SUBMISSIONS TO PORTFOLIO COMMITTEE ON JUSTICE & CONSTITUTIONAL DEVELOPMENT

TRADITIONAL COURT'S BILL 2008

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INTRODUCTION

The Women's Legal Centre ("WLC") welcomes the opportunity to make submissions before the Portfolio Committee on Justice & Constitutional Development 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 in advancing and achieving their right to equality, particularly women who are socio-economically disadvantaged. WLC uses litigation and advocacy in order to fulfill its objectives.

Over the past five years the Women's Legal Centre has hosted a number of provincial workshops on the Recognition of Customary Marriages Act (Limpopo, Eastern Cape, Kwa-Zulu Natal, North West, Northern Cape, Gauteng, and Mpumalanga). We have also made submissions to the various project committees of the South African Law Commission on various aspects of customary law. 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 polygynous marriages, recognizing the customary law duty of support.

The WLC makes submissions on the Bill in general, and on how the Bill impacts on women in particular. 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. Women and the development of customary law.
5. Approach to the Bill.
6. The specific provisions of the Bill.

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[1]

> ***[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-***

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

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]

2. Mbatha, Moosa and Bonthuys in their chapter entitled "Culture and Religion in Gender Law and Justice"[2] 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"***

3. This Bill intimately affects the daily lives of more than 20 million South Africans. Most of them live in rural areas. Many of them are women. The nature of the legislation is such that the Assembly should take special care to ensure that the people affected have been given a meaningful opportunity to be heard in the making of this law. The views of

[2] At page 162

rural women are needed before it can be said that there has been meaningful participation in the passing of this Bill into legislation.

4. Unfortunately, the process thus far has made this practically impossible. The WLC is based in Cape Town, where Parliament sits. We only very recently learnt of the opportunity to make submissions. The deadline for doing so (6 May) comes immediately after a two-week period in which there have been three public holidays. We have struggled to do the necessary work in the time available, in order to enable us to make these submissions. We question whether people living in rural areas have in fact been made aware of this process, and have been given a meaningful opportunity to make representations.

5. We ask the Portfolio Committee to place on record what steps were taken to bring this to the notice of rural people, specifically rural women.

6. The Report of the South African Law Commission[3] shows that rural people have taken a very active interest in the subject-matter of this Bill. We call on the committee to assess whether submissions have been received from the people who will be affected by the Bill. Should there be few submissions, and these mainly from traditional leaders and their institutions, and from communities which are assisted by urban-based non-governmental organisations, it will show that the people affected have not been given a meaningful and adequate opportunity to comment. It can hardly be suggested that if rural people had a meaningful opportunity to make submissions on this important Bill, they would choose not to do so.

7. We therefore call on the Committee not to make any decision on this Bill until there has been an adequate opportunity for rural people, particularly women, to make submissions and participate in the Committee's process.

International Obligations of the South African State:

8. South Africa is a party to the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 ("CEDAW") which requires States to eliminate gender discrimination.

[3] SALC Project 90: Customary Law: ***Report on Traditional Courts and the Judicial Function of Traditional Leaders***

9. For these purposes, the relevant articles are as follows:

"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. In relation to access to justice, the Protocol specifically states:

"Article 8 : Access to Justice and Equal Protection before the Law

> ***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)

The South African Constitution:

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

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

'9. 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."

14. Section 112(3) of the Constitution recognizes 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. "

15. 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 to 42:

"***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.[4] … (Customary law) is***

[4] 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

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."

16. All the provisions in the Constitution recognizing customary laws, the exercise of the rights to culture and powers of traditional leadership recognize 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.

17. 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.[5] 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 posited the achievement of equality, freedom and dignity as paramount to the pursuit of an equalitarian society.[6]

18. 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.

19. Before 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

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

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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.

[5] Putting feminists on the agenda, Sibongile Ndashe

[6] Ndashe , at page 3

21. The main source of information about indigenous African law before colonization 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.[7] 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 emphasized 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".***[8]

22. Bennett in Human Rights and African Customary Law under the South African Constitution (1995)[9] argues that codified versions of customary law are poor versions of women's pre-colonial status which fail to reflect current social practice.[10]

23. Ndashe[11] 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.

24. In her paper entitled The Reconstitution of Customary Law in South Africa, Zimmerman[12] argues that :

> ***'Much of what is understood today as official customary law was produced through processes that privileged elite males 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***

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[7] Customary Law and Domestic Violence in Rural South African Communities, Curran & Bonthuys 2005 SAJHR 607

[8] 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

[9] At page 84

[10] Curran and Bonthuys at page 613

[11] Putting feminists on the agenda, Sibongile Ndashe

[12] Jill Zimmerman – the Reconstitution of Customary Law in South Africa : Method and Discord, 17 HARV. Blackletter LJ 197

the legal system of a new and democratic South Africa absorbs customary law unchanged, it incorporates the historical female exclusion."[13]

25. As opposed to "official" customary law which has been tainted by its interaction with colonialism and apartheid and its exclusion of women, living customary law takes into account the current social context and is more in touch with the customs of the people, particularly women. Living customary law thus lends itself to development which recognizes the rights of women.

26. 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. "

27. 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***"[14].

28. 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. Additionally, it is essential that women should be presiding officers.

29. Bearing in mind that the constitutional right to participate in culture includes women's rights to 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.

30. It must be noted then that rural African women are both African and women and the pitting of the right to equality in a westernized 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.

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[13] Page 3 of Jill Zimmerman – the Reconstitution of Customary Law in South Africa : Method and Discord, 17 HARV. Blackletter LJ 197

[14] Zimmerman at page 6

31. A more democratic conceptualization 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 realization of their right to participate in a cultural life of their own choosing.[15]

31. 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 recognize current social practices and more women would be able to articulate their interests and shape African culture from within.

32. 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.[16]

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

34. The committee 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 recognizes women's right to equality. 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.

[15] Zimmerman at page 13
[16] Curran and Bonthuys at 614

35. 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 (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:

36. It is suggested that the preamble, in addition to its affirmation of customary law as recognized 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:

37. 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:

38. 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:

39. 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, they claim had to be brought by a senior male family member.[17]

40. 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.”

41. Further, Section 3 (2)(b) of the same Act requires at least one third of members of a traditional council to be women.

42. The 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. Further, the Bill does not provide for members of the council (which are required to be one third women) to be appointed presiding officers, again excluding women and attempts at gender parity.

43. 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

[17] Curran and Bonthuys at page 633

fundamental importance of having women as presiding officers is argued above in detail and the provisions as they stand are open to constitutional challenge.

44. Further, and more generally, as the Law Commission pointed out in its Report,[18] 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.

45. 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.

46. 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.***

47. The Bill does not ensure that appointment etc of these judicial officers will take place in this manner. The appointment is entirely in the discretion of the executive, in the form of the Minister.[19] 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.[20]

48. 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

[18] SALC Project 90: Customary Law: ***Report on Traditional Courts and the Judicial Function of Traditional Leaders***: Paragraph 2.3 and 2.4
[19] Clauses 4(1), 4(2) and 4(4).
[20] Clause 22

regard,[21] and by the definition of "this Act" to include the regulations.[22] 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.[23] The Constitution requires that Parliament, and not the Minister, must ensure that judicial officers are appointed in the manner required by section 174(7).

49. 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."***[24]

50. 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. We respectfully submit that this cannot be responsibly achieved within the time-frame which has been set for this legislative process. That is another reason why the Committee should not rush through this Bill.

51. The Bill as it currently stands, however, clearly fails the test of constitutionality in this regard.

52. 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

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[21] Clause 21(1)(a)
[22] Clause 1
[23] Compare in this regard ***Moodley v Minister of Education & Culture, House of Delegates*** 1989 (3) SA 221 (A) at 233E
[24] At 615-616

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.

Jurisdiction: clauses 5(1) and 6

53. 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.

54. 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.[25] That adaptability, which has at its core the consensual nature of the system, has been a major source of their strength.

55. 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.

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

57. This underlying premise of traditional courts was recognised by a Full Bench (three judges) of the Transkei High Court in the Mhlekwa case.[26] 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***

[25] ***Alexkor Limited and Another v The Richtersveld Community and Others*** 2004 (5) SA 460 (CC) at [53]
[26] ***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)

accepted or assumed that such persons are necessarily adherents of such traditional structures and laws and procedures."[27]

58. 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 particular locality.[28] The jurisdiction of a traditional Court should be limited to those who recognise its authority.

59. 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.

60. 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.

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

61. The jurisdiction in civil matters of the traditional Courts exclude the following:

a. any constitutional matter;
b. matters relating to divorce, separation or rising out of a 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.

62. It is notable that the draft Bill does not expressly exclude maintenance claims. The South African Law Commission report recommended that Traditional Courts should not

[27] Page 621; see also at page 629.
[28] Clauses 5(1) and 6

have the power to make decisions regarding maintenance, yet this is not listed as a prohibited area in the Bill.

63. 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.

64. The Women's Legal Centre offers 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.

65. It should be recognized that giving traditional Courts jurisdiction to handle maintenance matters would significantly increase access to justice of rural women who may not always be situated close to a Magistrate's Court and may not have the economic means to access remedy at a maintenance Court. However, there are grave concerns about the capacity of these courts to process and administer maintenance claims. Further, The Maintenance Act of 1988 provides for Magistrate's Courts only to be Maintenance Courts. The offences in the Maintenance Act related to the failure to pay maintenance also require a fine or imprisonment, which the Traditional Courts would not be able to impose as a sanction.

66. It is submitted that maintenance matters be excluded from the Bill.

67. It is also noted that the Domestic Violence Act of 1998 can only be enforced in Magistrate's or Family Courts and there is no provision for traditional Courts to issue protection orders. However, issues of domestic violence have not been expressly excluded in Section 5 of the Bill.

68. Research has shown that customary law lacks specific rules dealing with domestic violence.[29] The same study on traditional/ customary 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

[29] Curran and Bonthuys – Customary Law and Domestic Violence in Rural South African Communities 2005 SAJHR 607 at 608

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 and because 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.

69. 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".[30]

70. 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.

71. Further, that while the Bill does make provision 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 orders, as the Domestic Violence Act provides for sentences of direct imprisonment.

72. This view is supported by the South African Law Commission project which recommends the exclusion of offences connected with domestic violence in terms of the Domestic Violence Act from the jurisdiction of customary Courts. This has not been expressly stated in the Schedule to the Bill before the Commission.

73. 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 means 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

[30] At page 617

ability to state their cases, while also decreasing the chances of their claims of domestic violence being understood and taken sufficiently seriously."[31]

74. 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.

75. 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):

76. 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 above that traditional Courts should not have jurisdiction to hear domestic violence matters.

Constitutional requirements for criminal trials: clause 6

77. Section 35(3) of the Constitution guarantees the right to a fair criminal trial. It sets out certain of the elements of a fair trial.[32] They include

a. the right to legal representation,[33]

b. the right to be tried by an ordinary Court,[34] and

c. the right of appeal to or review by a higher Court.[35]

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

Legal representation:

[31] Curran and Bonthuys at 633
[32] ***S v Zuma and others*** 1995 (2) SA 642 (CC) at paragraph [16]
[33] Section 35(3)(f)
[34] Section 35(3)(c)
[35] Section 35(3)(o)

79. The Report of the Law Commission sets out both sides of the debate as to whether legal representation should be allowed in civil and criminal cases in traditional Courts.[36] There are substantial arguments on both sides. The Law Commission recommended that legal representation should be allowed; the Bill takes the opposite point of view. We do not take an in-principle view either way. In our view, the answer depends in part 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 is the argument that people should be allowed to defend themselves with the assistance of a legal representative.

80. We submit that one thing is however 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.

81. 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."***[37]

82. Parliament therefore has to make a choice in this regard:

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

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

Ordinary Courts:

83. 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***

[36] SALC Project 90: Customary Law: ***Report on Traditional Courts and the Judicial Function of Traditional Leaders***: paragraph 4.6
[37] At page 618

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."[38]

84. 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:

85. 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:

86. It is important here to expressly approve the application of living customary law, taking into account the current social practices, particularly the experiences of women.

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

Sessions of Traditional Courts:

88. The Women's Legal Centre supports the provisions of Section 9(2)(a) that women be afforded full and equal participation in the proceedings of the Court.

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

89. 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.

[38] ***Mhlekwa*** page 616

90. 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" benefit that accrues in terms of customary law and custom.

91. 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."***[39]

92. 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.

93. 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.

94. 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:

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

    b. in both civil and criminal cases, traditional Courts may deprive people of land rights short of banishing hem.

95. We submit that this is fundamentally objectionable.

96. 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.

Opting out

[39] ***R v Hugo*** 1926 AD 268 at 271

97. 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 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.

98. 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.

99. 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.

100. 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 <u>prevention</u> of abuse which is required, and not remedies which might be available after an abuse has taken place.

101. 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.

102. The Law Commission recommended[40] 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".[41] The Commission specifically

[40] SALC Project 90: Customary Law: ***Report on Traditional Courts and the Judicial Function of Traditional Leaders***: Chapter 7

[41] In other words, the recommendation was not limited to criminal trials, but was particularly strong with regard to criminal trials.

mentioned, in this context, "the controversy surrounding the issue of independence and impartiality of customary Courts".

103. 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 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.[42]

104. For all of these reasons, we strongly urge Parliament to permit opting out. Parliament needs to be seen to hold the balance between conflicting views, and to attempt to accommodate them where this is reasonably possible. It will do this by making the consensual element an underlying principle of traditional Courts.

[42] Compare ***Mhlekwa*** at page 629