

**LEGAL RESOURCES CENTRE**

In re:

**TRADITIONAL COURTS BILL, B1 of 2017**

**SUBMISSIONS TO THE PORTFOLIO COMMITTEE ON JUSTICE AND  
CORRECTIONAL SERVICES**

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## 1. Introduction to the Legal Resources Centre and its submissions

1.1 The Legal Resource Centre (“the LRC”) is an independent non-profit public interest law clinic which uses law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, or historical circumstances. The LRC, both for itself and in its work, is committed *inter alia* to:

1.1.1 Ensuring that the principles, rights, and responsibilities enshrined in the Constitution are respected, promoted, protected, and fulfilled;

1.1.2 Building respect for the rule of law and constitutional democracy;

1.1.3 Enabling the vulnerable and marginalised to assert and develop their rights;

1.1.4 Promoting gender and racial equality and opposing all forms of unfair discrimination;

1.1.5 Contributing to the development of a human rights jurisprudence; and

- 1.1.6 Contributing to the social and economic transformation of society.
- 1.2 The LRC has been in existence since 1979 and operates throughout the country from its offices in Johannesburg, Cape Town, Durban, Grahamstown, Makhado, Mthatha and Mbombela.
- 1.3 As part of its mandate, the LRC seeks to address the legal needs of those who cannot afford to access the justice system through the organised legal profession. While the LRC has appeared on behalf of clients in traditional courts, that are the subject of this submission, many of our clients approach after having sought to resolve their legal problems by means of customary dispute resolution processes or having been brought before traditional courts. It is evident from the experiences of our clients that the “formal” courts are largely inaccessible to a large number of South Africans and that the traditional justice system is therefore the primary form of justice that is practically available to many. The LRC therefore believes that effective and legitimate customary dispute resolution processes as an integral part of the legal system is a key component for ensuring adequate access to justice for all South Africans.
- 1.4 The LRC has been extensively involved in many of the leading cases before the High Courts, the Supreme Court of Appeal and the Constitutional Court dealing with the relationship and interaction between customary law, civil law and the Constitution. In particular, we have sought to promote the status of customary law under the Constitution and its development to be brought in line with

constitutional principles. Matter in which the LRC was involved include:

- 1.4.1 *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC); *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) (Customary law land and property rights);
- 1.4.2 *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *SAHRC v President of the RSA* 2005 (1) SA 580 (CC); *Mthembu v Letsela* 2000 (3) SA 867 (SCA) (Customary law succession);
- 1.4.3 *Premier of the Eastern Cape and Others v Ntamo and Others* [2015] ZAECBHC 14; 2015 (6) SA 400 (ECB); [2015] 4 All SA 107 (ECB) (Identification of headman in terms of customary law).
- 1.4.4 *Pilane and Another v Pilane and Another* [2013] ZACC 3, 2013 (4) BCLR 431 (CC) (rights of customary law communities to meet).
- 1.4.5 *Sigcau v President of the Republic of South Africa and Others* [2013] ZACC 18, 2013 (9) BCLR 1091 (CC) (identification and recognition of King).
- 1.4.6 *Mayelane v Ngwenyama and Another* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC). (Customary marital property and maintenance);
- 1.4.7 *Gongqose and Others v S; Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others* [2016] ZAECMHC 1 (customary fishing rights);
- 1.4.8 *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) (Chieftanship and gender rights).

- 1.5 The LRC welcomes the opportunity to make these submissions to the Portfolio Committee on Justice and Correctional Services regarding the Traditional Courts Bill, 1 of 2017 (“the Bill”). Our submissions are informed by the experiences of customary dispute resolution mechanisms and traditional courts of the clients that we represent in Limpopo, North West Province, Mpumalanga, KwaZulu-Natal and the Eastern Cape.
- 1.6 The LRC acknowledges the significant role being played by customary dispute resolution processes and the central role of customary law in our society. However, the LRC believes that the proper recognition of customary law as an independent source of law under the Constitution, as is envisioned by our Constitutional Court, demands much more. It demands that customary law be taught, debated, developed, applied and adjudicated by lawyers, judges, scholars and students on par with the common and statute law. This would demand of law schools, of lawyers and of courts and other fora to fully recognise the legal weight and validity of customary law. Anything short of those developments will continue to see customary law – and the communities who live it – be relegated to inferior spaces and forms of justice.
- 1.7 The LRC respectfully requests to be afforded an opportunity to make oral submissions to the committee on this Bill when it is appropriate. Moreover, in light of the short deadline afforded for these submissions, we request permission to supplement our submissions at the time if needs be.
- 1.8 These submissions will proceed as follows:

- 1.8.1 First we will comment on the information that the Committee will at a minimum require to meaningfully engage with the Bill before it;
- 1.8.2 We briefly set out the relevant statutory and factual context to be considered along with the Bill;
- 1.8.3 Then we look back at the most severe criticisms of the 2008 and 2012 Traditional Courts Bill, and comment specifically on how the current Bill deals with those critical issues;
- 1.8.4 Before turning to a clause by clause analysis, we emphasise what we submit this Bill should do: facilitate the promotion and development of living customary law;
- 1.8.5 Finally, we provide a preliminary clause by clause analysis.

## **2. Information that should be before the Committee and the public in making their submissions**

- 2.1 The LRC assumes that the critical challenges that we observe in rural areas every day and that inform our submissions, also formed part of the information that informed the Department in drafting this piece of legislation. In this regard, we have asked the Department on more than one occasion to make available the Socio-Economic Impact Assessment ('SEIA') that should have accompanied the Bill when it went to Cabinet and before it was introduced to your committee. That document would shed light on the particular challenges that the drafters took into account in writing this Bill and would assist the LRC and its clients greatly in understanding the intention of the protective mechanisms in the Bill. It would also allow the LRC to make input on specific challenges that may not have been identified by the Department. It should also shed light on the budgetary implications of this Bill.

2.2 Most importantly, it is imperative for this Committee to have the SEIA before it if they are to have any chance of meaningfully engaging with this piece of draft legislation as the Constitution requires. It is submitted that the meaningful participation of stakeholders in the public hearings of this Bill will only be ensured if the Department releases its SEIA to the committee and the public.

2.3 Moreover, this Bill seeks to regulate what the Constitutional Court calls “living customary law”. As the Court has stated:

*“The official rules of customary law are sometimes contrasted with what is referred to as ‘living customary law’, which is an acknowledgment of the rules that are adapted to fit in with changed circumstances.”<sup>1</sup>*

2.4 It is clear from this statement that, in order to properly evaluate whether the Bill is likely to legitimately (and therefore successfully) regulate customary dispute resolution mechanisms throughout the country, and in its multiple configurations, it is essential to observe what actually happens in practice, and not simply to rely on “official” versions of the law. As the Constitutional Court noted in *Bhe*:

*“In Mabena v Letsoalo,<sup>2</sup> for instance, it was accepted that a principle of living, actually observed law had to be recognised by the court as it would constitute a development in accordance with the ‘spirit, purport and objects’ of the Bill*

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<sup>1</sup> *Bhe* at paragraph 87. See also para 85: “What needs to be emphasised is that, because of the dynamic nature of society, official customary law as it exists in the textbooks and in the Act is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes which continually take place.”

<sup>2</sup> *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

*of Rights contained in the interim Constitution.*<sup>3</sup>

2.5 In undertaking the task of identifying the living law, one has to have regard to the actual practice of each particular community. As the Privy Council observed in the context of land rights in *Amodu Tijani v The Secretary, Southern Nigeria*,<sup>4</sup> in a passage approved by the Constitutional Court,<sup>5</sup>

*“To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.”*

2.6 This is the legal principle that applies to the determination of the character and content of the customary law of a community. For that purpose, what is required is *“the study of the history of a particular community and its usages”*. It is necessary, however, to obtain information that is accurate and reliable, that goes beyond the immediate experiences of only a few individuals.

2.7 In his presentation of the Bill to your committee on 31 January 2017, Deputy Minister Jeffery hinted at the huge differences in the current operation of traditional courts or customary dispute resolution mechanisms, in part because of the differences in apartheid and homeland legislation. In the former Bophuthatswana, for example, traditional courts operate as formal structures akin to

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<sup>3</sup> *Bhe* at paragraph 111.

<sup>4</sup> [1921] 2 AC 399 (PC) at 404.

<sup>5</sup> *Alexkor* at paragraph 56; see also the judgment of Ngcobo J in *Bhe* at para 156.

Magistrate's Courts. In other provinces, the mechanisms largely involve small units, like families or villages, gathering informally in settings appropriate for the purpose. The Committee will need to understand these significant differences in practice in order to understand the impact that the Bill will have on existing customary structures. At the same time, communities that may be affected by the operation of the Bill must be given full opportunity to voice their understanding of how the Bill will impact upon, support or undermine their existing practice.

- 2.8 The LRC thus appeals to the Committee to ensure deep, broad and thorough consultation with affected peoples across the country in assessing the contents of this Bill and potential amendments. In any event, the constitutional imperative of facilitating meaningful public engagement appropriate to the nature and importance of a piece of legislation, would require it.

### **3. The statutory and factual context**

- 3.1 This Bill will not operate in a vacuum. On the contrary, it slots into the legal framework created by the Traditional Leadership and Governance Framework Act 41 of 2003 ("the Framework Act") and the provincial pieces of legislation enacted within this framework. When the Deputy Minister of Justice and Constitutional Development introduced this Bill to your committee earlier this year, he insisted that the Bill should be evaluated on its own and that the criticism of the related legislation is irrelevant to this process.
- 3.2 We respectfully and strenuously disagree. The Bill explicitly relies on the Framework Act in its definition of traditional leader as a

leader recognised “in terms of an Act of Parliament”. That Act of Parliament is the Framework Act. Tied to the definition of a traditional leader in the Framework Act are the definition of the traditional community concerned, its boundaries, and the identity of the traditional council concerned.

3.3 If the Bill was intended to depart from the Framework Act boundaries, it would surely have done so explicitly. Instead, it is entirely silent on jurisdictional boundaries. It is difficult to envision any court operating in the absence of jurisdictional boundaries and given the inclusion of an “opt out” clause in clause 4 of the Bill, it was clearly not the intention to create that situation here. It must therefore be assumed that the intention is for the Bill to default to the boundaries of the Framework Act.

3.4 That places the Framework Act, and in particular the boundaries it entrenches, squarely at the centre of the Bill currently before this committee. In the circumstances, we must at least point to the significant problems that mark those very boundaries.

3.5 The genesis of the problem lies in the Framework Act and the policy decision<sup>6</sup> that despite the fact that the traditional boundaries inherited in 1994 were largely the result of colonial and apartheid architecture and covered all the former homeland areas, and despite the exacerbation of these illegitimate boundaries by, in

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<sup>6</sup> The draft White Paper on Traditional Leadership published in 2003 still indicated that the then Department of Land Affairs would determine (presumably new) boundaries of traditional community areas. The final White Paper omits this paragraph and is silent on how boundaries will be determined. However, when the Framework Act was debated in parliament, the understanding was that every community would freshly apply for recognition and the determination of its boundaries in terms of section 2 of the Act. However, the transitional provision, entrenching the boundaries drawn in terms of the Bantu Authorities Act of 1951 and contained in section 24 of the Act, was slipped in at the last moment with massive repercussions.

some cases, the imposition of illegitimate traditional leaders on the basis of their sympathy towards the apartheid government, the regulation of traditional leadership under the Constitution will use those same boundaries as the foundation of the recognition of traditional communities.<sup>7</sup>

3.6 This approach was particularly ironic given that the Department of Justice itself elaborated on this unfortunate history in its 1999 Executive Summary of the Status Quo Report on Traditional Leaders and Institutions. This report (p 5) refers to the problems of grouping together “communities belonging to different tribes to form a tribal authority”, and the resultant widespread boundary disputes.

3.7 The Framework Act did attempt to create a mechanism whereby communities or individuals could lodge complaints about what they considered as illegitimate leaders or boundaries. This mechanism was called the Commission on Traditional Leadership Disputes and Claims and was initially a national commission. However, it soon became clear that the Commission, commonly referred to as the Nhlapo Commission, would never even scratch the surface of the vast number of disputes lodged. As a result, provincial committees were established to deal with disputes at a provincial level. These committees remain overwhelmed to this day, five to ten years into their mandates. In Limpopo alone, the provincial government announced that more than 500 boundary and leadership disputes were lodged. None of these have been settled. In other provinces where the committees have come to some decisions, the

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<sup>7</sup> The Framework Act deems the boundaries established in terms of the Bantu Authorities Act of 1951 to be the default boundaries for Traditional Council jurisdictional areas, and converts existing tribal authorities into "new" traditional councils provided they include a minority of women and "elected" members.

committees are commonly viewed as politically captured because of their deference to the status quo and the problematic research and reasoning on which they rely. As a result, grievances about imposed boundaries and leaders remain widespread.

3.8 One more relevant aspect of the Framework Act should be considered: neither that Act nor any of the provincial pieces of legislation under its Framework provide for a single mechanism for an ordinary community member to personally hold a leader to account if that leader acts in contravention of customary law or of the provisions of any of the relevant pieces of legislation. Worse still, the customary law mechanisms that exist under customary law are negated by these statutes and therefore can also not be relied upon. That places ordinary community members in a particularly vulnerable position.

3.9 It is within this context that the Bill before the committee must be considered. The duty of the legislature is in particular to protect the rights and interests of those most vulnerable. While there is thus no doubt that countless traditional leaders are serving their communities with honour and that thousands of people feel themselves at home within their traditional boundaries, the Bill should specifically ensure the safety of the many people not in that position.

3.10 In order to illustrate the point, I wish to describe an actual situation in which the LRC has been involved. We will not use the real names of people and places in order to protect their identity.

*Mr Mabunda lives in a village in Limpopo province. Mr Mabunda and his family*

were forcibly relocated to a farm called Geduld in 1981. When they arrived at Geduld, they found other people who had been dumped there six years earlier. Mr Mabunda's family received a stand and two tents and, until 2005, paid rent for the stand to the government. During this time, the people who had been thrown together on Geduld became a community. They had an elected structure that governed the village. But in 2005, a Chief in the area announced that, in terms of the 2003 Framework Act, Geduld fell under his jurisdiction and so did everyone who lives there. From that day, they were forced to pay him rent in addition to the various forms of 'tribal tax' that he charged his other subjects. Perplexed, some people of Geduld resisted by refusing to pay these charges to a Chief that they did not recognize as their own. When the Chief installed a headman in the village who took over the power of allocating land, resistance grew. Resisters were punished by, for example, being denied land allocations, or being forced to pay outrageous amounts to bury their loved ones. The 2003 Framework Act provides no mechanism for Mr Mabunda to assert that he does not belong to this Chief or his jurisdiction, despite the fact that he ended up in the area due to forced removals. It does not even provide a mechanism by which he can hold the Chief to account. Those mechanisms are reserved for the Royal Family or the Chief's traditional council, who, unsurprisingly, don't use it. Instead, the Act has emboldened the Chief to create his own tribal police who round up resisters and other dissidents in the community and drag them to the tribal court, which often sits in the middle of the night, where they are summarily adjudicated to be guilty of the crime of 'disrespecting the chief' and fined accordingly. Several people, among them elderly men and women, return from such an ordeal with the bruises of blows from pick axe handles. Mr Mabunda refused to pay one of those fines, and was soon summoned to the local Magistrate's Court, at the informal request of the Chief, to answer the charge of 'disrespecting the Chief' in front of a Magistrate. When he continued to resist, he was abducted by the tribal police, held captive for more than 30 hours and repeatedly beaten. Several of the people in that community who had suffered injuries at the hands of the 'tribal police'

*attempted to open cases of assault at the local police stations. They were invariably turned away because police officers often consider 'tribal issues' to be beyond their jurisdiction.*

3.11 The test for the Bill currently before the Committee must be whether it will protect Mr Mabunda and others in similar situations. The LRC is of the view that the Bill before the committee makes significant strides in ensuring the necessary protections for vulnerable people within traditional communities are in place. However, questions remain. Before raising those issues, however, we wish to remind the committee of the challenges faced by the previous versions of the Bill.

#### 4. The 2008 and 2012 Traditional Courts Bill

4.1 While the version of the Bill before this committee differs greatly from the earlier versions of the Bill, it is helpful to revisit the analyses of the earlier Bills in evaluating the Bill before us.

4.2 We submitted in 2012 that the old version of the Bill failed because it **superimposed statutorily recognised structures in place of the many institutions currently engaged in customary dispute resolution processes**. In ignoring (and overriding) the courts that operate at village, council and family level, the Bill undermined the dynamics that mediate power and contribute to accountability in rural areas. In doing so, it also subsumed and undermined courts that are in some instances used and supported by people who dispute the legitimacy of the boundaries of their communities.

- 4.3 We were further concerned about **discrimination against women in many customary and traditional courts**. We were of the view that legislation concerning customary courts should take particular care to avoid entrenching patriarchal power relations and to provide practical mechanisms towards the realisation of substantive equality for women in the context of traditional courts.
- 4.4 The LRC was deeply concerned about how the 2012 Bill **entrenched the controversial tribal authority boundaries** already discussed, and recognised only senior traditional leaders and those of royal blood as presiding officers.
- 4.5 The 2012 Bill provided formally appointed traditional leaders with **state-sanctioned coercive powers** to force people who live within a court's jurisdictional boundary but who reject its legitimacy to appear before it, and authorised the court to strip them of their customary entitlements to land, water or community membership and to perform forced labour. The strong objection that the LRC had to this approach was not merely based on constitutional principles, but on the actual experiences of clients who are continuing to endure this very treatment in provinces such as Limpopo and the North West where apartheid traditional courts legislation created these very powers.
- 4.6 Other particular concerns raised by the LRC in 2012 included:
- 4.6.1 the drafters of the Bill had failed to take into account the reality of the way that traditional courts are currently exercising judicial powers and functions. In particular, the LRC argued that the drafters of the bill had taken a **“top-**

**down” approach** to the institutional arrangements made in the Bill, rather than building on structures that already exist;

4.6.2 the 2012 Bill seriously **jeopardized the realisation of the constitutional imperative, contained in section 39(2), of the development of customary law** by courts of law if this development is relegated to a separate court system ruled by traditional leaders as the exclusive creators and adjudicators of customary law.

4.7 Critically, the LRC submitted that the Bill failed to recognise that the **content of customary law is contested** in many areas, particularly between traditional leaders and ordinary people. By centralising power in the hands of traditional leaders, the Bill enabled traditional leaders to enforce controversial versions of customary law that favour their interests and downplay the customary entitlements of subjects (e.g. land rights and rights to participate in decision-making processes). In this regard, there were indications that the Bill seeks to enforce customary law not by the innate legitimacy of traditional courts and the acceptance of customary law, but by coercive measures.

4.8 As you will be aware, the 2012 Bill never made it through parliament. It was rejected repeatedly by community members, academics and lawyers at the hearings held, and yet the committee was never able to meaningfully engage with those submissions. Rather the then committee allowed the Bill to lapse. It is critical that this Committee learns from the failures of both the 2008 and 2012 processes and design a fresh process that is constitutionally compliant.

4.9 We would like to comment on the adequacy of the Bill now before the Committee in light of these criticisms of the previous versions:

(a) The imposition of statutorily recognised structures in place of existing customary structures

4.9.1 With regards to the imposition of statutorily recognised structures in place of the many customary structures at lower community levels that engage in most of the dispute resolution in communities, the new Bill recognises the existence of other structures often at lower levels like the family, ward or village level.<sup>8</sup> This is significant. However, important questions remain, such as:

4.9.1.1 The wording of the recognition of the other levels of dispute resolution suggests that those are not regarded as courts (see Preamble). That would imply that this Bill only applies to what the Bill defines as courts. None of the protection will thus extend to the lower levels of dispute resolution. Given that by far the most disputes are heard in those fora, this poses an obvious problem.

4.9.1.2 In fact, it appears that the Bill may just be paying lip-service to its recognition of the lower level fora, by creating a hierarchy in status between chief and headmen 'courts' and lower level mechanisms not regarded as 'courts'. The basis for this distinction appears to be arbitrary, unless it is based on the

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<sup>8</sup> The Preamble states: "recognising that there are different levels of dispute resolution in terms of customary law, in addition to the role played by traditional courts".

principle of empowering statutorily recognised traditional leaders<sup>9</sup> which was a severe criticism of previous versions of the Bill.

4.9.1.3 The issue is further confused by Clause 6(3), which provides that “the traditional court system is made up of such different levels as are recognised in terms of customary law and custom”. Does this mean that the lower level fora are regarded as courts and that the Bill applies to them?

4.9.1.4 It should be noted that an answer to this question will have huge budgetary implications for the implementation of this Bill. If all fora are regarded as courts, for example, they will all require clerks.

(b) The protection of women

4.10 With regards to the protection of women as a particularly vulnerable grouping in some traditional settings, the 2017 Bill makes an effort at writing express protections for women into the provisions of the Bill. For example, it provides that:

4.10.1 Traditional Courts must promote and protect the representation and participation of women, as parties and members thereof (5(2));

4.10.2 The relevant Minister must put measures in place to ensure such promotion and protection happens, and must report to Parliament about the measures taken (5(3)(a));

4.10.3 The Gender Commission must report to Parliament on the participation of women in traditional courts (5(3)(b)).

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<sup>9</sup> Such an interpretation is supported by Clause 5(1)(b) of the Bill which provides that a traditional court must be convened by “a traditional leader or any person designated by the traditional leader”.

4.11 There must remain a concern, however, as to the implementation of these measures. It is suggested that the protection of women can only be effective if, at a minimum, the suggested “opt out” provision in clause 4(3) is implemented successfully. We provide suggestions as to how that clause can be improved and implementation ensured further below.

(c) Entrenching and empowering apartheid boundaries

4.12 With regards to the concern, expressed in 2012, that the then Traditional Courts Bill further entrenched and empowered the illegitimate and problematic boundaries, those concerns are not addressed in the current Bill. We explained why above. We do submit that the provision of an “opt out” clause does go some way in ameliorating the difficulties of people summoned to the court of a chief they don’t recognise. Consider the example of Mr Mabunda above. The Bill currently confirms the illegitimate boundaries that he is trying to resist, but at least he will be able to refuse the summonses to the traditional court – if, of course, that clause is effectively implemented.

4.13 While this will provide relief to Mr Mabunda, it also means that he is still not allowed to voluntarily affiliate with the community, custom and leadership structure which he recognises. The default is still that he is captured within an illegitimate boundary and the onus remains on him to take steps to remove himself from the situation and the jurisdiction of the court. Clearly within the context of Mr Mabunda’s situation described above, it will not be a simple task

and may well open it up to retaliation. The Bill is silent on how such retaliation may be addressed.

4.14 Thus, for all the talk in the Bill of recognising “voluntary affiliation” as fundamental to customary law, the Bill in fact does not give credence to this principle.

(d) State-sanctioned coercive powers

4.15 The LRC is confident that, if implemented well, the provision of an “opt out” clause should address this concern that existed with the 2012 Bill.

(e) Customary law is contested

4.16 The LRC would reiterate the fact that customary law and its contents remain deeply contested. That has two major implications for the Bill:

4.16.1 It challenges this committee to ensure that it develops a nuanced understanding of these contestations and ensure that the Bill does not exacerbate contestations or, more serious still, curb the potential for customary law to develop to become and remain in line with the Constitution and the needs of the community concerned.

4.16.2 Secondly, it highlights the fact that the customary law that will be applied by the courts regulated by this Bill, will often itself be contested. At present, the Bill gives no guidance whatsoever as to how traditional courts must deal with this question. The Constitutional Court, in Shilubana, set out clear principles for establishing the contents of customary

law. The Bill must require the application of these principles in establishing the customary law that will be applied (at least in cases where there is a dispute over the contents of the applicable customary law).

**5. The constitutional imperative to recognise and develop customary law**

5.1 Section 39(2) of the Constitution provides that every 'court, tribunal and forum' must develop customary law to 'promote the spirit, purport and objects of the Bill of Rights'. As in most African countries where customary law is given constitutional recognition, however, few presiding officers in formal courts have sufficient knowledge to properly apply customary law without resorting to often inappropriate statutory codifications of custom exclusively. While we tend to think of the marginalisation of customary law as an independent source of law as a relic of colonial and apartheid courts, there is scant evidence that post-constitutional judges of the High Courts, Supreme Court of Appeal and, to a lesser extent, of the Constitutional Court, appreciate the constitutional status of custom. While section 39(3) of the Constitution recognises that customary rights exist separate and alongside the common law, finding its source directly in the Constitution, very few courts have ever been able to give this recognition to customary law. This is simply a result of a lack of knowledge.

5.2 It is our submission that the constitutional recognition of customary law will remain nothing more than a promise if there is not an urgent and dedicated attempt to assert its place within the formal state law system and its courts. Judges, magistrates and the

judicial officers of customary courts must all be trained to understand the status of customary law under the Constitution, the rules of evidence relating to it and how it is to be applied in the face of statutory law that regulates it (in terms of s 211 of the Constitution). History has taught us the painful lesson that the relegation of customary law to a separate legal system – as was the colonial habit – only diminishes the status of customary law to an inferior relic. This is not what the constitutional recognition of customary law envisioned.

- 5.3 What this Bill should not do is entrench the separate nature of customary law as a legal system which will make it increasingly difficult for the formal legal system to engage with custom and hence develop it. This, we submit, is how custom becomes irrelevant. Presiding officers in ‘traditional courts’ could become the only ones to develop customary law in terms of s39(3), while the common law and statutory law will continue to enjoy the benefit of robust interpretation and development in courts at all levels. There can be little doubt that, given this scenario, customary law will remain an inferior system of law.
- 5.4 What the Bill should do, in fact is constitutionally bound to do, is recognise and facilitate the recognition and promotion of customary law. We submit that that in the absence of the Bill giving proper recognition to the voluntary nature of affiliation in customary law, the Bill will continue to fall short in this regard.

## 6. **Clause by clause commentary**

- 6.1 In this section we deal briefly with more detailed concerns with specific clauses of the Bill. However, our commentary remain provisional, however, pending clarity on questions raised here such as whether this Bill applies to all customary dispute mechanisms or only the ‘courts’ of statutorily recognised traditional leaders. We reserve our rights to make necessary further submissions when clarity is provided.
- 6.2 We note that in its *Preamble*, the Bill explains that it is intended to “address certain abuses prevailing in some traditional courts as they currently exist”. In the absence of clarity which particular abuses this refers to, it is difficult to evaluate the effectiveness of the Bill in doing so. An opportunity to read the SEIA that accompanied the Bill will assist in this regard.
- 6.3 The *Preamble* also claims that the Bill will “enhance accountability in the resolution of disputes in accordance with evolving customary and practices in the new constitutional dispensation”. While the “opt out” clause provides for the strongest mechanism of accountability in the Bill, we have explained that this mechanism is not one that exists in customary law. Rather, customary law would provide for voluntary affiliation of people or “opt in”.
- 6.4 *Clause 1*: the definition of “traditional court” read with the definition of “court” does not clarify whether these courts are meant to fall within the ambit of Section 166 of the Constitution or not. Clarity is required.

- 6.5 *Clause 1:* the definition of “customary law” should explicitly refer to the principles laid down by the Constitutional Court in identifying the contents of the applicable customary law.
- 6.6 *Clause 2:* the principles set out in this clause are laudable, but then undermined by the absence of an “opt in” provision in the rest of the Bill.
- 6.7 *Clause 4:* we note that clauses 4 and 5 place tremendous responsibility on the clerks of traditional courts. The Bill does not explain what qualifications or training will be required of clerks and also makes no mention of the budgetary implications of appointing what will be hundreds or thousands of clerks across the country.
- 6.8 This information will be critical to assessing the potential of effectively implementing this clause.
- 6.9 *Clause 4:* this clause should at a minimum provide that the clerk and/or Justice of the Peace should ensure that the person summoned understands his/her right to opt out of the traditional court proceedings. Failure to do so should be a review ground.
- 6.10 *Clause 4:* The LRC is concerned with the powers of the court to “counsel” or “guide” persons before it even in the absence of one of the parties. Given that these are powers currently unknown to courts in South Africa and not clearly delineated in the Bill, it potentially undermines the “opt out” provision.
- 6.11 *Clause 11:* Review grounds should at least extend to the normal review grounds applied to courts. It should also explicitly provide for the non-compliance of the clerk with the requirement of ensuring

that the person understands his/her right to opt out, as a review ground.

6.12 *Clause 12*: It is entirely unclear what is meant by the escalation of matters to “a customary institution or structure in accordance with customary law and custom”. We reserve our right to comment on this section once it is clarified what structures are referred to.

6.13 *Schedule 1*: the Schedule provides that traditional courts are competent to “advise” on several issues which they are not competent to adjudicate on. It is entirely unclear what the power to “advise” entails and, in light of the critical issues listed for “advisory” powers, we submit that this should be scrapped.

7. We once again thank the Committee for the opportunity to make submissions and look forward to hearing from you about the future conduct of the hearings.