Dear Ms Sibisi,

I would like to lodge several complaints regarding the Traditional Courts Bill [B15-2008].

Procedurally, I object to the notice period and would call for a proper and lengthier consultation process in rural areas that does not only concern itself with traditional leaders at national and provincial level but also looks at those people at the local level, especially ordinary members of the community.

Substantively, I raise objection to the following:

1/ The Bill does not make express provision for the community that is the site of the traditional court to be involved in traditional courts except as (otherwise silent) parties to a dispute. While subsection 9(2)(a)(i) might be read to suggest broader involvement, it is not very clear that it is meant to. If this community involvement is not explicitly provided for in the Bill, subsection 21(1)(a) should at least require the Minister to make provision for such in the regulations. The current absence is problematic in the following respects in particular:

a) While the definition of "traditional court" is very broad, the Bill does not reflect sufficient recognition of, or provision for, the multi-levelled (nested) nature of customary law dispute resolution fora. What of ward-level traditional courts: do they qualify as traditional courts under the Bill? And what of appeals from such ward courts to the community-wide courts: how are these to be treated? Are the decisions of ward courts to be awarded equal status and enforcability as community-level court decisions? This seems to require explicit treatment.

b) The Bill does not, at any point, make mention of councillors (besides in defining a "traditional council" and in providing for recordkeeping under subsection 9(5)(b) of the Bill). The only persons mentioned are those presiding over the decision of the traditional court, which assigns those individuals more power than they have customarily. This is therefore inconsistent with the integral role that councillors play in traditional courts; their role should thus be explicitly recognised in the Bill. For example, in the definition of "presiding officer" in section 1, it should be specified as to who is doing the advising of the presiding officer; namely, that councillors and members of the community -- who are permitted to participate in deliberations -- are doing this.

c) The Bill does not make explicit provision for the community that is the site of the traditional court to be involved in either the designation of the presiding officer or the suspension or revocation thereof (section 4). The fact that this decision can be made singularly by the Minister (agreed and recognised by the Premier or President and registered by the Director-General) is anti-democratic, not to mention contrary to customary law. Even while in terms of section 16 any person may lodge a complaint, it does not seem appropriate that the complaints of members of the community are not assigned greater weight. This incorporation of traditional courts into the state machinery, strict regulation thereof and, indeed, bureacratisation of traditional courts denotes a shift of power from the traditional leadership institution to the legitimising state. This is problematic because it fails, once again, to give the community a necessary voice but instead serves to reinforce the position of traditional rulers, further corroding the dependence of traditional leadership on accountability to and legitimacy in the attendant communitiy's eyes. Of course, this is a problem consistent with the Traditional Leadership and Governance Framework Act 41 of 2003.

d) By procedurally incorporating traditional courts into the state legal system so fully, the Bill, positively necessitates the substantive incorporation of customary law into state law (with the intended consequence that state law is brought to bear on living customary law more profoundly). This, in turn, demands that the Bill deal with issues such as how *stare decisis* applies to and should affect traditional courts, and it should recognise and provide for the application and development of living customary law in the context of the new relationship between traditional courts and other state courts.

2/ The provisions for women's participation and vulnerable persons' treatment in subsection 9(2)(a) are problematic for their vagueness. Articulated as they are presently, they provide little guidance and therefore cannot be effected in a truly palpable way.

3/ There is something profoundly wrong with referring to traditional court procedures (as is done in subsection 9(2)(b) of the Bill) in terms of latin phrases derived from a positivist understanding of law and legal process. This is inconsistent with the object of affirming the values of the traditional justice system.

4/ With the way the Bill is formulated, it is likely to turn traditional courts into elite institutions reserved for those who are trained and educated, see subsection 4(5) and 9(4)(b), and section 9 more generally. It must be ensured that traditional courts remain an expression of traditional communities and their values, norms and processes.

More technically:

The Bill does not provide a definition of "customary law and custom". Given the contestable nature of this term, and the myriad ways in which it has been interpreted and applied, an act that concerns itself with the primary institution that is to apply this, should at least attempt to define it. I would suggest that this definition borrow from the South African Law Reform Commission's understanding of the phenomenon; and the Constitutional Court's definitions in both the *Alexkor* and *Bhe* decisions. In other words, this category should expressly include living customary law. Also, is "customary law and customary practices" in section 8 different from "customary law and custom"?

Section 1 states that the presiding officer

"(b) pronounces judgment at the end of such proceedings after being advised in terms of customary law and custom".

However, it does not clarify what form such 'advice' should take or the weight of influence that the 'advice' should have attributed to it. Specifically, does this mean that the decision is actually the presiding officer's to make but s/he must do so in consultation with those unspecified individuals who should advise him/her? Or does it mean that s/he must only announce the decision that these unspecified individuals have made *with* him/her? As can be seen from above, the latter is preferable.

Section 1 also lists alternative vernacular names for a traditional court. Is this list of 'indigenous' names supposed to be exhaustive and prescriptive or just a sampling and descriptive?

Section 14(1)(d) assumes that "interest in the cause, bias, malice" will be understood in a universal way but this would seem to warrant special definition for the traditional community context where kinship and/or close family relationship are the norm.

Section 17 states that the Minister may assign resources for the employment of traditional court assistants, if they are available. This should be a stronger requirement than a discretionary one; if these courts are to function optimally or even comparably/competitively with Magistrates' Courts, they should have guaranteed assistance.

Section 19(2) should allow for the parties' choice, should they not wish for their matter to be referred back to the traditional community (especially if they allege that they anticipate that they will not be able to appeal to the Magistrate's Court if they do not succeed in the traditional court). This is unless appeals to the Magistrates' Courts are to be free and unburdened thereafter. Speady justice should not be hereby compromised for poorer and more vulnerable people.

With respect to the Memorandum on the Objects of the Traditional Courts Bill, clause 7, I object to the notion that this Bill has no communications implications. There is a need for the government to be (more) intentional about conveying accurate information to the local chiefs and rural communities who often are uninformed of relevant information. Particularly, this is an ongoing duty as Government Gazette notices are unlikely to reach them unless a particular effort was made to ensure that they do. This is of particular consequence for women and youths who may not otherwise know that they are entitled to participate.

Here ends my submission.

Kind regards

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