

5. RWM is concerned about the research, consultations and recommendations presented by the South African Law Reform Commission after conducting a research in 1998 to 2003 which has disappeared from the process of drafting the Bill. In 1998, RWM was effectively involved in the Law Reform Commission's Discussion Paper activities about the Judicial, Functions and Roles of Traditional Leaders where the Law Reform Commission emphasized that women must be included in the council but instead the Bill centralizes power to the presiding officer who is a senior traditional leader or his delegate and the councils (who will be elected and selected on February 19 2012) do not feature in the 2008 Bill.
6. The Law Reform Commission recommended that rural communities be able to opt out of customary courts in favour of other courts (e.g. Magistrates Courts) – traditional leaders objected claiming that this would undermine their authority. The Bill therefore, emphasizes that refusal to appear before the senior traditional leader as presiding officer of traditional court is an offence (clause 20)
7. At that time I 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 at Coastlands Hotel in Durban – November 1998.
8. 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.

9. 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.
10. 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.
11. I am 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.
12. Traditional courts have long been criticized as creating serious implications for women's rights by upholding and enforcing patriarchal power relations.¹ The problems experienced by rural women in accessing full and equal participation in tribal courts have been recorded in surveys, workshops and research papers.
13. I 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.
14. 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.

¹ The "Report on Traditional Courts and the Judicial Function of Traditional Leaders" (South African Law Commission, Project 90, 21 January 2003).

15. 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.
16. 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.
17. 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.
18. 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.
19. 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.
20. 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.
21. Research conducted in KwaZulu-Natal, for example, indicated that some chiefs demanded sexual favors from women in exchange for assistance.

22. Research also indicated that even women who were able to obtain positions of authority experienced difficulties and faced resistance by members of their community.
23. 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.
24. 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.
25. 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.
- h. The Bill also bans the legal representation in criminal disputes, making it inconsistent with the Bill of Rights in our Constitution.

- i. Yet the Constitution provides that every accused person is entitled to be represented by a lawyer in criminal matters. – section 35 (3) (f). The counter argument is that lawyers would change the nature of customary courts and make more costly. RWM thus argue that the Bill conflicts with the Constitution of our country and yet the:
- Presiding officer can impose fines and damages
 - Presiding officer can order any person to perform unpaid labor – 10 (2) (g)
 - Presiding officer can deprive of customary entitlements – (10) (2) (i)
 - **Implications** – could deprive of land rights, strip of community membership.
26. The Bill does not guarantee women participation in traditional courts – neither as members of the Traditional Councils who make decisions in the courts, nor as litigants. Rural women are most often marginalized in traditional courts. They are commonly refused their self-representation and even attendance of some traditional courts. This leads to their further exploitation and economic vulnerability. For example, widows are not permitted to enter the “sacred spaces” that are traditional courts whilst in mourning and are often required to be represented by a male relative who seek to dispossess them of their inheritance. They are therefore, unable to defend themselves in the traditional courts and are consequently evicted from their marital homes. The Traditional Courts Bill does not require that this customary law practice change but instead permits that women may continue being represented by men “in accordance with customary law”.
27. The Bill as whole - entrenches unequal power relations.
28. The Bill reinforces often-contested colonial and apartheid boundaries, which forced people of different cultures to live under traditional authorities they did not recognize. Furthermore, its does not permit people to opt out of traditional courts jurisdiction and criminalizes refusal to appear before court once summoned nu do so.

29. For the reasons cited above and others, I 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.
30. I 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.
31. 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.
32. For all these reasons, I strongly submit to the SC on Security and Constitutional Development and the National Council of Provinces 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.
33. Rural Communities must be given sufficient notice;
34. Rural communities need the consultations to take place nearby;
35. Rural communities need to be provided with resources to enable people of all types to attend consultations;
36. Rural communities be provided with the opportunity of a local workshop to explain the Traditional Courts Bill of 2008 properly to its members.

37. Thank you.

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TO: THE SC ON SECURITY AND CONSTITUTIONAL DEVELOPMENT,
DEPT OF JUSTICE & CONSTITUTIONAL DEVELOPMENT

SUBMISSION ON THE TRADITIONAL COURTS BILL OF 2008

By Nomaswazi Ngubane

Rural women's independent rights to land

1. In my submission, I would like to raise concerns regarding the shortcomings in the Traditional Courts Bill that specifically impact negatively on rural women's land, property and inheritance rights:
2. Rural women are still not allocated land in their own right as women. Women are expected to be represented by their male relatives in order to be allocated land by the traditional leaders. The general practice in rural areas is for traditional leaders to allocate land to married men as 'house hold heads'.
3. Single women, divorced women and widows experience the greatest difficulty in accessing and holding onto land in their own right as women.
4. I have a personal experience of being forcibly evicted from my marital home after my marriage broke down. Single women especially widows, and women who do not have sons, are seldom allocated residential sites. This problem is even worse in areas administered by traditional leaders.

5. 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.
6. I therefore, 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, I 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 have access, control and ownership of land as well as justice in the rural areas.
7. The pervasive and constitutionally impermissible role that traditional leaders are accorded under the Traditional Courts Bill of 2008, and the negative impact that this is likely to have on women, has been recognized by many women in the rural areas. As rural women we accordingly challenge the constitutionality of the Traditional Courts Bill on various grounds including, that it infringes upon the principle of separation of powers, and the rights of women not to be discriminated against in terms of section 9(3) of the Constitution, by impermissibly conferring on traditional leaders' executive powers incompatible with the role of traditional leadership under the Constitution.
8. Given the extensive powers that the TCB confers upon the traditional leader as a presiding officer in respect of both ownership and administrative functions on communal land, I submit:
 - 1.1. that by giving traditional leaders extensive "executive like" powers, the Bill is likely to reinforce patriarchal power relations to

the detriment of women's access to land and security of tenure;
and

1.2. that by securing rights held by men, the Bill is likely to entrench discrimination against women and this practice is seen by many as feminization of poverty caused by landlessness.

9. My concerns with the TCB are not dissimilar. In fact, of particular concern to me is section- (10)(2) (i) which seeks to give power to the traditional leader as presiding officer the power to deprive rural people of customary entitlements.

10. This is not in line with our government's constitutional commitments to equality between women and men under s 9 of the Constitution and tenure which is legally secure under s 25(6) of the Constitution.

11. Our Constitution provides that:

(1) A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person."

12. However, this practice was consistently undermined by colonial and apartheid laws such as the black areas land regulations (promulgated under the South African Development Trust and Land Act, 18 of 1936

and the Black Administration Act, 38 of 1927) which provided that land may be allocated only to the male head of the family. Pursuant to this injunction, Native Commissioners persistently vetoed the decision of traditional leaders to allocate land directly to women. Hence, over time, traditional leaders stopped allocating arable land to women and allocated it only to men.

13. This notwithstanding, women continued to occupy and use the land. It is, therefore, not surprising that in most rural areas that I have resided in, the cultivation of arable land remains the prerogative of women. Despite the fact, however, that women are the primary users and occupiers of rural land, old order rights held by men denied the family based nature of land rights in extended families and ignored their use and occupation rights.
14. In addition, African customary law did not enjoin the male head of the family and sole holder of family property to protect the property of family members who had use and occupation rights in it. To the contrary, the inheritance laws imposed a rigid rule of primogeniture which prevented women from inheriting land. The insecure tenure of African women is, therefore, as a result of past discriminatory laws, including customary law and practice.

15. If this TCB is passed the ownership or land tenure rights of women will no longer exist, because to my view, the consequence of women's past exclusion is not only formalized by this Bill, but our vulnerability is increased by potentially exposing us to eviction from the land by the traditional leader as a presiding officer section: (10)(2) (i). Therefore, by formalizing rights in land, held by men, that were derived from past discriminatory land and customary laws and practices, section (10)(2) (i) of the TCB will effectively undermine, rather than enhance, women's security of tenure and will accordingly be impermissible in terms of section 25(6) of the Constitution

16. In addition to a denial of our legal status, as women we may also find a commensurate decline in our social positions in the household and the community. We will, in this respect, have no future role in making decisions about the household. If we are to encounter conflict with either of the spouses we will have little option but to leave the household and find accommodation elsewhere. I have come across various examples of sons and their fathers evicting the widowed mother and unmarried sisters from the natal home, because of internal family problems.

17. 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, neighbors 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 favors men.

18. 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.

31 It is my view, that the root cause of the abuse and excessive control that women are subjected to, is inequality in property relations. Because men own and control everything including the land, they believe they can do as they please. Wives, on the other hand, find they have no alternatives or escape and so have to put up with the problems, regardless of how serious they are. I have witnessed countless women being left with nothing when they are evicted from their marital homes because their husbands have died, or because they want to get rid of them.

32 We are left with the legacy of widows, divorced and separated women and unmarried women struggling to access and secure land rights of their own.

33 The General Household Survey of 2003 (GHS) which has been analyzed by Debbie Budlender, a specialist researcher with the Community Agency for Social Enquiry ("CASE"), indicates that 41% of rural women over 18 are neither the household head, nor married to the

household head. Hence, 41% of rural women live in households where other people are the holders of land rights. I annex hereto, marked " ", the confirmatory affidavit of Ms Budlender.

- 34 For all the reasons set out above, it is submitted that section (10)(2) (i) of the TCB discriminates against women on the basis of their sex, gender or sexual orientation. In so doing, this categorizes rural women as undeserving of concern and respect as human beings.
- 35 In the circumstances, this constitutes unfair discrimination in terms of section 9(3) of the Constitution and is accordingly impermissible.
- 36 In my experience, tribal authorities are known to discriminate against women. They, accordingly, very rarely appoint women to traditional authorities. Even if one or two women are represented in the council, they would have been appointed to that position by the chief because they are close to him and support his views – sometimes they are even his relatives. One exception that I am familiar with is that of the Amahlubi traditional council where women are well represented and quite vocal. But generally women are not members of tribal councils. In fact I know of various instances where women have not been allowed even to attend traditional authority or traditional council meetings.
- 37 I am also aware of instances where women, who have attempted to raise issues in these meetings in communities like Matiwanoskop at uThukela District under the iron fist of Honorable member of KZN

Legislature Mr Shabalala, have been shouted down or locked out of the meeting venue. For example, towards the end of 2003, women in Matiwane's Kop, who attempted to raise problems experienced by them in the community, were sworn at and locked out of the church and had to hold their church service on the road outside the church.

38 I am concerned about this Bill because, many men in traditional structures tend to regard women as people who know nothing, have nothing to contribute and are prone to gossiping. This attitude undermines the confidence of women to raise issues and be able to stand their ground. We become nervous of being made fools of. We are particularly nervous about attempting to raise issues if the traditional leader is present in the meeting. The problem is not just one of women not being represented on traditional structures, it is also one of women being allowed to attend and speak at traditional council meetings, and of the fear that they will be ridiculed and their views discounted, should they attempt to speak out.

39 The TCB is thus unequivocal in government's endorsement of traditional authorities as the institution that will administer land rights, regardless of their track record in relation to women's land rights. This endorsement will undoubtedly impact negatively on the local power dynamics within which women attempt to attain and secure land rights.

40 Issues that are critically important for women are decided at traditional councils meetings. Because women are not properly represented on

these structures and cannot participate freely and confidently their interests are not protected or advanced. Decisions about planning and development issues are one example. The other critical issue is about land rights and security of tenure. The tribal council's attitude and composition will determine whether women are allocated land, especially single women, and it will decide who can remain on the land in the context of family disputes. This will have a direct impact on security of tenure for women. Consequently, the traditional councils that are established under are critical to rural women and will have a determining impact on their access to land and the security of the rights in land that they manage to attain.

- 41 Past experience demonstrates that the tribal authorities that were established under the Bantu Administration Act have had no positive impact on the position of rural women. If anything, women and more specifically rural women, have been rendered powerless by these traditional authorities.
- 42 In an attempt to off-set the discrimination that women experience and continue to experience at the hands of traditional authorities, section 3 of the Traditional Leadership and Governance Framework Act provides that 40% of the members of a traditional council must be elected and that 60% must be selected by a traditional leader and that 30% of a council must be women.

43 .Whilst the 30% quota is a welcomed attempt to ensure women's representation on the traditional councils, it is not sufficient to address the entrenched problems experienced by rural women in accessing land for the following reasons:

1.3. the Traditional Leadership and Governance Framework Act provide for measures to ensure that the women's quota is **not** made up of acquiescent female relatives that are appointed by the traditional leader; but to our experience we know traditional leaders like Mr Sondelani Zondi at Vulindlela in KZN whose mother is member of his traditional council.

1.4. In the context of the existing dynamics which undermine, silence and consequently exclude women, the 30% women's quota is too low.

44. I believe that this will not create the kind of environment where women can be independent and support one another in challenging discriminatory structures and stereotypes. In view of the fact that women are neither properly represented nor respected in existing traditional authorities, the TCB will, by giving them extensive powers over communal land, reinforce patriarchal power relations that impact negatively on women.

45. Furthermore and in view of the fact that there are more women than men living in communal areas, I am of the view that their representation should be at least 50%. In this regard, the 2001 census shows that 58.9% of people over 18 years of age living in "tribal areas" are women. I refer this Court to the confirmatory affidavit of Ms Debbie Budlender, annexed hereto marked "___". Ms Budlender has extracted the abovementioned figures from the raw data of the 10% sample of the 2001 census.
46. by providing for formal equality between men and women, it fails to provide for substantive equality.
47. I am advised, that the right to equality as provided for in section 9 of the Constitution is a right to substantive equality. Substantive equality requires, in the context of securing land rights for women, an examination of their actual, social and economic conditions and their relationship to systematic patterns of domination within society. In this regard, I am advised that the primary purpose of the equality provisions, in the Constitution, is to recognize the social and economic disparities between groups and individuals and to seek to eliminate the sources and effects of past and present disadvantage and discrimination.
48. A substantive understanding of equality, in this regard, ought to recognize that women, and more especially rural women, are subject to inequality which is deeply structural and embedded in the very way that African customary systems are organized. Traditional authorities are an

essential component of these systems and have through the years become renowned for practices that discriminate against women.

49. As has been demonstrated earlier in this affidavit, women have been subjected to systematic forms of unfair discrimination at the hands of tribal authorities. However, not only does the TCB fail to recognize traditional authorities as being one of the sources of discrimination against women, but it also fails to eliminate the effects of such discrimination by omitting to provide for remedial measures to:

1. Deal with the systematic discrimination practiced by traditional authorities in refusing to allocate land to rural women; more especially single women, and
2. Assist rural women, more especially single and divorced women including widows, to achieve security of tenure in land rights, thus enabling them to, maximize their human development and enjoy the benefits of an egalitarian and non-sexist society.
2. Instead, section (10)(2)(i) imposes traditional leaders as presiding officers without any communication or consultation with rural communities.
3. Therefore, by giving traditional leaders "extensive" powers to administer "communal land" in the guise of land traditional councils, section (10)(2) (i) entrenches inequality and discrimination against women.

4. In the circumstances, section (10)(2) (i) constitutes an infringement of the right to be equality in terms of section 9(2) of the Constitution, and the right not to be discriminated against on the grounds of gender in terms of section 9(3) of the Constitution.

50. **In all the circumstances, I respectfully ask the Honorable Secretaries of the SC on Security and Constitutional Development and the Department of Justice and Constitutional Development to please assist rural women by making sure our submissions are tabled at SC for the SC where I demand that this Traditional Courts Bill of 2008 must be abolished/scrapped.**

Thanks You

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