

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

<p>1. MS. S E MTHIMKULLU Tuesday 18/09 11h15 – 11h45</p>	<p>1. How are cases going to be tried in traditional courts if lawyers are not allowed and there is no-one qualified in court to do this? 2. Let us not drive youth away from rural communities by passing oppressive laws without consulting people.</p>
<p>2. ASSOCIATION FOR RURALADVANCEME NT (AFRA) Tuesday, 18/09 12h00 – 12h30</p>	<p>1. The Bill will have negative consequences for rural people if passed in current form. Consultation was flawed and rural communities were given short notice to discuss Bill and no transportation was provided to take them to venues. 2. Work of SALRC has been ignored by drafters of Bill. 3. The Bill uses TGLFA which was based on BAA regarding traditional boundaries and the determination of traditional communities. The Constitutional Court has condemned the use of former apartheid legislation, especially the BAA to create new laws. Most of provisions in Bill will not stand constitutionally test, e.g denial of right to legal representation and no provision for people to opt out of the jurisdiction of traditional courts. 4. Powers given to senior traditional leader to define custom and culture is problematic. 5. Custom and culture change from time to time and the failure to clarify what custom is could result in traditional leaders imposing certain values as custom which the rural communities will be unable to challenge if abused. 6. The Bill is not clear on how uniformly i.r.o sanctions and orders will be standardised to avoid exploitation and heavy taxation of rural people. 7. The ability to deprive accused persons of customary benefits may lead to abuse and loss of access to land, including cropping fields. It is submitted that land deprivation must be excluded from the Bill. 8. It is not clear what process will be followed if the accused person is the traditional leader who will preside on the matter. At what point can a conflict of interest be established? 9. The notion of centralising traditional and custom issues in one person as the presiding officer is rejected and other levels like family dispute courts and headman's courts should be empowered and clearly stipulated in the Bill, including their jurisdiction. 10. Regarding women's equal access to traditional courts, <i>the Bill should list all present forms of practices which undermine women's participation that will not be tolerated by the courts like the denial of access to widowed women and denying women to represent themselves.</i> 11. TCB uses same apartheid era boundaries which will result in imposition of traditional leaders on communities. 12.</p>

120719 Secrecy

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

	<p>13. TCB should categorically state that communities who acquired land through land reform and who have their own administration structures like Trusts and CPAs are exempted from the Bill since they live on private land.</p>
<p>3. RURAL WOMEN'S MOVEMENT (RWM) - SIZANI NGUBANE Tuesday, 18/09 12h45 – 13h15</p>	<ol style="list-style-type: none"> 1. TCB does not adequately address the real, day-to-day discrimination experienced by rural women in the traditional justice system, and is likely to lend legitimacy to the unequal and patriarchal power relations to the detriment of women's ability to access justice in the rural areas. 2. There has been no communications with the rural communities, particularly rural women, about the content of the Bill. 3. Consultations were inadequate and only involved traditional leaders. 4. Research, consultations and recommendations presented by the SALRC from 1998 to 2003 have disappeared from the process of drafting the Bill. 5. The Bill centralises power to the presiding officer who is a senior traditional leader or his delegate and the councils in contrast to the SALRC's emphasis that women must be included in the council. 6. The problems experienced by rural women in accessing full and equal participation in tribal courts have been recorded in surveys, workshops and research papers which included the fact that they were not allowed to attend, speak or represent themselves. 7. Tribal courts are adjudicated by older men who are often biased against women. Serious problems including 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 councillors in the court. 8. The traditional justice system must be practically and substantively improved to conform to Constitutional values like non-sexism, equality and access to justice for all. 9. Research indicated that some chiefs demanded sexual favours from women in exchange for assistance. 10. Rules of procedure and 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. 11. Wide powers given to presiding officer to impose fines and damages; order any person to perform unpaid labour; deprive any person of customary entitlements (including depriving them of land rights, strip of community membership) are in conflict with the Constitution. 12. 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. 13. The Bill reinforces often-contested colonial and apartheid boundaries in terms of which people of different cultures were forced to live under traditional authorities they did not recognise. 14. TCB does not permit people to opt out of the traditional court's jurisdiction and criminalises refusal to appear before court when summoned. 15. Further decisions on the Bill should be postponed wider consultations take place to include the input of rural women in different areas whose rights and well-being will be significantly impacted. Rural Communities must be given sufficient notice and

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

	<p>consultations must be held close to communities. Rural communities must be given resources to enable people of all types to attend consultations, and the Bill must be explained in a local workshop.</p>
<p>4. MALULEKE R F / SHIGALO WA MAHUNGUTI TRIBAL COUNCIL Wednesday, 19/09 09h00 – 09h30</p>	<ol style="list-style-type: none"> 1. Bill should be discontinued on ground that if it becomes an Act the status of senior traditional leadership will become extinct instead of being restored as being sought by the council. 2. Council resolved that the status of affected sidelined senior traditional leader be restored. 3. The status of independent headman must be elevated and recognised as senior traditional leader.
<p>5. SILWANENDLALA UBUNTU FARMERS AGRICULTURAL CO-OPERATIVE PTY LTD Wednesday, 19/09 09h45 – 10h15</p>	<ol style="list-style-type: none"> 1. Unhappy with the TCB. 2. Small farmers are being abused by the tribal authority to which the TCB gives judicial powers to hear cases and cannot therefore be fair when it hear their cases that they have against the tribal authority. 3. Tribal authority need to discuss with communities about the customary law of the communities which will be known by all the people in rural areas. 4. The community must be involved during the making of laws - when the TCB was drafted the drafters did not consult rural people. 5. Expected the present government to bring changes to the traditional leadership system but now it is more difficult than before, no one is monitoring, observing and evaluating traditional leadership powers and they abuse the people. 6. Problems in the area include the tribal authority standing in the way of community development; selling communal land that it does not own; charging levies but not providing services to the people and the chief not being recognised by the community. 7. Request that NCOP give leadership classes about customary law to the chiefs and their councillors; and that all the laws that will be used by the traditional leaders should be established by the members of the communities concerned.
<p>6. WOMEN'S LEGAL CENTRE Wednesday, 19/09 10h30 – 11h00</p>	<ol style="list-style-type: none"> 1. Need to include the voices of women who have previously excluded, particularly in development and recording of codified and historic custom. 2. South Africa's international obligations in respect of covenants and treaties and the South African Constitution include those relating to equality before the law, right to fair trial and public hearing by a competent, independent and impartial tribunal, elimination of all forms of discrimination against women, to consider the particular problems faced by rural women, ensuring effective access by women to judicial and legal services, including legal aid; and the modification of social and cultural patterns to eliminate harmful cultural and traditional practices. 3. When applicable the courts must apply customary law subject to the Constitution and any legislation that specifically deals with

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

4. customary law.
The affirmation of the right to culture and the creation of official courts to apply customary law in South Africa must be done in a way that is sensitive to women's rights to equality and empowers women's participation in the processes related to the application of customary law and its development.
5. Traditional courts may provide a useful dispute resolution mechanism and attempts must be made to include women and that the youth are included in training programmes and participation in the courts.
6. Community courts provide more opportunity for inclusion by participation and decision-making.
7. Living customary which developed to take into account women's experiences, is preferred by the Constitutional Court as opposed to a stultified one encoded and interpreted under colonialism and apartheid.
8. The participation of women as presiding officers in traditional courts affords them an opportunity to contest prevailing cultural norms that disadvantage them. In applying "living" customary law women may recognise current social practices and more women would be able to articulate their interests and shape African culture from within.
9. The right to equality and the application of customary law are not mutually exclusive rights. Customary law forms part of our legal system, to the extent that it does not conflict with the rights in the Bill of Rights.
10. The Bill is an opportunity to develop a court system that will be capable of developing customary law in a manner consistent with the Constitution.
11. Only through the participation of women in the application of customary law in the traditional courts can customary law be reconstituted 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.
12. At least one third of members of a traditional council must be women as traditional courts will operate through them.
13. The Bill gives traditional leaders unilateral powers to apply and interpret customary law within their jurisdictional boundaries.
14. At the level of the "Chiefs Court", it is often not the chief or headman who presides, but a councillor. This flexibility must be increased in order to give effect to gender equality.
15. Only a king, queen, senior traditional leader, headman, headwoman or member of the royal family can be presiding officer in a traditional court. This contradicts the multi-layered nature of the system and the inherent fluidity and flexibility in the system, as well as flexibility required by the Constitution. It is also inconsistent with the Traditional Leadership and Governance Framework Act which contemplates that councillors will be members of traditional councils. The TCB however excludes councillors from being presiding officers.
16. The Bill tends to concentrate at the level of the court senior and traditional leader, disregarding the various other levels above and below it.
17. The provision that the appointment of judicial officers in a manner that ensures judicial independence is at the sole discretion of the Minister who may delegate this power to any official in the Department of Justice above the rank of Director falls short of what the Constitution requires and is not remedied by regulations in this regard. The Bill fails the constitutionality test in this regard.
18. Traditional leaders must be trained on the judicial processes and the substantive law surrounding the constitutional rights to equality, dignity, freedom from discrimination as well as 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 judicial officers of the traditional courts on the

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

	<p>history of the development and codification of customary law, particularly on the exclusion 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.</p> <p>19. The Bill is fundamentally flawed in placing people under the jurisdiction of a traditional court because they happen to live or be in a particular locality.</p> <p>20. Maintenance matters must be expressly excluded from the Bill as only Magistrates Courts can be Maintenance Courts in terms of Maintenance Act.</p> <p>21. Domestic Violence matters must be expressly excluded from the jurisdiction of traditional courts.</p> <p>22. To allow the traditional courts to hear maintenance and domestic violence matters would create a parallel system to that created by the DVA and Maintenance Act with different rules and sanctions and will consequently amount to unfair discrimination on the basis of culture.</p> <p>23. Crimes like conjugal rape, incest, and statutory rape do not appear in the schedule of the Bill.</p> <p>24. Parliament needs to decide whether traditional courts should hear criminal matters in which case legal representation must be allowed in terms of the Constitution. If they will only hear civil matters then Parliament can decide whether or not legal representation should be allowed.</p> <p>25. Too wide powers given to presiding officers to deprive community of benefits or impose unpaid labour.</p> <p>26. Persons must be able to choose in which court they want court matters to be heard – opt out.</p> <p>27. Consideration should be given to suggestions made by SALLRC, especially in light of wide consultations conducted by SALLRC.</p>
<p>7. VULAMASANGO SINGENE MNQUMA DISTRICT (TRANSLATED) Wednesday, 19/09 11h15 – 11h45</p>	<p>1. Women in rural areas who are under traditional leadership have not yet enjoyed the right of equality with men.</p> <p>2. Women are not represented on municipal councils.</p> <p>3. The only position women occupy in tribal authorities is that of secretary or where they are represented like in Ngqamakhwe, they are usually widows standing in for their children until they are older.</p> <p>4. Women do not have freedom of speech and should therefore be represented or be able to express herself.</p> <p>5. The TCB favours the chief, his councillors and headmen who are all men.</p> <p>6. Single women are not given sites and the Bill must give support to women's rights in traditional courts.</p> <p>7. The chiefs do not have any skills and do not know how to get services for their people.</p> <p>8. Traditional courts will compromise of offenders who sometimes get assisted by in others courts by social workers and experts in the field.</p> <p>9. There was no consultation of people in rural areas through the Green Paper to give them information about the Bill. The people of Vulamasango Singene in Mngquma District want the Bill to be brought to their wards.</p>

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

<p>8. LAW SOCIETY OF SOUTH AFRICA</p> <p>Wednesday, 19/09 12h00</p>	<ol style="list-style-type: none"> 1. Careful consideration should be given to training model which incorporates real-life situations that traditional leaders will have to deal with. 2. Transitional provisions and repeal of laws (section 23(1)(b)(i) – insert Act No 13 of 1982. Provisions in this section are vague and require concise definition. 3. No provision is made for a procedure to bring a respondent or accused to court and should be considered. 4. No provision is made for the keeping of records or proceedings which will make appeal and review proceedings in Magistrate's Court difficult. The Bill should be amended in this regard. 5. The protection of women's rights will be undermined as they are not allowed in some places to enter traditional courts as sacred places. 6. Women must be included and allowed to participate in the development of customary law. 7. There are no checks and balances in the Bill and no separation of powers. 8. Preventing right to legal representation means parties are denied the right to a fair trial. 9. The Bill does not make provision for an internal appeal system. 10. Parties do not have the right to choose that their matters be heard in mainstream courts.
<p>9. MARY DE HAAS</p> <p>Wednesday, 19/09 12h45 – 13h15</p>	<ol style="list-style-type: none"> 1. If passed the legislation will perpetuate and entrench abuses which are already taking place. 2. The Bill is discriminatory and perpetuates colonial and apartheid categories and practices. 3. Although traditional leaders already have powers to hear petty matters, this legislation will reinforce abuse of power by those who are so inclined. In certain areas in KZN there is abuse of power by traditional leadership and complaints from community members about collusion (even through acts of omission) between leaders and local police. 4. The Bill forces people living in traditional areas to comply with directives given by leaders, and does not give them the choice of opting out of a system which can be extremely repressive (depending on the person of the traditional leader). 5. This legislation jeopardises people's land-related security because of penalties traditional leaders may impose. 6. Important customs are preserved within families, not artificially constructed tribes (or traditional communities as they are now called). 7. Powers of designation are far too wide. There is no real democracy in a number of traditional areas, and councils are appointed by leaders based on a system of patronage. 8. Despite it aiming to be 'non sexist' the Bill does not recognise the extent to which women in many rural areas are oppressed by the highly authoritarian system of traditional leadership. 9. Areas under female leaders are not necessarily more democratic as the system encourages autocracy rather than <i>democracy</i>. 10. The Bill rests on pillars of colonialism and apartheid of artificially constructed tribes and traditional leaders. 11. The Bill does not empower women.

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

<p>10. LAW RACE & GENDER RESEARCH UNIT – UCT Thursday, 20 Sept 09h00</p>	<ol style="list-style-type: none"> 1. Consultation on Bill was unequal as only traditional leaders as direct interest group consulted. 2. Bill is inconsistent with customary precedents and undermine intrinsic character and accountability of existing customary dispute resolution processes. 3. Power is centralised in that opting out of jurisdiction of traditional court not allowed and people living in former homelands are forcibly subjected to traditional authority according to apartheid jurisdictional boundaries. 4. Court's jurisdiction is very broad and traditional leaders are given unaccountable powers to impose coercive sanctions. 5. The western notion of a single presiding officer as decision-maker is misleading and the TCB imposes a false model on all customary communities and thus undermines the localised nature and variability between communities themselves and the functioning of their respective courts as determined by their unique needs. 6. Customary courts do not only exist at the level of the chief but also comprise family, clan and headmen's courts. 7. In practice customary courts function as community forums in which mature members of the community participate in the questioning, deliberation and decision. Even where the chief formulates and pronounces the decision in a customary court he is bound by what the council and/or community has found in hearing a particular case. 8. In contrast protection afforded to parties and the ability of parties to appeal or review decisions are limited. 9. The prohibition on legal representation and "opt - out" is in conflict with the Constitution. People should be allowed to choose customary law jurisdiction by "opting in". 10. Traditional institutions are not consistent with the separation of powers doctrine as traditional leaders will have executive, legislative & judicial powers. 11. Gender inequalities are not improved but rather exacerbated and women are entitled to equal representation in courts as under the Bill of Rights. 12. Bill is arguably unconstitutional. 13. Consultation needs to be broadened to include ordinary rural people. TCB is however inappropriate as a starting point for discussions. 14. TCB is fatally flawed and should be withdrawn and replaced with legislation based on a framework that accommodates well-documented practices of local communities. Proposed alternative framework detailed in submission.
<p>11. LAND ACCESS MOVEMENT OF SOUTH AFRICA (LAMOSA)</p>	<ol style="list-style-type: none"> 1. The TCB should not be able to deal with land matters until the Communal Land Rights Act is revised and the Land Reform Green Paper is finalised and must be developed in conjunction with the proposed National Traditional Affairs Bill in order to create a coherent institutional framework for the administration of customary law. 2. No provision is made for the involvement of other statutory traditional and communal institutions, or how traditional courts will interface with them. 3. Customary law cannot exist in isolation from other laws and policies as was the case under apartheid and traditional courts cannot be expected to function in harmony with other critical laws and policies when so many of them remain at the drafting, consultation and review stage.

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

<p>Thursday, 20 Sept 09h45 – 10h15</p>	<p>4. The Constitutional Court judgment on the Communal Land Rights Act (CLRA) have been overlooked or disregarded in the drafting of the Bill as the TCB in the same manner potentially imposes a new regime on indigenous law and traditional leadership and does not explicitly exclude customary land laws. The TCB replaces existing indigenous institutions/office bearers that are mandates to resolve land and property cases by assigning this power to the traditional leader to adjudicate on land issues which was the basis for the repeal of the CLRA.</p> <p>5. Sanctions in the Bill which include confiscation of fixed assets and payment of money can potentially be abused to deprive community members of existing land rights for the benefit of more powerful interests, including traditional leaders themselves. Powers given to Magistrates Courts to review traditional court decisions on appeal will not be extended to matters involving communal land rights in the absence of legislation on which to base alternative judgments. This will result in more land matters to be referred back to traditional courts to the detriment of communities who do not have confidence in traditional courts.</p> <p>7. Lack of separation of powers and checks and balances is unconstitutional.</p> <p>8. The TCB does not make any provision for presiding officers to recuse themselves in situations of conflict of interest.</p> <p>9. The TCB makes a romantic assumption of impartiality and generosity on the part of traditional leaders regarding gender equality and women's rights. There is a gap between the objects or intentions of the Bill, guiding principles and operationalisation of the Bill in ensuring women's representation in. traditional courts as it makes no provision for intervention by the Minister of Women's Affairs and traditional councils where women are represented, apart from the Minister of Justice and Constitutional Development.</p> <p>10. Women's choices about which legal system they would prefer to have their cases heard under is forced.</p> <p>11. The object of enhancing access to justice is defeated by provisions that (i) appeals must be made to a magistrate's court and (ii) that complaints against the presiding officer must be made to the Minister, whereas some customary practices might provide for a local system of appeals.</p>
<p>12. MR. PETER MAHASE Thursday, 20 Sept 10h30 – 11h00</p>	<p>1. Tradition and culture should be in line with the Constitution and should allow for ample chance for consultation and discussion with heads of families and the traditional leader to make changes if necessary for development.</p> <p>2. Cultural transgressors are reprimanded according to culture guided by justice.</p> <p>3. The critical roles of individual heads of families as custodians of the family's culture must not be overlooked.</p> <p>4. Families provide guidance before other families which is extended to the traditional leader as custodian in a manner that the guidance is regarded as a general decision made by the public. It is not possible for different families to make a common tradition and custom and no-one can reject his tradition and adopt the tradition of another.</p> <p>5. Heads of families and traditional leaders are responsible for peace and order in the nation.</p>
<p>13. PEOTONA (CHERYL CAROLUS) Thursday, 20 Sept</p>	<p>1. It would be unjust and unconstitutional to place more power and authority in the hands of a few chiefs in rural areas that could potentially lead to the exclusion of community/council objectives, fear, intimidation and gross violation of human rights.</p> <p>2. The TCB does not adequately protect women in traditional court system and could adversely discriminate against women's rights in rural communities leaving them vulnerable and undermined.</p> <p>3. No legal representation is unconstitutional and every accused person is considered innocent until proven guilty.</p>

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

11h15 – 11h45	
<p>14. LESBIAN AND GAY EQUALITY PROJECT</p> <p>Thursday, 20 Sept</p> <p>12h00 – 12h30</p>	<ol style="list-style-type: none"> 4. International and African examples have been noted where traditional leaders disenfranchise women, force teenage girls into arranged marriages with old men and adult women are deprived of basic human rights. 5. The TCB can lead to economic exploitation, gender bias and isolation. 6. Support the call of "one law for one nation in a united stand". <ol style="list-style-type: none"> 1. Call for submissions was published on 13 December 2011 with a 2-month deadline for submissions, at a time of the year when the entire country shuts down for the summer holiday and very few people would have seen the call for submissions; and only in newspapers although very few rural people read newspapers. 2. TCB legislative process must be based on proper and adequate consultation of rural people, in particular rural women to ensure that all voices are heard and an opportunity to influence the content of the Bill is broadened and relevant changes are effected for the benefit of those who will be affected by it in line with the provisions of the Constitution. 3. Provincial hearings and a deeper process of consultation must create safe spaces for lesbians and other vulnerable members of rural communities to speak about their concerns and proposals on the Bill. Therefore, the homesteads of chiefs or offices of tribal authorities are not the neutral or suitable safe spaces for allowing all voices to be heard as in some cases where rural lesbians have been punished unfairly at such homesteads or tribal offices which are normally the seats of customary courts. 4. The TCB must be revised substantially to be in line with the Report and Draft Bill on Customary Courts that was developed by the South African Law Reform Commission's Draft Bill which were based on a proper 5-year consultative process that took substantive voices from rural women on board and consistent with the Constitution. 5. Bill is undemocratic, unconstitutional and discriminatory in its content; and opens the door for women not to approach the customary court but be represented by a man. Women's right to equality before the law is compromised in this situation which makes it worse for lesbian women since customary law is not favourable to people who have intimate relations with people of the same sex. 6. The Bill is silent on how traditional courts will be structured so as to remove unfair discrimination against lesbians that is entrenched in dominant practices and understandings of customary law. The Bill must state how this will happen. 7. Situation of women and lesbians living in rural areas will be worsened by the Bill as it will create a separate legal regime operated by unaccountable traditional leaders who have the sole power to determine the content of customary law. 8. The Bill locates all the judicial and administrative power in one person who will either be the chief or someone nominated by the chief. 9. TCB does not give an option to people who would rather use the Magistrate's Court or other forums. This must be changed in the Bill so as to allow those who chose so to opt out. 10. There is a need for dialogue on customary law can evolve and develop in line with the Constitution. 11. Support the concept of promoting access to justice through democratic customary and other community-based systems driven from below. However, these must be structured in ways that are democratic, accountable, gender-inclusive and actively promoting women's participation and gender equality, inclusive of all vulnerable groups, and based on the constitutional values of social justice, reconciliation, equality, democracy, non-sexism, and the removal of unfair discrimination on various grounds

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

	<p>including on the basis of sexual orientation. Therefore the TCB cannot and must not identify only traditional leader-based traditional courts.</p>
<p>15. SOUTH AFRICAN HUMAN RIGHTS COMMISSION</p> <p align="center">Thursday, 20 Sept 12h45 – 13h15</p>	<ol style="list-style-type: none"> 1. Lack of consultation and time to provide submissions are problematic. 2. Unclear and confusing whether traditional courts are courts recognised i.t.o. Constitution and whether their status is in relation to the recognition of constitutional rights 3. Imposition of the "Roman / Dutch – British – constitutional" model on traditional customary law systems does not seem to fit 4. The Bill is too general in nature and sanctions are too broad 5. Bill does not contain an 'opt-out' clause 6. Due process is not observed in respect of criminal matters 7. Bill fails to address sanctions to be imposed on child offenders 8. The Bill does not adequately protect the right to a public trial as provided in s35 of Constitution 9. The Bill removes the right to legal representation as provided in s35 of Constitution 10. Concern that certain sanctions may amount to forced labour 11. No clear yardstick regarding sanctions relating to civil and criminal disputes 12. Violation of right to fair trial and international law is sanctions imposed on persons who are not parties to the proceedings or present at the traditional court hearing of the matter 13. Violation of ss25 and 26 of Constitution if sanctions result in the withdrawal of land / property rights 14. The appeal system demonstrates a lack of understanding of existing indigenous appeal systems and also violates the constitutional right to a fair trial 15. Prohibition to appeal certain sanctions violates the Constitution regarding right to fair trial. 16. The Bill will have financial implications and ought to be adequately costed 17. The rights of children as set out in s28 of Constitution are not adequately protected in the Bill. 18. The rights of women are not adequately protected in the Bill as the Bill does not guarantee appointment of women as presiding officers. 19. Bill need to use disability-friendly language 20. Khoisan people need to be included in scope of Bill.
<p>16. COMMUNITY LAW CENTRE (UWC)</p> <p align="center">Friday, 21 Sept</p>	<ol style="list-style-type: none"> 1. Bill will impact on children in rural areas which is half of all children in South Africa. 2. The consultation process on the Bill has been entirely inadequate as apart from traditional leaders, millions of people directly affected by traditional courts and the provisions of this Bill have been excluded from the consultations to develop the Bill. 3. Public hearings on the content of the Bill that took place in towns around the country cannot be considered adequate. People were required to speak in the presence of traditional leaders which raised a reasonable fear that speaking against the Bill could result in future victimisation.

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

09h00 – 09h30	
4.	No attempt has been made to consult directly with rural children or with groups that work towards promoting children's rights in rural areas.
5.	People are being asked to comment on an intrinsically flawed bill, they are not given the opportunity to start from the point of what is currently working or not working with the traditional courts system.
6.	Consultations must recognise and be responsive to the potential vulnerability of different groups. Separate spaces must be created in which children, women or lesbian, gay, transgendered or intersex people can be consulted on their experiences of traditional courts and their recommendations for a Bill of this nature
7.	TCB reinforces the boundaries established under apartheid by referring to Traditional Leadership and Governance Framework Act boundaries.
8.	Bill establishes separate legal systems for different South Africans as those living in the former Bantustans are forced to submit to the traditional courts in relation to certain civil and criminal matters before they have recourse to the formal legal and criminal justice systems.
9.	The training required for presiding officers and other functionaries and the systems of accountability required in the formal legal system, although flawed, are vastly greater than those in relation to traditional courts.
10.	There is no option to opt out of traditional system as the Bill forces all people living in a particular area to be subject to the authority of the chief in that area, whether or not they subscribe to the same cultural norms as that Chief.
11.	Concern over lack of legal representation and representation of women and children by male family members.
12.	Appeals are limited and in criminal matters not allowed unless there are grounds for review.
13.	Sanctions include forced labour which is open to abuse.
14.	The capacity of traditional courts to provide adequate protection and promote and respect children's rights in the context of children's lower status in many families and communities is questionable. These courts will have jurisdiction over a wide range of issues affecting children including certain criminal offences committed by children and potentially matters relating to decisions regarding some forms of child abuse; the property and certain living arrangements of orphaned children, issues relating to potentially harmful religious and cultural practices such as virginity testing, circumcision, and female genital mutilation; excessive child labour; etc.
15.	It cannot be assumed that traditional leaders in courts will act in the best interests of children in issues that come before these courts.
16.	It is unacceptable that the TCB does not provide for diversion for children accused of crimes in the areas affected by this Bill.
17.	Legislation must include reference to the importance of training relating to children's rights;
18.	Provision must be made for children who are involved in matters before a traditional court to receive the support of people who are tasked with acting in their interests such as social workers and child and youth care workers.
19.	Bill in current form is unconstitutional.

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

17. SONKE JUSTICE NETWORK	GENDER
Friday, 21 Sept 09h45 – 10h15	<ol style="list-style-type: none"> 1. TCB should be rejected and withdrawn due to unconstitutionality and substantive and procedural defects. 2. Certain provisions violate women's rights to gender equality. 3. Women were excluded from consultations before Bill was drafted. 4. Bill should be redrafted after thorough consultations with community members, especially rural women. 5. TCB undermines constitutional values like access to justice, equality, fairness, openness and transparency. 6. Sole power to determine and create customary law is vested in a single senior traditional leader as presiding officer - this obviates the role of community councils; and eliminates democratic participation and is inconsistent with living customary law. 7. Accountability of presiding officer is compromised as he has executive, legislative and judicial powers. 8. The Bill entrenches patriarchy in customary law which hinders gender transformation. 9. The power to settle various kinds of civil and criminal disputes are not clearly defined. 10. Right to appeal is limited and in criminal cases this is in contravention of s35 of the Constitution. 11. The denial of legal representation violates the right to a fair trial and right to legal representation. 12. Unconstitutional sanctions include imposing unpaid labour, refusal to provide authorisation of residence and exclusion from the community. Banishment is outlaws in criminal cases, but the Bill is silent on banishment as a sanction in civil matters. 13. No opt out provision in Bill to refer matter to another court as it is an offence to refuse to appear before traditional court when summonsed. 14. Bill complies with apartheid boundaries as set out under BAA. 15. The TCB will negatively affect women, but also gay men and LGBTI. 16. Cost implications are concerning. Several interventions by traditional leader are unfunded mandates. It is not clear where funding will come from for Bill's implementation. How will court ensure attendance of witnesses and respondents at court, especially in light that a large number of men from rural areas work in urban areas which may impact on functionality of these courts. 17. The Bill is silent on traditional levies which may tacitly allow for the introduction of more and heavier levies. 18. The NCOP process for considering mandates have been highly irregular and instead of these being considered additional public consultations were requested.

TRADITIONAL COURTS BILL PARLIAMENTARY HEARINGS 18 – 21 SEPTEMBER 2012

SHORTLISTED SUMMARIES OF SUBMISSIONS

18. MANYELETI COMMUNITY LAND CLAIMANTS Thursday, 20 Sept 09h45 – 10h15	
1.	The claimants are currently under the jurisdiction of Chief Misi and the Traditional Authority and are disputing the chief's claim to the land currently held by the Manyeleti Conservation Trust as the communities from this area were not governed by a chief prior to their forced removal under apartheid.
2.	The Claimants are in the process of electing a legitimate Communal Property Association (CPA).
3.	The TCB has implications for the Claimants' land as the Bill states that a king, queen or senior traditional leader instituted in terms of the BAA has can be presiding officers in areas in which the traditional courts will have jurisdiction.
4.	The claimed land should belong and remain under the jurisdiction of the claimants and the traditional leader must only have power over the land demarcated as his jurisdiction.
5.	Want the Bill to be scrapped and/or redrafted to exclude land that would be privately owned under a Trust or CPA.
6.	Problems experienced under the chief's leadership include selling off land belonging to claimants without their knowledge and using money for own purposes.
7.	Problems experienced with traditional courts include dealing with people in terms of their status and not with the issue at hand and prejudice against those who are not on good terms with the chief. The chief also collects money and causing conflicts within the community whereas the TCB states that he is supposed to settle conflict.
8.	The powers given to the chiefs will violate the community's rights to own land, to a fair trial and justice system.
9.	The TCB will marginalise the community and bring back Bantustan days based on ethnicity and race.
10.	Other problems included forced removals of community members from land which the chief claims for himself.
11.	Sufficient notice should be given and proper consultation with rural people be done on the Bill; and new legislation should be drafted from this.
12.	Certain clauses that incorporate the BAA and TLGFA should be scrapped.
13.	The chiefs should not have powers to sell, distribute and use land with the community's knowledge.
14.	The NHTL and other government departments should monitor the implementation of the Act to ensure that chiefs abide by the legislation.