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SUBMISSION BEFORE THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON TRADITIONAL COURTS BILL (b15-2008)

Honourable YI Cassim

Thank you for allowing us the opportunity to make our written submission to yourself and the Honourable Committee on Justice and Constitutional Development.

We would like to firstly thank and appreciate the extent to which the honourable committee went in espousing the general principles enshrined in the constitution regarding the role and status of the Traditional Leadership institution in our system of Government through this bill. The bill however like any other form of representation of human effort does have its few shortcomings.

Our contribution to the bill in this regard is aimed at putting more meat at the enhancement of the effectiveness of the Traditional Justice system which the Traditional Court serves as an instrument to achieve such in society.

1. The bill is silent on the general appointment of the traditional court staff including but not limited to traditional police constables, court orderlys and prosecuting officers which have always been an important operational feature of the Traditional Court system from time immemorial albeit in a traditional form. This structure gives effect to an organized traditional court system where law breaking citizens can be subpoenaed, brought to court, prosecuted and judgment dispensed appropriately.

The obscurity of this important operational feature of the Traditional Court in your bill will lead to a disorganized and fluid structural make up of the court functionary which will create cross-purpose functionalism in the court.

Cross-purpose functionalism in any court may hamper the efforts of bringing a fair trial to citizens. In this case one thinks of a situation where an Inkosi or any presiding officer performs both functions of prosecution and judgment.

The bill needs to make provisions for the continuity of existence and recognition of this structure in the traditional court system if they are to be made effective, efficient as well as enhance their integrity as contemplated in section 2(d) of the bill.

Even though the Traditional Court system customarily permits members of the community to have a say during a hearing of a dispute there however always exists a need for a dedicated court officer who traditionally serves as the initiator of proceedings of the disputing parties in a Traditional Court and that is the officer referred to as a Traditional Court Prosecutor. Similarly citizens have to be served with subpoenas which have to be delivered by authorized tribal constables.

A traditional court orderly perform functions of maintaining order in the traditional court, calling and directing witnesses and so on. We submit that the traditional court police must be appointed and be accredited in terms of the provisions of the Criminal Procedure Act 1977 if they are to be effective against modern day law breakers.

2. The bill directs the minister to make regulations on the matter of how persons who have not complied with sanctions imposed by traditional courts must appear before them. We would like to respectfully submit to the minister for the adoption of procedure laid in section 33(1) of the KwaZulu Amakhosi and Iziphakanyiswa Act No.9 of 1990 which empowered the traditional court system to cause such persons to be arrested by the police and be brought before the magistrate on such defaults relating to criminal matters. The magisterial process would punish the offender by way of imprisonment!

The major problems of dispensing effective justice currently faced by traditional courts is whereby offenders in a traditional community break the law and have no possessions including livestock which traditional courts could resort to in punishing the offenders and restoring justice to the victims of such offences. The bill contemplates the enforcement of the traditional court sanction by way of section 11(d) which provides for execution which in our view will still remain a deluding conception if the offender has no possessions or livestock.

3. Section 17 of the bill provides for the minister to make resources available at the magistrates court to assist traditional courts to perform their functions. We submit that the wording "may" must be substituted for "must" in other words the bill must compel the minister to make such resources available if the traditional courts are to be effective.
4. Section 20(c) contemplates punitive sanctions for non-attendance of traditional court proceedings without sufficient cause. When the minister makes regulations we respectfully submit that the contempt of court penalties match or supersede those of Magisterial and other higher courts

of the land so that appropriate dignity in accordance with African custom can be restored to traditional courts.

With modern day development bringing all forms of change and perception in society, the traditional court has suffered a major social indignation and disparagement. The tendency has developed in society with the advent of modern tribunals (Magistrates and High Courts) to view traditional courts as of lower rank in the administration of justice. The shortcoming in modern society's view in belittling traditional courts is that of value judgment whereby modern society attaches lesser importance on matters which fall within the purview of our traditional justice system when such matters are in fact of significant economic and socio-cultural concern to traditional communities residing within areas of jurisdiction of traditional courts. We submit that the restoration of the dignity of the traditional court could be restored by giving it more teeth in law to provide for a proper recourse on those disrespecting its honorable forum

We would therefore like to respectfully thank your committee for this opportunity to present our contribution to your bill trusting that it will be considered seriously and be taken through in your next stages of drafting the proposed legislation on Traditional Courts.

Thank you honorable Chair.