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

SUBMISSION ON THE TRADITIONAL COURTS BILL OF 2008

By Nomaswazi Ngubane

Rural women's independent rights to land

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

5. Women in rural areas are often seen as people of a lower social status and without economic power. Therefore, women rarely stand a chance of being part of a traditional council composed mostly of men who are in many instances biased against women and resistant to the notion of sharing real authority with women.
6. I therefore, submit that the Bill does not adequately address the real, day-to-day discrimination currently, as well as historically, experienced by many rural women in the traditional justice system. Rather, I believe that the Bill is likely to further lend legitimacy to the unequal and patriarchal power relations to the further detriment of many women's ability to have access, control and ownership of land as well as justice in the rural areas.
7. The pervasive and constitutionally impermissible role that traditional leaders are accorded under the Traditional Courts Bill of 2008, and the negative impact that this is likely to have on women, has been recognized by many women in the rural areas. As rural women we accordingly challenge the constitutionality of the Traditional Courts Bill on various grounds including, that it infringes upon the principle of separation of powers, and the rights of women not to be discriminated against in terms of section 9(3) of the Constitution, by impermissibly conferring on traditional leaders' executive powers incompatible with the role of traditional leadership under the Constitution.
8. Given the extensive powers that the TCB confers upon the traditional leader as a presiding officer in respect of both ownership and administrative functions on communal land, I submit:
 - 1.1. that by giving traditional leaders extensive "executive like" powers, the Bill is likely to reinforce patriarchal power relations to

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

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

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

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

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

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

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

13. This notwithstanding, women continued to occupy and use the land. It is, therefore, not surprising that in most rural areas that I have resided in, the cultivation of arable land remains the prerogative of women. Despite the fact, however, that women are the primary users and occupiers of rural land, old order rights held by men denied the family based nature of land rights in extended families and ignored their use and occupation rights.

14. In addition, African customary law did not enjoin the male head of the family and sole holder of family property to protect the property of family members who had use and occupation rights in it. To the contrary, the inheritance laws imposed a rigid rule of primogeniture which prevented women from inheriting land. The insecure tenure of African women is, therefore, as a result of past discriminatory laws, including customary law and practice.

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

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

17. And while Clause 9(3)(b) seems to offer women equal participation in a proceeding before a traditional court by specifying that a party may be represented by "his or her wife or husband, family member, neighbors or member of the community", this must be done "in accordance with customary law and custom", which ultimately undermines any supposed

given benefit, since the interpretation of “custom” almost invariably favors men.

18. For the reasons cited above and others, we believe that the limited attempts to align the traditional justice system with the Constitution in the current Bill are neither realistic nor sufficient given the documented dynamics of inequality, exclusion and silencing of women in tribal court settings.

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

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

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

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

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

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

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

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

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

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

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

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

- 1.3. the Traditional Leadership and Governance Framework Act provide for measures to ensure that the women's quota is **not** made up of acquiescent female relatives that are appointed by the traditional leader; but to our experience we know traditional leaders like Mr Sondelani Zondi at Vulindlela in KZN whose mother is member of his traditional council.
 - 1.4. In the context of the existing dynamics which undermine, silence and consequently exclude women, the 30% women's quota is too low.
44. I believe that this will not create the kind of environment where women can be independent and support one another in challenging discriminatory structures and stereotypes. In view of the fact that women are neither properly represented nor respected in existing traditional authorities, the TCB will, by giving them extensive powers over communal land, reinforce patriarchal power relations that impact negatively on women.

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

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

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

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

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

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

Thanks You

Nomaswazi Ngubane (86 years old)

Address: c/o 38 Valley Road, Sea Cow Lake – Durban 4051

Tele/fax: c/o 031 579 4559