Traditional Courts Bill [B1 – 2012]

SAHRC Submission to the National Council of Provinces, 15 February 2012

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Introduction

1. The South African Human Rights Commission (SAHRC or 'Commission') welcomes the current parliamentary public hearings within the process of providing formal recognition to African customary law in South Africa. The African customary law system is integral to the lives of many who live in this country. While the Commission commends the legislature for attempting to give recognition to this system, one should also acknowledge that customary law in essence is not a stagnant system.[1] Be that as it may, African customary law has been subjected to and survived both colonialism and apartheid. The subjugation of the cultures of indigenous peoples and the imposition of colonial cultures on them are some of the most devastating features of colonialism and apartheid in the South African context. In this regard the Cultural Charter of Africa provides:

> "…cultural domination [under colonialism] led to the depersonalization of part of the African peoples, falsified their history, systematically disparaged and combated African values, and tried to replace progressively and officially, their languages [and religion] by that of the colonizer."[2]

2. It is against this cultural domination which our peoples in their struggles against colonialism and apartheid fought against. It is within this regard that our people in the Freedom Charter of 1955 proclaimed that "All people shall have equal right to use their own languages, and to develop their own folk culture and customs."

3. Now, African customary law within our new African constitutionalism will need to face the challenge of recognition alongside all other laws and procedures[3] and survive the test of constitutionality to remain part of our democratic

[1] *Shilubana and Others v Nwamitwa* CCT 03/07[2008] ZACC 9 at para 27 (*accessed via www)*
[2] Preamble of the Cultural Charter for Africa. Adopted by the OAU on 5 July 1976 in Port Louis, Mauritius and came into force on 19 September 1990
[3] Referring to South Africa's pluralistic legal system; the state-run legal system on the one side and the plural traditional system on the other *as referred to in*
Hinz, M.O. Traditional governance and African customary law: Comparative observations from a Namibian perspective 10 May 2007 (*accessed via www)* 63

constitutional state founded upon the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism, non sexism and the supremacy of the Constitution.[4]

The mandate of the South African Human Rights Commission

4. Our mandate is set out in section 184 of the Constitution and states as follows:

> "Human Rights Commission
>
> **Functions of Human Rights Commission**
> 184. (1) The Human Rights Commission must-
> (a) promote, respect for human rights and a culture of human rights;
> (b) promote the protection, development and attainment of human rights; and
> (c) monitor and assess the observance of human rights in the Republic."[5]

5. In line with this constitutional mandate, the SAHRC considers it necessary to take advantage of the National Council of Provinces invitation to make submissions on the Traditional Courts Bill (the Bill) which is currently before Parliament for consideration. The Bill has the potential to impact the rights of many people who may fall subject to the Traditional Courts recognised in terms of the Bill.

6. The Bill challenges many of our understandings of the rights enshrined in the Constitution within the context of recognising tradition, custom and culture in African society that has been systematically denied for centuries. The current debates around the Bill are thus not about the integrity and/or legitimacy of the traditional court system but rather to determine the manner in which this recognition should be reflected in legislation within our constitutional

[4] Section 184 Section 1 (a), (b) & (c), the Constitution of the Republic of South Africa Act 108 of 1996
[5] Section 184 of the Constitution of the Republic of South Africa Act 108 of 1996

democracy. The SAHRC recognises the institution, status and role of customary law.[6]

Preliminary issue – There has been a lack of consultation and time to provide submissions

7. The *Memorandum on the Objects of the Traditional Courts Bill* indicates that in depth consultation occurred with some interested parties; namely: the relevant traditional leadership structures, magistrates at a conference; provincial workshops with the Houses of Traditional Leaders and SALGA, chapter 9 institutions and workshops with magistrates and prosecutors. However, the most important group, namely those people who will be directly affected by the Bill and who live subject to customary law do not appear to have been consulted with.[7] Given the important implications of the Bill in the people's daily lives it is inexcusable that no consultation has occurred at a local level. It is doubtful that the hosting of a small number of provincial public hearings will remedy the situation.

[6] The Bill gives effect to Chapter 12, section 211 of the Constitution which states as follows:

> (1) The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution.
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
> (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. *(own emphasis added)*

[7] Article 19 of the UN Declaration on the Rights of Indigenous Peoples provides the following

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

8. Also, the notice period allowed for making submissions on the Bill has been extremely short.[8] In many democracies elsewhere in the world, parliament would likely have given a few months for the public to comment on a Bill of such important significance.

9. Finally, Parliament is well aware of the emerging constitutional court jurisprudence on the issue of public participation which is guaranteed in our constitution.[9]

10. The public has a Constitutional right to participation in the legislative processes of the National Assembly. Section 59(1) of the Constitution states:
"The National Assembly must –

(a) Facilitate public involvement in the legislative and other processes of the Assembly and its committees; "

11. In the *Matatiele* constitutional court matter, the court stated: "(t)he Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process."[10] This constitutional right has also been interpreted to mean affording meaningful opportunities to participate,[11] and the opportunity to make submissions.[12]

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[8] The PMG notice distribution list issued the call for submissions on 21 April 2008, with a cut off date of 6 May 2008. During this period there were 3 public holidays.

[9] See for example *Doctors for Life International v Speaker of National Assembly and O*thers: 2006 (12) BCLR 1399 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2)(CCT73/05A [2006] ZACC

[10] *Matatiele* above at para 60

[11] "What is ultimately important is that the Legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-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

It is utterly unclear and confusing as to whether Traditional Courts are courts as recognised in terms of the Constitution. If they are not, then it is even less clear what their status is in relation to the recognition of constitutional rights

12. At a conceptual level traditional courts must be established in terms of section 166(e) of the Constitution. However the debate will be whether the Bill and the Court fall within the constitutional provisions or not.

13. In terms of the Constitution, section 166 states as follows:

> "The courts are-
> (a) the Constitutional Court;
> (b) the Supreme Court of Appeal;
> (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
> (d) the Magistrate's Courts; and
> *(e)* <u>any other court established or recognised in terms of an Act of Parliament</u>, including any court of a status similar to either the High Courts or the Magistrates' Courts." *(own emphasis)*

14. If Traditional Courts fall within the scope of section 166(e) then it cannot be misconstrued that these courts ought to be compliant with constitutional values and principles. If the courts do not fall within the section then it indicates firstly, that these forums are not courts at all and secondly, that an indication of non-compliance with constitution principles can be inferred.

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to ensure that people have the ability to take advantage of the opportunities provided..." *Doctors for Life* judgement at para 129

[12] " …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 submission at the hearing of the institutions of governance. All this is a part of facilitating public participation in the law-making process" *Doctors for Life* judgement at para 137

15. Chapter 12 of the Constitution recognises the institution, status and role of traditional leadership according to customary law, but subject to the Constitution.

16. By naming the Bill the 'Traditional Courts Bill', defining the word "traditional court' in section 1 (definitions clause) as "… a court established as part of the traditional justice system, which_ ….." *(own emphasis)* it would be apparent to any person on a plain reading of the Bill that the drafters of the Bill intended these Traditional Courts to be courts in the ordinary sense of the word and consequently as recognised by the constitution.

17. The South African Law Commissions' Project 90 on Customary Law (January 2003) (hereinafter referred to as the SALRC Report 2003) which was the outcome of a relatively extensive process of consultation reported that "(m)ost people agree that they are and should be courts of law." The SALRC accepted this position.[13]

18. The "Policy Framework on the Traditional Justice System under the Constitution" issued by the Department of Justice and Constitutional Development (undated) repeats how during the certification process of the Constitution the averment that the traditional courts were not duly recognised was dismissed: "Under the final Constitution the customary courts thus qualify as 'any court established or recognized in terms of an act of parliament."[14]

19. Further on in the Policy Framework it is said that "whilst it is true that a traditional court, when adjudicating a dispute, hands down a 'verdict' (i.e. finds someone guilty or innocent), it is also true that the ultimate objective of the

[13] South African Law Commissions' Project 90 on Customary Law (January 2003), par 2.2.
[14] "Policy Framework on the Traditional Justice System under the Constitution" issued by the Department of Justice and Constitutional Development (undated), p20

proceedings is dispute resolution and the restoration of a healthy relationship between the parties."[15] The Policy Framework goes further to indicate that Traditional Courts are not 'formal courts'.[16] The Policy Framework also recognises that there is a blurring between what is a customary dispute and what is a civil or criminal matter and thus as a consequence, there is a need to confer criminal and civil jurisdiction upon Traditional Courts to hear less serious crimes and minor civil disputes. Finally, the Policy Framework quotes from Sachs, A., "(b)ut resolving family and neighbors' disputes and dealing with petty assaults and small thefts requires other techniques and processes."[17]

Turning to the Bill:

The long title states:

> "to provide for the structure and functioning of traditional courts";

The Preamble states:

> "the traditional justice system, which is based on customary law, forms part of the legal system of the Republic";

The definition of a "traditional court" states that it

> "means a court established as part of the traditional justice system," The Guiding Principles state that "In the application of this Act, the following should be recognised and taken into account: (a) The constitutional imperative that courts, tribunals or forums, when- …"

Combined with these examples, the Bill is littered with language that creates an overriding impression that the courts established in terms of the Traditional Courts Bill is a court as recognised in terms of section 166 of our Constitution (e.g. civil disputes, offences, presiding officer, procedure, execution, and even

[15] "Policy Framework on the Traditional Justice System under the Constitution" issued by the Department of Justice and Constitutional Development (undated), p32
[16] Ibid
[17] Ibid Para 6.7.7.1

phrases such *audi alteram partem, nemo iudex in propria causa*, sanctions and orders etc. .).

20. Despite these clear indications that Traditional Courts are courts of law, it would appear that many of the constitutionally recognised rights within the area of criminal and civil legal proceedings are not recognised.[18] At the same time there are hints within the Bill and the Policy Framework that Traditional Courts many not be courts but merely function as tribunals. This is an enormous challenge that needs to be reconciled. Either Traditional Courts are courts within the purview of the Constitution[19] and these courts and persons who appear before these courts are clothed in all the rights that the Constitution provides, or the legislator must be clear in creating an institution that is not a court within the Constitution and ensure that this is clear. This ambiguity goes to the heart of many of the Commissions difficulties with the Bill.

21. If the institution being created in the Bill is a dispute resolution mechanism, then this must be stated clearly and referred to in appropriate terms. A dispute resolution mechanism would also imply that all parties must consent to the forum; this is not currently provided for in the Bill.

Imposition of the "Roman / Dutch – British – constitutional" model on traditional customary law systems does not seem to fit

22. The drafters of the Bill have attempted to give effect to African traditional customary legal systems through the framework and language of the current South African legal system which is inspired by the Roman-Dutch, British and more recent constitutional systems. This framework and language distort the traditional system and open the system up to constitutional guarantees being

[18] Such as the right to legal representation
[19] Section 166(e)

ignored or actively denied. This opens the Bill up to constitutional attack (e.g. the right to legal representation – to be discussed further down).

23. Many criminal matters in the African system are treated as delictual matters unlike within the Western system where there is a distinction between criminal and delictual matters. Within the African system there is a hybrid of the two systems. In the African system murder was treated as a delictual matter. The courts did not make a fine distinction between criminal and civil matters and this is why very minor criminal offences would still have been dealt with in Traditional Courts. Today where there is no criminal distinction within the traditional system and traditional courts still deal with assault and insults as a delictual matter. This poses a problem as there is no model of an African traditional court that can be used as a point of reference when establishing a traditional court system. Some traditional courts have been superimposed by the western system and are structured similar to junior magistrate's courts. The other Traditional Courts which have not been superimposed have rebelled resulting in many traditional courts operating outside of government systems. Historically traditional courts have operated on the basis of customary law and administered by way of apartheid legislation.[20] We have a mixed bag of traditional courts such as the Kwazulu-Natal system which has the Kwazulu-Natal penal code operative within that court structure. In addition Transkei has broken away and now has its own regulatory framework legislation. Unfortunately, the problem with the Bill is that is does not speak to the reality of all the different types of traditional courts and of the people living thereunder.[21] A recurring theme with all codifications of customary law and principles is that it fails to reach the people it was designed to protect.

[20] South African Law Reform Commission "Background to Legislation" 1 *see* http://www.saflii.org/za/other/zalc/report/2003/1/2003_1-CHAPTER.html
[21] Thipanyane, T "Cultural, Religious and Linguistic Rights" 182 *see* Reflections on Democracy and Human Rights 2006

24. There is a need for far greater research to be conducted on current systems of customary law. These systems are not static but evolving and changing by their nature. In having a greater understanding of how customary law plays itself out today in 21st century constitutional South Africa, the legislator will be better placed to create a language that gives effect to the traditional system that is not in conflict with the Constitution. In Namibia for example, a nation-wide project has begun to self-state customary law.[22]

The Bill is too general in nature

25. The Bill is very general in nature and gives very few particulars as to how Traditional Courts will in practice be aligned with the Constitution ("the Constitution") (clause 3(1) (a)). Whilst the Bill states that the Traditional Courts are to function "in accordance with constitutional imperatives" (clause 2(c)) how this is to be implemented in practice remains absent from the Bill.

Other examples of the Bills' general nature

26. The Bill and Memorandum make reference to enhancing and promoting access to justice[23] but fails to demonstrate how this will be achieved. Despite indicating that the Bill will promote access to justice to all persons, the Bill is silent on the number of Traditional Courts to be established and in which areas they will be erected.

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[22] *See* Hinz, M O, "traditional governance and African customary law: Comparative observations form a Namibia perspective", 10 May 2007 (*accessed via the www)*

[23] References in the Bill to access to justice

Clause 2(ii) in the Bill and Par. 2.1 (ii) in the memorandum

'affirm the role of the institution of traditional leadership in enhancing access to justice; '

Clause 3(1)(b) in the Bill and Par 2.2 (b) in the memorandum

' the need to promote access to justice to all persons;'

27. The Bill does not spell out clearly whether any consultation and participation is to take place for the designation of presiding officers.

28. Despite a commitment to gender equality and representation, it is utterly unclear from the Bill how this will be achieved and/or promoted.

29. There is limited information provided in the Bill about the procedure to be adopted by the Traditional Courts. Rather, it is left for inclusion in the Regulations. This is not sufficient.

30. No indication has been given as to the jurisdiction of the Traditional Courts regarding the imposition of fines and the amount that may be imposed. This is important as it will indicate the amount of power that these courts will have in their respective communities.

Sanctions are too broad

31. The sanctions that can be imposed under the Bill, pursuant to clause 10, are very wide. This may create the potential for the abuse of power by a Traditional Court despite the Bill stating that the sanctions that can be imposed by a Traditional Court are limited to those, which are "consistent with the provisions of this Act".

For example, clause 10(2) of the Bill states:

> "A traditional court may, in the case of both civil and criminal disputes, but subject to subsection (1) in the case of criminal disputes, after hearing the views of the parties to the dispute, <u>make any appropriate order in the circumstances</u>, including the following:
>
> …
>
> (l) <u>Any other order that the traditional court may deem appropriate</u>, which is consistent with the provisions of this Act." *(own emphasis)*

32. The Bill provides for geographic jurisdiction rather than jurisdiction based on membership of a customary group.

The Bill does not contain an 'opt-out' clause

33. The Bill fails to address a situation whereby a matter falls within the parameters of Western criminal jurisdiction and the traditional system. Would a 'perpetrator' be 'tried' under the traditional system or the Western system? Who makes such a decision? In addition to this, if there is no 'opting-out' clause are people who are meant to access these courts subjecting themselves to a culture which is not their own. In essence, this difficulty relates to one of the underlying problems with the Bill, that it fails to recognise the difficulty of merging a traditionally African system with a Western one.

34. There is so much overlap between disputes arising out of customary law and custom and disputes that arise in the normal course of events that the Bill is rendered very general in nature.

Due process is not observed in respect of criminal matters

35. The *Memorandum* to the Bill recognises the criminal jurisdiction of Traditional Courts and refers to the Schedule of offences that the Traditional Court has jurisdiction over.[24] However, the Guiding Principles set out in clause 3(2)(d) of the Bill state that "… the principles underlying the traditional justice system are not, in all respects, the same as in the context of due process, as applied or understood in the retributive justice system." Clause 6 of the Bill refers to the settlement of criminal disputes by a traditional court. Clause 7 of the Bill states that:

[24] *See* para 2.5 of the Memorandum

"Traditional courts are distinct from courts referred to in section 166 of the Constitution, and operate in accordance with a system of customary law and custom that seeks to-

(a) prevent conflict
(b) maintain harmony; and
(c) resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution."

36. The Bill is confusing. On the one hand it is stating that Traditional Courts are not recognised as courts as stated in the Constitution and therefore do not have to observe due process, such as the right to legal representation and on the other it is stating that the norms and standards set out in the Constitution must be respected and upheld. It is utterly unclear which parts of the Constitution the legislator intends to be applicable to Traditional Courts. However, the legislator is not at liberty to legislate away constitutionally derived rights. It is submitted that the Bill would not withstand constitutional scrutiny on this issue in its current form.

Due process has to be recognised within the Bills' current form

37. A brief overview of our international human rights law obligations quickly indicates that the Bill falls short of its due process obligations. The Bill fails to recognise basic rights, such as the right to a fair trial, the right to legal representation and in terms of Article 14 of the ICCPR, traditional courts cannot hand down binding judgements unless basic fair trial rights have been met. (*see below)*

38. The International Covenant on Civil and Political Rights (ICCPR) which South Africa has signed and ratified states the following in Article 14(3)

"3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) Not to be compelled to testify against himself or to confess guilt."

39. Para 4 of the General Comment No. 32 of the Human Rights Committee (2007) of the International Covenant on Civil and Political Rights states:

> "Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees."*own emphasis)*

40. Para 24 of that General Comment is also relevant and states:

> "Article 14 is also relevant where a State, in its legal order, recognises courts based on customary law, or religious court, to carry out or entrusts them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognised by the State, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant. These principles are notwithstanding the general

obligation of the State to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts." *(own emphasis)*

41. Therefore, South Africa is bound, pursuant to its international obligations to ensure that people who come before a traditional tribunal or court in respect of criminal matters have the right to due process (basic requirements of a fair trial) which would include the right to legal representation and other guarantees set out in Article 14 (3) of the ICCPR. This is particularly so as clause 10 read with clause 11 creates binding judgments and sanctions on persons and clause 12 provides that Traditional Court's orders are final.

42. Closer to home, African Regional Human Rights instruments also recongise the right to a fair trial and various due process rights. Article 7 of the African Charter on Human and People's Rights states that:

> "Every individual shall have the right to have his cause heard. This comprises:
>
> (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulation and customs in force;
> (b) the right to be presumed innocent until proven guilty by a competent court or tribunal;
> (c) the right to defence, including the right to be defended by counsel of his choice;
> (d) the right to be tried within a reasonable time by an impartial court or tribunal.
> (e) No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

Sanctions imposed on child offenders

43. In a Western system where a child is found guilty of a delictual offence, parents may be held responsible for compensating the aggrieved party for their loss. In the case of a criminal matter, the child is often punished in its personal capacity. There is a clear distinction between the Western system and African customary law. In the African system, a parent is liable for any delictual loss suffered at the hands of the child. This reiterates the treatment of a delict and a crime as the same offence within the African customary system. For example, a child may steal a goat from his neighbour which within the Western legal system is categorised as the criminal offence of theft punishable by criminal sanction. However within the African customary system, that same offence would be punishable by returning the goat or compensating the neighbour for the loss suffered.

44. This Bill fails to address what sanctions would be imposed against child offenders. Would the sanction include an apology to the aggrieved person, would the parents of the child be liable for the loss or would the child be punished within a Western criminal sense?

The Bill does not adequately protect the right to a public trial

45. Clause 6 of the Bill states:

> "A traditional court, may subject to section 10(1), hear and determine offences brought before the court if the offence occurred within the area of jurisdiction of the traditional court in question and if such offence is listed in Schedule 1."

46. The Schedule to the Bill limits the criminal offences with which a Traditional Court can deal with, pursuant to this section, to the following:

> "theft, where the amount does not exceed an amount determined by the Minister by notice in the *Gazette,*

malicious injury to property, where the amount does not exceed an amount determined by the Minister by notice in the *Gazette*,

assault where grievous bodily harm has not been inflicted, and

Crimen injuria, where the amount involved does not exceed an amount determined by the Minister by notice in the *Gazette*."

Section 35(3) (c) of the Constitution states:

"(3) Every accused person has a right to a fair trial, which includes the right – ……..

(c) to a public trial before an ordinary court; "

47. The Bill is unclear as to whether an accused person charged with a criminal offence will be able to exercise their Constitutional right to have their matter heard in public before an ordinary court should they so choose.

48. Women are not allowed to enter certain traditional African courts or tribunals. The Bill should affirm the right of women to be present during these proceedings. In addition the Bill should also affirm the right to a public trial.

The Bill removes the right to legal representation

49. The Bill takes away the Constitutional right of South Africans to be legally represented.

Clause 9(3) of the Bill states:

"No party to any proceedings before a traditional court may be represented by a legal representative." *(own emphasis)*

A party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom.

Section 35(3) of the Constitution states:

> "(3) Every accused person has a right to a fair trial, which includes the right –
>
> (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
>
> (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"

It is concerning given that the Traditional Courts can impose sanctions for criminal offences.

50. Traditional African custom does not provide for legal representation as envisioned in the Constitution. Thus, as it stands, the Bill is unconstitutional for failure to recognise the right to legal representation. The Bill essentially denies a person the right to call upon a qualified legal professional to represent him/her. The clause on legal representation as it presently stands ought to be removed and the matter needs further consultation and consideration.

The Commission has a number of concerns regarding the sanctions that may be imposed

Sanctions must be careful not to fall within the scope of forced labour

51. Included in the sanctions that can be imposed by a Traditional Court is an order that any person performs some form of service without remuneration. This may be akin to forced labour in certain instances which is forbidden by the Constitution.

52. The African Charter on Human and Peoples Rights provides that individuals have the right to work for remuneration. This supports the idea that work cannot be enforced as a sanction. In addition to the provisions in the Charter, the

Declaration on Indigenous Peoples Rights[25] also makes reference to the requirement of equal work for equal pay. The UN Convention on Forced Labour defines forced compulsory labour as "…all work or service which is exacted from any person under the menace of a penalty and for which the said person has not offered himself voluntarily."[26] However, the Convention provides an exception and states that forced labour shall not include any service performed by a person on a conviction in a court of law, provided the work is carried out under the supervision of a public authority and the person is not hired to or placed at the disposal of private individuals, companies or associations.[27]

53. Clause 10 (2) (g) and (h) of the Bill provides that both parties to the proceedings or any other person may be required to perform a service, without remuneration for the benefit of the community .(*own emphasis)* The Convention provides that forced labour would include services that are rendered for the benefit of individuals etc. The clause therefore violates the Convention and a party may argue that performing services in terms of the Bill could be construed as "forced compulsory labour."

54. However, the International Covenant on Civil and Political Rights, states that forced labour does not include "(i) any work or service normally required of a person who is under detention in consequence of a lawful order of a court…"[28] If the view of the ICCPR is accepted then the exceptions to forced labour will therefore be regarded as a limitation on section 13 of the South African Constitution and will have to be justified in terms of section 36.[29]

55. Article 2(2)

[25] Adopted by the United General Assembly on 13 September 2007
[26] Article 2 (1)
[27] Article 2 (2) (c)
[28] Article 2 (2)
[29] Currie, I and de Waal, J (2005) *Bill of Rights Handbook* 314

"…Nevertheless, for the purposes of this Convention the term "forced or compulsory labour" shall not include: (c) Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;…"

Article 8 of the International Covenant on Civil and Political Rights (ICCPR) states that:

"1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

1. No one shall be held in servitude.

3(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(h) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;"

Clauses 10(2) (g) & (h) of the Bill states:

"A traditional court may, in the case of both civil and criminal disputes, but subject to subsection (1) in the case of criminal disputes, after hearing the views of the parties to the dispute, make any appropriate order in the circumstances, including the following:

(g) an order that one of the parties to a dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court;
(h) an order that one of the parties to the dispute, both parties or any other person performs some form of service for or provides some benefit to, a specified victim or victims; …" *(own emphasis)*

Section 13 of the Constitution states:

"No one may be subjected to slavery, servitude or forced labour."

56. The SAHRC is aware that within the traditional African customary system one should aim at restoring the person to the position they had been in before suffering the harm. For example, if a cow had damaged a fence, the owner of that cow would need to mend the fence him/herself. This may however be construed as subjecting a person to forced labour in terms of the International obligations. In addition to this it also raises constitutional questions. The performance of services may be constitutionally permissible should the limitation clause of the Constitution be properly applied. Therefore, Presiding officers will need to be aware of these provisions of the Constitution and how the right can be limited. Furthermore, that sentence should be carefully scrutinised so as not to inhibit the values and principles of the Constitution.

Sanctions relating to civil and criminal disputes

57. Clause 10 (2) (a) of the Bill makes provision for the Traditional Court to impose an order for the payment of a fine, not exceeding the amount determined by the Minister as referred to in the *Gazette*.

58. Firstly, the clause undermines the traditional values of a customary system by distinguishing between civil and criminal disputes. The distinction between civil and criminal disputes is inherently a feature of the common law.[30] This merely reiterates the theme of superimposition of the traditional system with a Western one.

59. Secondly, the clause makes provision for the Minister to determine the maximum amount that may be imposed by a Traditional Court. This aspect is controversial as it is unclear what the "yardstick' would be when determining the maximum payment. The legislator should bear in mind that these courts ought

[30] *See* Hinz, M O, "Traditional Governance and African customary law: Comparative observations form a Namibia perspective", 10 May 2007 (*accessed via the www)* 72

to function in a traditional setting and one wonders whether the Minister would take into consideration the socio-economic circumstances of the persons who access these courts.

60. Clause 10 (2) (a) of the Bill states:

"A traditional court may, in the case of both civil and criminal disputes, but subject to subsection (1) in the case of criminal disputes, after hearing the views of the parties to the dispute, make any appropriate order in the circumstances, including the following:

(a) An order for the payment of a fine, sounding in money, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*,payable in instalments, if necessary;..."

Sanctions may be imposed on persons who are not parties to the proceedings or even present at the Traditional Court hearing of the matter

61. Clause 10(2)(g) & (h) of the Bill provides for a sanction against any other person, other than the parties to the dispute, to perform some form of service or remuneration for the benefit of the community or specified victim or victims.

62. This provision is utterly untenable as it violates the most basic of fair trial rights namely that a person must be charged with the offence and be provided with an opportunity to defend her or himself. It is in clear violation of section 34 (access to courts) and section 35 (arrested, detained and accused persons) of the Constitution not to mention the regional and international human rights instruments. For example: Article 7(2) of the African Charter on Human and People's Rights states: "Punishment is personal and can be imposed only on the offender".

The legislature needs to reconsider this clause as it violates international law. Further research needs to be done in order to strike a balance between Western system and traditional African customary law.

Sanctions may result in the withdrawal of land / property rights

63. Clause 10 (2) (i) of the Bill states:

"A traditional court may, in the case of both civil and criminal disputes, but subject to subsection (1) in the case of criminal disputes, after hearing the views of the parties to the dispute, make any appropriate order in the circumstances, including the following:

(i) an order depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom; *.."(own emphasis)*

64. The Bill gives a traditional leader unlimited power to deprive a person of any benefit. These benefits may include access to and use of land and property. This may render a person unable to provide for her or himself. Further, it goes against persons rights as expressed in sections 25 and 26 of the Constitution, which state:

"25 Property
No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." *(own emphasis)*

"26. Housing
Everyone has the right to have access to adequate housing.
The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." *(own emphasis)*

Section 25 of the constitution states that "No one may be deprived of property except **in terms of law of general application**". Customary law is not a law of "general application" and therefore for a Traditional Court to deprive a person of any benefit would be unconstitutional. Further pursuant to s 26 of the Constitution, housing cannot be demolished "without an order of court". Since it is not intended that Traditional Courts be courts in the sense of s 166 of the Constitution, if a Traditional Court were to make an order regarding the eviction or demolishment of someone's home, this would be unconstitutional.

The appeal system demonstrates a lack of understanding of existing indigenous appeal systems and also violates the constitutional right to a fair trial

65. Clauses 13 and 14 of the Bill states:

"**Appeals to magistrates' courts**

13. (1) A party to a civil or criminal dispute in a traditional court may, in the prescribed manner and period, appeal to the magistrate's court having jurisdiction against an order of a traditional court, as contemplated in section 10(2)*(a)*, *(b)*, *(h)* or *(i)*, as well as section 10(2)*(k)*, to the extent that the order in terms of section 10(2)*(k)* relates to an order contemplated in section 10(2)*(a)*, *(b)*, *(h)* or *(i)*.
(2) An order of a traditional court in respect of which an appeal is lodged, as contemplated in subsection (1), is suspended until the appeal has been decided (if it was prosecuted in the time and in the manner so prescribed) or until the expiry of the prescribed period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed.
(3) Notwithstanding any other law to the contrary, a magistrate's court hearing an appeal as contemplated in this section has the power to —

(a) confirm the order of the traditional court;
(b) amend or substitute the order of the traditional court, as it deems appropriate in the circumstances, with any order contemplated in section 10(2); or
(c) dismiss the order of the traditional court."

Procedural review by magistrates' courts

14. (1) A party to any proceedings in a traditional court may, in the prescribed manner and period, take such proceedings on review before a magistrate's court in whose area of jurisdiction the traditional court sits on any of the following grounds:

(a) The traditional court acted *ultra vires* (outside the scope of the Act);
(b) absence of jurisdiction on the part of the traditional court;
(c) gross irregularity with regard to the proceedings; or
(d) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004), on the part of the presiding officer.

(2) Notwithstanding any other law to the contrary, a magistrate's court has the powers, as may be prescribed, relating to a procedural review contemplated in this section."

Clause 13 (1) of the Bill limits the orders that may be appealed against to the following clauses:

Clause 10(2) (a), (b), (h), (i)

"10. 2. (a) An order for the payment of a fine, sounding in money, not exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, payable in installments, if necessary: clause 10(2)(a); …"

(b) An order, expressed in monetary terms or otherwise, including livestock—
(i) making a settlement between the parties to the proceedings an order of court;
(ii) for the payment of any damages in respect of any proven financial loss;
(iii) for the payment of compensation to a party; or
(iv) for the payment of damages to an appropriate body or organisation: clause 10(2)(b);

(h)An order that one of the parties to the dispute, both parties or any other person performs some form of service for or provides some benefit to, a specified victim or victims;

(i)An order depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom: clause 10(2)(i); and

Clause 10 (2) (k)
An order containing a combination of any of the sanctions contemplated in paragraphs *(a)* to *(j)*, except where the matter is referred to the national

prosecuting authority under paragraph *(f)*, in which event the decision of the national prosecuting authority will prevail: clause 10(2)(k)."

66. Therefore, the other sanctions and orders that may be given by a Traditional Court pursuant to clauses 10 (c), (d), (e), (f), (g), (j), (l) **cannot** be appealed against. These include:

> "(c) an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of: clause 10(2)(c);
>
> (d) an order that an unconditional apology be made: clause 10(2)(d);
>
> *(e)* an order requiring the accused person or defendant to make regular progress reports to the court regarding compliance with any condition imposed by the court: clause 10(2)(e);
>
> *(f)* an order directing that the matter be submitted to the national prosecuting authority for the possible institution of criminal proceedings in terms of the common law or relevant legislation: clause 10(2)(f);
>
> *(g)* an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court: clause 10(2)(g)
>
> (j) an order discharging a person with a caution or reprimand in the case of a criminal dispute: clause 10(2)(j).
>
> (l) any other order that the traditional court may deem appropriate and which is consistent with the provisions of this Act. Clause 10(2)(l)"

A lack of understanding of indigenous appeal systems

67. Within customary law there are various levels of review, for example a decision of a court presided by a headman can be taken upon appeal to the Chief or King / Queen. Therefore what the Bill does by creating a system of appeal directly to

the Magistrates Court is to override a recognised system of appeal that currently exists. This could potentially lead to the creation of enormous conflict within communities and demonstrates that the Bill has not sought to capture the actual practice of customary courts. This goes against the objectives of the Act. The SALRC Report 2003 recommended that a litigant who is dissatisfied with a decision of a customary court have a right of appeal to a higher customary court and either to a customary court of appeal or to the magistrate's court and further to the high court.[31]

68. Although the appeal system within the Bill makes allowances for dissatisfied 'litigants' to use the magistrates court as an option it does not make allowances for incorporation of traditional appeal systems. In addition to this it should be noted that persons who visit traditional courts within their community are often illiterate and for these people to appeal to a Western court structure such as a magistrate's court is unfounded. The system within the magistrates' court is an intricate one an more often than not requires experiential legal expertise.

The legislated prohibition to appeal certain sanctions violates the Constitution

69. The prohibition on the right to appeal against certain sanctions goes against the constitutional right of an accused person to a fair trial, including the right of appeal to, or review by, a higher court: section 35(3)(o) of the Constitution.

Section 35 (3) o) of the South African Constitution states:

> "(3) Every accused person has a right to a fair trial, which includes the right –
> (o) of appeal, to, or review by, a higher court."

The Bill will have financial implications and ought to be adequately costed

[31] Para 13 of the SALRC Report 2003

70 Paragraph 6 of the Memorandum states that the only financial implication of the Bill will be that which is incurred with the financial training of presiding officers of Traditional Courts and that this will be accommodated within the Departments allocated budget. In other words the impression is being created that there will be no additional costs for the proper and effective implementation of this Bill.

The Commission is of the view that the Bill will incur costs, a few examples hereof are listed beneath.

Record of proceedings (clause 18)

71. This clause provides that a Traditional Court must, in the prescribed manner, record or cause to be recorded the nature of each dispute or charge, the summary of the facts of the cases as well as the decision of the court including any sentence, order or sanctions of the court. Implicit herein is the training of officials in recording the proceedings in the correct 'prescribed' manner. The use of the word 'prescribed' could be interpreted in a traditional sense as well as in the non-traditional 'common law' interpretation. In the latter, resources (e.g. computers, sound equipment) are required to record and maintain thorough records of court proceedings.

In addition to the above the issue as to whether the decisions of a traditional court would create legally binding precedents should also be addressed? There may also be costs involved in the transporting of records from the Traditional Court to the Magistrate's Court. Furthermore, the transfer of cases from Traditional Courts to Magistrates' Courts involves logistical financial implications particularly in areas where the magistrate court is situated far from the Traditional Courts.

Section 5 in the Memorandum states that 'Clerks attached to the magistrate courts will provide administrative support to the traditional courts'. The determination of the type of administrative support needs to be determined and whether these clerks will be based at the Traditional Court. It would be impractical to have clerks stationed at the Magistrate Court, providing remote administrative support. If so, this would have financial as well as communication implications.

Training programmes for presiding officers

72. The Bill provides, in the Memorandum, that the financial implications for the state will result from the training programmes for the presiding officers. It fails to consider the training required for court officials. Furthermore it fails to consider the training that is necessary for Magistrates in order that they hear matters. This issues needs to be addressed. If the aim of the Bill is to ensure that African custom is adopted and recognized, there is urgency to steer clear of marginalizing the African customary system as was the case in the past.
    (see extract below: *Fosi v Road Accident Fund and Another*)

"Indigenous African Customary Law has occupied an unfortunate position in the legal history of our country. The fact is that it was hardly recognized by the law-makers and was accordingly scarcely applied in South African Courts. It enjoyed the status of being known that it existed and its continued existence was merely tolerated as a necessary evil."[32]

Physical costs of the court

73. The Traditional Courts must also be maintained and new courts possible built, it is unclear which department will be responsible for this cost.

[32] Case No. 1934/2005 (Reportable) High Court of South Africa (Cape of Good Hope Eastern Circuit Local Division at George – delivered on 21 February 2007) para 16

The rights of children are not adequately protected in the Bill

74. There are only two provisions in the Bill that address children. That is, clause 5(2)(c) which prohibits a Traditional Court from hearing and determining any matter relating to the custody and guardianship of minor children, and clause 9(2) which states:

"(2) During proceedings of a traditional court, a presiding officer must ensure that—

(a) the rights contained in the Bill of Rights in Chapter 2 of the Constitution are observed and respected, with particular reference to the following:
(ii) that vulnerable persons, particularly children, disabled persons and the elderly, are treated in a manner that takes into account their particular vulnerability;"

The constitutional rights of children that are relevant for the purposes of the Bill are found in section 28 as follows:

" Every child has the right-
(e)to be protected from exploitative labour practices;
(f)not to be required or permitted to perform work or provide services that-
(i)are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;"

There is limited guidance as to the appropriate sanctions that could be imposed upon children in relation to criminal matters.

Further, the constitutional right that children have to legal representation in a *civil* matter is removed by clause 9(3) of the Bill.

The rights of women are not adequately protected in the Bill

75. There are a few provisions that address gender in the Bill. For example, clause 9(2)(a)(i) of the Bill states:

> "(2) During the proceedings of a traditional court, a presiding officer must ensure that –
> (a) the rights contained in the Bill of Rights in Chapter 2 of the Constitution are observed and respected, with particular reference to the following:
> *(h)* <u>That women are afforded full and equal participation in the proceedings, as men are</u>;" (*own emphasis)*

76. South Africa is a party to the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, has ratified the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa and specifically protects the right to equality and the constitutionality of affirmative action in section 9 of the Constitution.

77. Given the pervasiveness of gender equality in South Africa and the history in many of our traditional communities of women's specific exclusion[33] and even treatment as a minor, it ought to be expected that the Bill would go further in ensuring that there are affirmative action measures to ensure that full and equal participation at all levels of women in Traditional Courts.

78. Issues that need to be addressed in this regard are the following:

There is no provision in the Bill that guarantees the appointment of women as presiding officers.

[33] *See Bhe and Others v Magistrate of Khayelitsha and Others* 2005 (1) SA 580 (CC)
" It was a form of discrimination [referring to exclusion of women from inheriting] that entrenched past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order." (Paragraph [91] at 621E - F.)

Bearing the above in mind, the legislator should be mindful of this omission as not specifically providing for the involvement of women, other than as parties to the proceedings, would cause serious controversy.

Finally, customary law is not static in nature but changes with value system in the community.

Miscellaneous issues

79. The Bill should seek to use disability friendly language such as "persons with disability"[34]

80. It must be noted that during discussions on the Traditional Leadership and Governance Framework Bill it was recognized that Koisan peoples fell outside of the scope of this Bill. This situation is yet to be rectified and now appears to have been repeated within the context of the Traditional Courts Bill.

81. The Bill requires a Traditional Leader to take an oath or affirmation before a Magistrate within the area of jurisdiction of the Magistrate's Court prior to commencing duties. [35] In light of the above, this clause seemingly makes the traditional leader and by implication traditional court subservient to the magistrates court rather than creating a parallel judicial system.

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[34] Clause 9(2)(ii)

[35] Clause 15 (1)

"A traditional leader who has been designated as presiding officer of a traditional court must, subject to section 23(3)*(a)*(ii) or 23(3)*(b)*(ii), take the prescribed oath or make the prescribed affirmation that he or she will uphold and protect the Constitution before the magistrate of the magistrate's court having jurisdiction or any additional magistrate of that court who has been authorised thereto in writing by the said magistrate, before he or she may perform any of the functions contemplated in this Act."

Clause 15 (1)

A traditional leader who has been designated as presiding officer of a traditional court must, subject to section 23(3)*(a)*(ii) or 23(3)*(b)*(ii), take the prescribed oath or make the prescribed affirmation that he or she will uphold and protect the Constitution before the magistrate of the magistrate's court having jurisdiction or any additional magistrate of that court who has been authorised thereto in writing by the said magistrate, before he or she may perform any of the functions contemplated in this Act.

82. The system of customary law in its very nature is consultative. It appears from the Bill that the consultation with the community is lacking. In a system such as this, the absence of due regard to the interests of community integration is alarming. The Bill diminishes the involvement of the community by stipulating that the Minister, after consultation with the Premier of the Province, designate a senior traditional leader and the Minister may after consultation with the President, designate a King or Queen recognised by the President. [36]

83. There is a need for an "opting-out"/ "choice clause".

The Bill needs an explicit provision which enables and individual to "choose" the system she/he feels should be applicable to the dispute. The omission of this clause would create controversy among complainants who wish to resolve their dispute in an ordinary court of law as opposed to traditional dispute resolution system.

We refer the legislator to the section 10(1) of the Recognition of Customary Marriages Act 120 of 1998 in which an option is granted to parties to change their marriage system from a customary system to a marriage with all the consequences of one entered into under the Marriages Act.[37]

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[36] Article 4

(1) The Minister may, in the prescribed manner, after consultation with the Premier of the province in question, designate a senior traditional leader recognised as such by the Premier, as is contemplated in the Traditional Leadership and Governance Framework Act, as presiding officer of a traditional court for the area of jurisdiction in respect of which such senior traditional leader has jurisdiction.

(2) The Minister may, in the prescribed manner, after consultation with the President, designate a king or queen recognised as such by the President, as is contemplated in the Traditional Leadership and Governance Framework Act, as presiding officer of a traditional court for the area or areas of jurisdiction in respect of which such king or queen has jurisdiction.

(4) The Minister may, at the written request of a king, queen or senior traditional leader contemplated in subsection (1) or (2), in the prescribed manner, designate any headman, headwoman or a member of the royal family as an alternative presiding officer of the traditional court, in the absence of such king, queen or senior traditional leader.

[37] Clause 10(1) Change of marriage system

A man and a woman between whom a customary marriage subsists are competent to contract a marriage with each other under the Marriage Act, 196 1 (Act No.25 of 1961). if neither of them is a spouse in a subsisting customary marriage with any other person.

Conclusion

84. The recognition of a traditional system as forum for dispute resolution is commended. However, the underlying cause for concern is that the Bill seems to be an imposition of Western values on a traditional system. The language throughout the Bill, such as referring to "traditional courts"; "criminal and civil disputes" etc. is cause for concern. If the legislator intends that this traditional system be a fully-fledged court structure then regard should be had to issues such as the constitutional guarantee of having legal representation[38] especially so if the court has the ability to issue sanctions and whether these courts have powers to set precedence.

85. Perhaps a notion to consider is whether the Traditional Court would function as a "family group conference"[39] This point reiterates the need for the legislator to decide on whether the system recognised by the Bill is a court system or whether it is a "traditional dispute resolution forum".

87. This Bill indicates that the legislature intended to create a piece of legislation within which two legal systems are merged. The merger and superimposition of the Western legal system on the traditional African system is reiterated throughout the theme of the Bill. Issues such as legal representation, sanctions, appeals and the right to a public trial all need to be addressed so as to give effect to constitutional values and principles.

88. The legislatures are strongly urged to consider the issues raised in this submission.

[38] Section 35(3)(g) and (f)
[39] A system whereby a discussion forum is instituted, taking place at a neutral venue to resolve disputes. Normally such a system focuses of healing and restoring the position of all persons involved. .Such as the model used in New Zealand – it is used mainly in youth justice issues