Legal representation

141. In most African countries where customary courts or traditional courts are found legal practitioners are barred from appearing in these courts on behalf of clients. The report by the SALRC sets out both sides of the debate as to whether legal representation should be allowed in civil and criminal cases in traditional Courts.[83] There are substantial arguments on both sides. The Commission recommended that legal representation should be allowed; the Bill takes the opposite point of view.

142. We do not take an in-principle view either way. In our view, the answer depends on the extent of the powers of the Courts, and the sanctions which they may impose. The greater the powers of the Court, the stronger the argument that people should be allowed to defend themselves with the assistance of a legal representative.

143. Notwithstanding, we submit that one thing is beyond debate: if the Courts have the power to conduct *criminal* trials, then the Constitution requires legal representation. The Constitution could not be clearer in this regard, as articulated in section 35 thereof.[84]

144. In the *Mhlekwa* case, the Transkei High Court came to this very conclusion (and also found that there was no constitutionally valid justification for excluding the right to legal representation):

> "Section 7(1) of the Regional Authority Courts Act, as amended by Act 19 of 1985, expressly provides that an accused person may not be represented by a legal representative and that a legal representative may not be present 'in the capacity of a legal representative during any proceedings' of a regional authority court… I agree with the applicants' submission that s 7 of this Act is inconsistent with the entrenched right to a fair trial."[85]

145. As such, a choice has to be made:

d. If traditional Courts hear only civil cases, then Parliament must decide whether legal representation should be permitted.

e. If traditional Courts also hear criminal cases, then Parliament is obliged by the Constitution to permit legal representation.

[83] SALC Project 90: Customary Law: *Report on Traditional Courts and the Judicial Function of Traditional Leaders*: paragraph 4.6.
[84] Section 35(3) states that every accused person has a right to a fair trial, which includes "(f) to choose, and be represented by a legal practitioner and to be informed of this right promptly."
[85] At page 618

146. A model that could perhaps be used is to allow women to appear in traditional courts as paralegals. There is much to be said for a model that allows community representation. It should be specified that women are allowed to represent themselves in the courts and that people may be assisted by community members (expressly defined as men and women) in the courts. (See section "Procedure of Traditional Court of the submissions).

Ordinary Courts

147. We have already referred to the finding of the Court in the *Mhlekwa* case that because of the way the presiding officers were appointed, the Act did not "include such measures [contemplated in section 174 of the Constitution] or any other guarantees to ensure judicial independence. Such courts can for this reason not be said to be 'an *ordinary court*' with the qualities of independence as envisaged in s 35(3) of the Constitution."[86]

148. This is a further reason why traditional Courts of the kind proposed in the Bill are not permitted by the Constitution to decide criminal cases.

Right of appeal

149. Finally, we express doubt about whether the Bill's limitation of appeals, and the provision of a circumscribed review, is consistent with the constitutional requirement of a right of appeal or review.

Nature of Traditional Courts

150. It is important here to expressly approve the application of "living" customary law. A law that will take into account current social practices, particularly the experiences of women.

151. Again, it is not clear that the application of customary law is subject to the other rights in the Constitution.

Procedure of Traditional Court

152. The WLC supports the provisions of Section 9(2)(a) that women be afforded full and equal participation in the proceedings of the Court. It should be expressly stated that women may represent themselves and may be assisted by a male or female paralegal or community member.

153. The Bill should require a presiding officer to hold an enquiry where a women is a party but not present or is represented by a male family member as to the reasons

[86] Id. at p 616.

for her absence and to pend proceedings to give her an opportunity to make her submissions.

154. The use of community members as paralegals may assist women (and men) litigants, and may provide a solution to overcome the difficulties associated with legal representation (its expense, accessibility in rural areas etc.)

Sanctions and orders which may be given by traditional courts: Clause 10

155. As we have stated above, our view on whether legal representation should be permitted in civil cases, depends in part on the extent of the powers of the Courts, and the sanctions which they may impose. The same consideration applies to the limitation of appeals.

156. **Clause 10(2)(i)** is a particular cause for concern. It provides that a traditional Court may deprive the accused or a defendant of "*any* benefits that accrue in terms of customary law and custom."

157. The word "any" is "upon the face of it, a word of wide and unqualified generality. It may be restricted by the subject-matter or the context, but prima facie it is unlimited."[87]

158. Land rights are probably the most important benefits which accrue to members of traditional communities in terms of customary law and custom. The right to occupy and use land is of course at the very foundation of people's lives. Clause 10(2)(i) means that traditional courts may deprive people of any of these rights.

159. We submit that it is fundamentally objectionable to give traditional Courts this vast power. This is a power which is not even given to more formal Courts, which are presided over by professionally qualified judicial officers, in cases in which the parties are entitled to be defended by their lawyers.

160. The African National Congress adopted a resolution at Polokwane in 2007 which calls for the allocation of customary land in a manner that "empowers rural women and supports the building of democratic community structures at village level, capable of driving and coordinating local development process". It is submitted that the male dominated traditional courts applying patriarchal principles of land ownership would undermine the policy goals of the ruling party.

161. The only limit to this power is the provision in clause 10(1)(b) that a traditional Court may not impose banishment in a *criminal* case. What this necessarily means is that:

[87] *R v Hugo* 1926 AD 268 at 271.

f. a traditional Court *may* impose banishment in a civil case; and

g. in both civil and criminal cases, traditional Courts *may* deprive people of land rights short of banishing them.

162. We submit that this is fundamentally objectionable.

163. We also draw attention to the fact that clauses 10(2)(g) and (h) authorise the Court to order *any* person other than the parties to provide community service, or to provide a service or benefit to a victim. A Court cannot validly or legitimately order a penalty against a person who is not before it. This is fundamentally inconsistent with sections 34 and 35 of the Constitution. The Bill should explicitly provide that no such order may be made unless the person concerned has been given an opportunity to defend the case both on its merits, and as to what sanction (if any) should be ordered against him or her.

164. Furthermore, in light of the fact that most people in the rural areas are women and children, who already bear the brunt of manual labour, this work is likely to fall on their shoulders. This was expressly addressed by Minister Xingwana who recognised that " …women constitute the majority of people living in rural areas…"[88]

165. In his speech to the Parliament of Women Cape Town, Deputy Minister of Rural Development and Land Reform T.W. Nxesi admitted that "[w]e know that rural women perform a variety of tasks, including general agricultural work and raising livestock…" [89]

166. Moreover, the persons most likely to benefit from the "free labour" are the traditional leaders. [90]

167. Additionally, section 8(i) of the *Equality Act* states " [s]ubject to section 6, no person may unfairly discriminate against any person on the ground of race, including…systemic inequality of access to opportunities by women as a result of the sexual division of labour."

Opting out

168. Traditional authorities and Courts operate in an environment which is constantly changing and adapting. The process of change is in part a response to challenge and dispute. In some instances, there is challenge and dispute about the nature and

[88] Women should benefit the most from land reform, available at http://www.cosmocitychronicle.co.za/111103 Women%20should%20benefit%20th%20most%20from%20land%reform.php, accessed on 15 February 2012.
[89] Speech by the Deputy Minister of Rural Development and Land Reform T.W. Nxesi (MP): Input to the Womens Parliament Cape Town 21-23 August 2011, available at http//www.ruraldevelopment.gov.za/DLA-Internet/content/news/DM-Speech-22082011.jsp, accessed on 14 February 2012.
[90] Nombonisa Gasa, The Traditional Courts Bill, p 7.

extent of the authority exercised by those who hold office as traditional leaders. There is continuing debate, challenge and dispute about the role of women in traditional communities and their authority structures.

169. In a context of this kind, there is inevitably a risk of abuse of power. To say this is not to attribute bad faith to those who hold power. It is simply to recognise a fact about the nature of contestation and struggle over power. Women are particularly vulnerable. They are moving from a marginalised position to a central position in the structures of traditional power and authority, and are seeking to participate as full and equal citizens in structures and processes from which they have been excluded in the past.

170. One of the possible ways of abusing power is through the exercise of the coercive powers which are proposed by the Bill. A woman who challenges the exercise of authority is at risk of facing complaints that she has acted inconsistently with custom, and that she has offended those who hold power. She can then be brought before the very persons who hold that power, and be punished. This is unacceptable as a matter of legal principle.

171. Under these circumstances, it is necessary to take measures to prevent abuse of power. It is not enough to provide possible remedies where it is alleged that an abuse has taken place. For rural people, with few resources, those remedies will often be inaccessible and of little practical value. It is *prevention* of abuse which is required, and not remedies which might be available after an abuse has taken place.

172. The simplest preventive measure is to enable those who are affected to choose for the matter to be dealt with in the other Courts, where the decision-maker is in no way connected with the dispute.

173. The Law Commission recommended that the person against whom a complaint is made, should have the option of choosing that the matter be heard in the magistrate's Court or other Court "particularly in criminal trials".[91] The Commission specifically mentioned, in this context, "the controversy surrounding the issue of independence and impartiality of customary Courts".

174. As we have pointed out above, there are serious questions about whether the traditional courts have the structural independence which is required of a Court under our Constitution. The Transkei High Court found in *Mhlekwa* that the Regional

[91] In other words, the recommendation was not limited to criminal trials, but was particularly strong with regard to criminal trials. SALC Project 90: Customary Law: *Report on Traditional Courts and the Judicial Function of Traditional Leaders*: Chapter 7.

Authority Court did not have that independence. This places the legal recognition of traditional Courts in jeopardy. If, however, people against whom complaints are made are given the option of having the matter tried in the Magistrate's Court instead of the traditional Court, then the hearing in the traditional Court will be consensual (which is at the heart of the true traditional system). Under those circumstances, it will be possible to contend that the structure of the Court is not constitutionally offensive, because the parties have agreed to have the case decided by that Court.[92]

175. Women should be given a choice in deciding whether to invoke the jurisdiction of the state or their community, in other words opting out should be allowed.

176. In all cases the state should act as the ultimate guarantor of equality by relying on the individual rights granted by the Constitution and statutes as well as applicable international conventions.

177. Shachar argues that the existence of state jurisdiction as a competitive choice option creates an incentive for group leaders to respond to the needs of vulnerable constituents or else risk losing dissatisfied members. [93]

178. It is important to note that even where a women's desire to opt out might be more pronounced, overt community pressure or lack of resources may prevent the woman from exercising her choice options.

179. Here you can spot a "right vs. community" dilemma, particularly for women with limited access to education or money due to the fact that "[t]he less financially independent women are, the more they depend on remaining in their community's good graces" and "that without the ability to support themselves independently women feel that they have no choice but to accept the "harmful" cultural practices that their family and community encourage." [94]

180. Furthermore, women may encounter problems fulfilling their legal capacity. This may be made worse by a lack of knowledge of their substantive and procedural rights. Or having difficulty framing and expressing their claims.

    h. "Urban women are more likely to utilise the machinery of official courts than their rural counterparts. In this way, programs to educate women on a local level are still crucial for ensuring equal access to state justice at all levels." [95]

[92] Compare *Mhlekwa* at page 629.
[93] Legal Pluralism & Women's Rights: A Study in Post-Colonial Tanzania, 2006, available at http://law.bepress.com/expresso/eps/1683/, accessed on 16 January 2012, p 70. See also Shachar, Multicultural Jurisdictions, p 140-141.
[94] Id. at p 78.
[95] Id. at p 79.

181. The SALRC also determined that defendants in proceedings before customary courts should have the right to opt out and take matters to the mainstream courts.[96]

182. Consideration should be given to the suggestions made by the SALRC, not in the least because of the wide consultations that they undertook with the rural communities, especially women.

[96] Policy Framework on the Traditional Justice System under the Constitution, Department: Justice and Constitutional Development Republic of South Africa, p 33.

Further Comments

183. It should be noted that the TCB makes no provision for members of the community to raise issues and concerns they may have about the behaviour of "traditional leaders" and the "traditional courts". [97]

184. The training programmes that the designated traditional leader is required to undergo as prescribed in section 21(1)(b) should include human rights education, gender sensitivity and social context training programmes. In this manner traditional leaders should be sensitised about gender equality in the handling of disputes relating to women and other vulnerable members of society, and the observance and respect of rights enshrined in the Bill of Rights.[98]

185. It should be noted that the traditional courts system should not be seen as a substitute for the formal judicial system. It complements and supports the judicial system. The policies developed in it should be intended to increase access to justice for social groups that are not adequately or fairly served by the formal judicial system. [99]

[97] Nomboniso Gasa, The Traditional Courts Bill, p 29.
[98] Policy Framework on the Traditional Justice System under the Constitution, p 37.
[99] Id. at p 31.