

IN RE:

TRADITIONAL COURTS BILL, 15 of 2008

KWAZULU-NATAL RURAL WOMEN'S MOVEMENT

**SUBMISSION TO THE PORTFOLIO COMMITTEE ON
JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

6 May 2008

1. My name is Sizani Ngubane and I am the Director of the KwaZulu-Natal Rural Women's Movement (RWM), an independent Non-Profit Making Organization based in KwaZulu-Natal. The RWM is made up of rural women who live in the some of the poorest parts of South Africa. The movement has attracted a membership of more than 40 000 (made up by 510 rural women's Community Based Organizations), with ages ranging from 16 to 84 years of age. The RWM is recognized as a significant institution by other actors working in the land reform movement, and we are one of five organizations, internationally, who won the Nelson Mandela Graca Machel Innovation Award.
2. The RWM respectfully requests an opportunity to make oral submissions when the Portfolio Committee conducts its hearings.
3. In our submission, the RWM would like to raise concerns regarding the shortcomings in the Traditional Courts Bill (Bill) that specifically impact negatively on rural women's rights.
4. We submit that the Bill does not adequately address the real, day-to-day discrimination currently, as well as historically, experienced by many rural women in the traditional justice system. Rather, we believe that the Bill is likely to further lend legitimacy to the unequal and patriarchal power relations to the further detriment of many women's ability to access justice in the rural areas.
5. The Bill also ignores a report, based on extensive consultation with rural women, that was made to the South African Law Commission (SALC) on this issue.¹ Many of our members, including our Provincial Chairperson, Prisca Shabalala, were involved in that part of the consultation process that took place in KwaZulu Natal in 1998.
6. At that time I worked for the rural NGO, Association for Rural Advancement (AFRA), which convened a workshop of rural women that was attended by approximately 250 women, many of whom were or later became members of the RWM. The workshop was also attended by women who are the wives and daughters of chiefs and women who are tribal secretaries and work with tribal courts. The workshop was held in Durban.
7. Various women raised the problems faced by widows in representing themselves in tribal court hearings convened by tribal authorities. They described how, in many areas, widows in mourning dress were not allowed to speak at the tribal court. In some areas widows were required to sit outside the fence of the tribal court. They were not allowed to stand but had to convey their views sitting, to a man on the other side of the fence who then interprets what they say to the tribal court. The women complained that this put them at a serious disadvantage, especially in family disputes that arise after the death of a husband. Often, these disputes result in the widow being evicted from her marital home – yet she is denied the opportunity to put her case to the court herself.
8. Another issue raised by women at the workshop was that the people who adjudicate tribal court disputes are male councilors. They are often older men who are biased against women who bring family disputes to the court. They consider it inappropriate for the women to discuss family problems in public. They also tend to identify with men and regard the complaints brought by women as trivial, troublesome and unruly. Yet family disputes often have serious consequences for women and may end up with them being forced out of their homes.

¹ Joint submission by the Commission on Gender Equality, the Centre for Applied Legal Studies and the National Land Committee on Traditional Courts and the Judicial Function of Chiefs (CALC, CGE and NLC, 1999), in response to "The Harmonisation of the Common Law and Indigenous Law: Traditional Courts and the Judicial Function of Traditional Leaders" (South African Law Commission, Discussion Paper 82, Project 90, May 1999).

9. We found it remarkable that even the wives and female relatives of the chief expressed concern about how councilors tend to identify with men and denigrate women's perspectives in the disputes that they adjudicate.
10. We are deeply disappointed that our previous efforts to communicate the problems facing rural women in relation to traditional courts to the South African Law Commission have been ignored by the drafters of the current Bill.
11. Traditional courts have long been criticized as creating serious implications for women's rights by upholding and enforcing patriarchal power relations.² The problems experienced by rural women in accessing full and equal participation in tribal courts have been recorded in surveys, workshops and research papers.
12. We reiterate the points made in the joint submission by the CGE/CALS/NLC to SALC in which we were involved, that traditional courts should continue to be recognized but that the traditional justice system must be practically and substantively improved to conform with the values in the Constitution as they relate to non-sexism, equality and access to justice for all.
13. Women in rural areas are often seen as people of a lower social status and without economic power. Therefore, women rarely stand a chance of being part of a traditional council composed mostly of men who are in many instances biased against women and resistant to the notion of sharing real authority with women.
14. In our experience, this is especially true of single women, including women who have never married, widowed or divorced women, and especially women who have no sons.
15. The lack of representation (which is an important, though not necessarily a determinative element in ensuring equality) of women in traditional courts aside, various studies demonstrate that women, even though party to a dispute, are often not allowed to participate equally and fully. Even men who are not party to a dispute, of which a woman is a party, may participate more fully than the woman in question.
16. For example, in some communities, women may not be allowed to question litigants or speak to the presiding officer. Or women may only bring a dispute to court through a male relative. This leads to the unjust situation whereby while a dispute can result in serious consequences for a poor vulnerable woman, she is denied the opportunity to bring a case to the court herself or to speak out on her own behalf.
17. Some women are not even allowed to attend court or are asked to leave before completion of the proceedings or asked to sit in a separate women-only area.
18. Often, serious problems brought by women, including those involving physical abuse, are treated as "private domestic matters" which the women should have kept private, and are not given due regard or serious consideration by the councilors in the court.
19. Women often report that male councilors tend to identify with male litigants and discount or undermine women's perspectives or statements. Focus group participants indicate that councilors are sometimes rude and humiliate women, shouting at them or forcing women to kneel when addressing the court.
20. Research conducted in KwaZulu-Natal, for example, indicated that some chiefs demanded sexual favors from women in exchange for assistance.

² The "Report on Traditional Courts and the Judicial Function of Traditional Leaders" (South African Law Commission, Project 90, 21 January 2003).

21. Research also indicated that even women who were able to obtain positions of authority experienced difficulties and faced resistance by members of their community.
22. Such rules of procedure, as well as the attitude of presiding officers to women and women's issues, prevent many women from viewing traditional courts as a desirable or viable means of access to justice.
23. Given these findings on the barriers in accessing full and equal participation in traditional courts and discrimination based on gender faced by women in rural areas, the Bill does not adequately or specifically address such problems to successfully align the traditional justice system with the Constitution.
24. For example, the following clauses, while not an exhaustive list, are problematic in an earnest attempt to align the traditional justice system with the principles and mandates in our Constitution:
 - a. While Clause 2(b) states that the objects of the act are to affirm the role of the traditional justice system in enhancing access to justice, given the problems that rural women face in accessing justice in the traditional courts, which problems are not practically addressed in the Bill, it is doubtful that this object of the Bill can be met as regards women.
 - b. The Bill also does not seem to address the inconsistency in Clause 2(b)(iii)'s phrase that one of the objects of the act is "promoting and preserving traditions, customs and cultural practices that promote nation-building in line with constitutional values". Since in practice, women often cannot fully enjoy their Constitutional rights to equality, non-discrimination and access to justice because of practices deemed to be "traditions, customs and cultural practices", the Bill fails to address how this object should be satisfied as regards women.
 - c. Similarly, while Clause 3(1) mandates that the principle to apply in the act includes the need to align the tribal justice system with the Constitution, including the achievement of equality and non-sexism, and the need to promote access to justice for all persons, we fail to see how the Bill provides that these constitutional principles are specifically and practically incorporated in the Bill.
 - d. While we applaud Clause 3(2)'s mandate that in the application of the act, the existence of systemic unfair discrimination and inequalities, particularly in respect of gender brought about by colonialism, apartheid and patriarchy, are to be taken into account, the Bill does not deal squarely with how the traditional courts shall implement this taking into account to immediately start correcting the systemic gender discrimination that has historically been and continues to be a part of our society.
 - e. Again, while we welcome Clause 9(2)(a)(i)'s mandate that a presiding officer in a traditional court must ensure that women are afforded "full and equal participation in the proceedings" as men are, the Bill fails to specify how exactly the officer will fulfill their obligation given the old and current practices in many traditional courts across the nation that have the effect of circumscribing women's participation.
 - f. Related to this concern is the fact that the Bill gives the power to ensure such a radical change of course solely in the presiding officer, who in most instances will be one male person.

- g. And while Clause 9(3)(b) seems to offer women equal participation in a proceeding before a traditional court by specifying that a party may be represented by “his or her wife or husband, family member, neighbour or member of the community”, this must be done “in accordance with customary law and custom”, which ultimately undermines any supposed given benefit, since the interpretation of “custom” almost invariably favours men.
25. For the reasons cited above and others, we believe that the limited attempts to align the traditional justice system with the Constitution in the current Bill are neither realistic nor sufficient given the documented dynamics of inequality, exclusion and silencing of women in tribal court settings.
 26. We would argue that rather than ensuring that women are no longer discriminated against in tribal court settings, the real impact of the Bill will be to perpetuate the existing discriminatory patriarchal power relations with state-backed sanction.
 27. The ones who will pay a price in this regard will primarily be the poorest and most vulnerable women in rural areas (i.e., single women, women without sons or women without land rights) and our Constitutional values that guarantee access to justice, non-discrimination and equality for all.
 28. For all these reasons, we strongly submit to the Portfolio Committee that any further decision on this Bill be postponed until a wider consultative process can be formed and wider consultative fora be available that include the input of rural women in different areas whose rights and well-being will be significantly impacted.
 29. Thank you.