The Traditional Courts Bill in the Context of Other Laws Dealing with Traditional Leadership

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The Traditional Courts Bill cannot be understood in isolation from the package of other laws dealing with the powers of traditional leaders. The first of these laws is the Traditional Leadership and Governance Framework Act of 2003. The Framework Act has since been complemented by provincial laws dealing with traditional leadership enacted in the different provinces.

The second major law is the Communal Land Rights Act (CLRA) of 2004, the controversial national law dealing with the powers of traditional councils in relation to land administration and transfer of title. The CLRA has not yet been brought into operation. Various rural communities have challenged its validity on the basis that the parliamentary procedure was inconsistent with the Constitution, and that its provisions breach the equality and tenure security provisions of the Constitution. The case was heard in the Pretoria High Court in October 2008 and judgment is still outstanding (as at October 2009).

Opposition to the package of laws does not stem from opposition to the institution of traditional leadership, or to customary law. There is widespread acceptance of the valuable role played by customary law and the need for indigenous legal processes to be recognised and supported. The controversy relates to the distortion of customary law, and the way in which the new laws bolster unilateral chiefly power and undermine indigenous accountability mechanisms thereby impacting on power relations in former homeland areas. The laws are criticised for entrenching the colonial and apartheid distortions and divisions that were central to the creation of the Bantustan political system and used to justify the denial of equal citizenship to all South Africans

This short document argues that the Traditional Courts bill, in the context of the package of other laws, undermines the 2007 ANC Polokwane resolution to:

> Ensure that the allocation of customary land be democratised in a manner which empowers rural women and supports the building of democratic community structures at village level, capable of driving and coordinating local development processes. The ANC will further engage with traditional leaders, including Contralesa, to ensure that disposal of land without proper consultation with communities and local government is discontinued.

The documents starts by explaining how the package of laws fits together. It highlights three interrelated issues:

- . How the laws entrench the apartheid myth of discrete tribes neatly abutting one another
- . The nature of the powers given to traditional leaders and the implications for power relations in rural areas
- The impact on women and on current processes of positive change in rural areas

It ends with reflections about whose interests the laws serve, the background to their enactment, their implications in terms of customary law and of relegating rural South Africans to the status of second class citizens in the country of their birth.

Discussion of the package of traditional leadership laws and how they relate to one another

The core law in the package is the 2003 Traditional Leadership and Governance Framework Act. Section 28 of the Framework Act provides for transitional mechanisms. It deems existing tribal authorities to be traditional councils provided they comply with new composition requirements.[1] The requirements are that 40% of the members of a traditional council must be elected and 30% must be women.[2]

[1] The Framework Act provided they must meet the requirements within a year, however very few managed to meet this deadline, which was extended by the provincial laws (many of which were

Section 28 entrenches the controversial tribal authority boundaries established in terms of the Bantu Authorities Act of 1951. These were established virtually wall-to-wall throughout the former homelands and formed the basic building blocks of the Bantustan political system, functioning effectively as the equivalent of local government in rural areas.

The overlay of fixed tribal boundaries

According to the census 17 million people live in the former homelands where the new laws apply, and women constitute 59% of the population of these areas. In many areas the tribal authority boundaries that were imposed in terms of the 1951 Act are historically controversial, having precipitated uprisings in areas such as Pondoland, Sekhukhuneland and Zeerust. Those traditional leaders who supported the Bantustan agenda were often rewarded with large areas, and those who resisted stripped of their power or relegated to headman status and confined to small areas. In many areas disputes about "tribal" boundaries, legitimate authority and grazing land remain ongoing.

Moreover the reality of intermixed and changing identities in rural areas belies the rigid super-imposed apartheid map of discrete "tribes" neatly abutting one another. People with different identities who clubbed together to purchase land, or lived on mission settlements, or moved from distant areas to be near work, or were evicted from "black spots" and dumped in the reserves, suddenly found themselves defined as the "tribal subjects" of leaders with whom they had little or no shared history.

During apartheid millions of people were forcibly removed during the process of "Bantustan consolidation" in an effort to try to bring the untidy reality of intermingled identities in line with the mythology of "separate tribes" each with their own homeland. Time and again Bantustan consolidation removals led to suffering and impoverishment, causing particular havoc in "mixed" areas such as Bushbuckridge and northern Limpopo. Currently hundreds of thousands of people are in the process of claiming restitution of land in the ethnically mixed areas where they lived before.

Widespread rural uprisings brought the Bantustan political system to its knees during the late 80s and early 90s. These uprisings played a key role in the demise of grand apartheid and the transition to democracy. Rural people demanded equal citizenship in a united South Africa and rejected their status as tribal subjects of separate ethnic "homelands". At that time the army was deployed in many rural areas to protect tribal authority offices from angry residents protesting against abuse of power and the extortion of excessive tribal levies.

In this context it is ironic that the new laws entrench controversial apartheid boundaries and provide traditional leaders with far reaching powers over people living within ethnically defined tribal boundaries.

Powers vested in traditional leaders and traditional councils

The Framework Act itself does not provide traditional leaders with much statutory power. Instead through its transitional mechanisms it entrenches existing traditional structure and boundaries as the "officially recognised" traditional structures and boundaries of the future. The "reform" component lies in the new composition requirements.

Section 20 of the Framework Act specifies that national or provincial government may enact laws providing a role for traditional councils or traditional leaders in relation to a wide range of issues including (but not limited to) land administration, health, welfare, the administration of justice, safety and security, economic development and the management of natural resources.

The Framework Act and the CLRA

It is thus other laws such as the Communal Land Rights Act of 2004 and the Traditional Courts bill that provide traditional leaders with substantive powers, rather than the Framework

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enacted in 2005) providing an additional year. However by 2008 many had not yet changed their composition and the 2008 TLGFA amendment bill proposes an additional four years.

[2] It is important to note that the women need not be elected. Instead they may be appointed by "the senior traditional leader". Furthermore the 30% quota for women may be decreased where insufficient women are "available."

Act per se. Both the Framework Act and the Communal Land Rights Act were enacted during the build-up to the 2004 election. The traditional leadership lobby initially rejected the Framework bill as too weak. There were threats that unless the Framework bill was amended traditional leaders would boycott the elections. However most traditional leaders withdrew their objections when the draft Communal Land Rights bill was amended to provide that traditional councils would be given control over land administration. The Communal Land Rights bill also enabled the transfer of title to traditional communities and enabled the Minister to endorse title deeds held by Trusts and Communal Property Associations to the "community". Many traditional leaders were unhappy about such institutions having separate title to land reform land within "their" areas.

Prior drafts of the Communal Land Rights bill had provided for elected land administration committees. However the last minute amendments meant that elections would be held only in those areas where tribal authorities refused to comply with the new composition requirements, in which case traditional leaders would be cut out of a role in land administration entirely. It was a carrot and stick approach. Those who cooperated with the Framework Act's new composition requirements would get control over land as the "carrot", while those who boycotted the new requirements would be "punished" by having elected structures in their areas and being deprived of any role in land administration.

As already mentioned, the legal validity of the CLRA is being challenged by four rural communities. They argue that instead of enhancing their security of tenure as required by section 25(6) of the Constitution, the Act undermines their tenure security by giving far-reaching powers to traditional councils who cannot be held accountable.

The CLRA case highlights the dangers of entrenching old tribal authority boundaries as the default boundaries for land administration. Some of the applicants have no historical connection with imposed traditional councils that claim power over them, others dispute the centralised nature of the powers vested in traditional councils, and point out that this undermines existing more participatory decision-making processes at the local and family level.

In response to the CLRA application the Director General of the Department of Provincial and Local Government stated in her answering affidavit:

> "The traditional councils have clearly defined areas of jurisdiction. Those who find themselves in those areas must adjust to the rules and traditional practices of that area."[3]

Seventeen million South Africans live within the former homelands and so find themselves within one or other traditional council jurisdictional area. The reality is that many people dispute the legitimacy of those boundaries and question the content of the rules and traditional practices laid down by traditional leaders. Not necessarily because they are opposed to custom and tradition, but because they are involved in disputes about the unilateral actions and self seeking versions of customary law put forward by some traditional leaders.

The Framework Act and the Traditional Courts bill

The Traditional Courts bill gives traditional leaders far reaching power to determine the content of customary law. Like the CLRA, the bill provides no recognition of decision making authority and dispute resolution at family or village level. The only level at which traditional courts are recognised is at traditional council level. The bill vests statutory power in the presiding officer of a traditional court, who must be an officially recognised senior traditional leader or his delegate. No role, functions or support is provided for village level councils, nor to the council members who, in practice, play the pre-eminent role in existing customary courts. In this respect the bill follows the precedent set by the Black Administration Act of 1927, except that the Black Administration Act does at least provide for the recognition of headmen's courts.

The bill makes it an offence not to appear before a customary court once summoned by the senior traditional leader as presiding officer.[4] The courts jurisdictional areas are based on the

[3] Para 45.1 of answering affidavit by Lindiwe Msengana-Ndlela.

old tribal authority boundaries, which are controversial in many areas because they incorporate groups who may have no historical affiliation with the chief, or do not recognise his authority.

The decisions of the court (which are decisions made by the presiding officer) have the legal status of rulings made by the magistrates' courts. Traditional courts (in the person of the senior traditional leader) have the authority to order unpaid labour, and to strip people of "customary entitlements". Land rights are one such entitlement, community membership is another.

The bill has far reaching consequences for those who dare to dispute the authority of traditional leaders. The bill enables the court, in the person of the presiding officer, to determine the content of customary law, notwithstanding contestations about its content in many areas. Common examples include contestation about traditional leaders "selling" land allocations for khonza fees, entering into unilateral mining deals or tourism ventures with outside investors, or demanding tribal levies for cars and lobola payments despite the state salaries they receive.

In many areas rural people disputes these practices as a distortion of custom and insist that in the past key decisions were discussed and taken by those directly affected (including at family and village level) and not by centralised councils. Furthermore the bill centralises authority within traditional courts to the senior traditional leader as presiding officer, providing him with the power to summon and punish those who challenge his version of customary law. The court is empowered to impose additional sanctions for non compliance "according to customary law"

Implications for indigenous accountability mechanisms

The unilateral power of the presiding officer to deprive people of customary entitlements is inconsistent with the underlying principles and practice of customary law. In most areas serious decisions concerning the deprivation of rights must first be debated at various levels, for example at the family, clan and village level, and finally at a *pitso*, or general meeting of the entire community.

The layered nature of customary institutions is well documented in academic literature, as is its central role in mediating and balancing power. Leaders are forced to take into account the views and deliberations of other levels of authority which provide people with alternative forums in which to express their views. The power of different levels in the traditional hierarchy expands and contracts depending on the confidence people have in leaders at the different levels. Unpopular or dictatorial traditional leaders will find sub-groupings referring fewer and fewer issues to them, and instead dealing with issues internally at lower levels. Secession was historically a primary mechanism of accountability in customary systems, and the underlying dynamic continues to be played out in myriad disputes concerning the status of chiefs and headmen relative to one another.

However once fixed jurisdictional boundaries are imposed by the state, and traditional leaders are given centralised statutory authority within those boundaries, the dynamics of indigenous accountability are fundamentally undermined.

The impact on women and on current processes of positive change in rural areas

Women's opposition to the bill

Women have been at the forefront of opposition to the new traditional leadership laws and the Traditional Courts bill. The Commission for Gender Equality opposed the bill, as did the Women's Legal Centre and the Rural Women's Movement of Kwa Zulu Natal. The parliamentary Joint Monitoring Committee on the Quality of Life and Status of Women also made a submission criticising the bill and calling for joint sittings with the Justice Portfolio committee

[4] The South African Law Commission recommended that people must have the right to opt out of customary courts, and appear before another court instead, should they so desire. Traditional leaders strongly opposed "opting out" on the basis that it undermines their authority. This was their main objection to the 2003 Law Commission report and draft bill, which subsequently disappeared without trace.

They argued that the bill would reinforce the patriarchal power relations that have discriminated against women in the past and potentially reverse some of the positive changes women have managed to win over the last 15 years. These positive changes include more single mothers being allocated land for residential sites, and more daughters being chosen to inherit responsibility for the natal homes they have supported over the years. The changes are uneven and have been hard fought. Many rural women still face the threat of eviction when their marriages end, or their brothers inherit their family homes. Moreover serious and significant obstacles remain in relation to women's status and unequal bargaining position in rural areas contributing to ongoing problems of violence and abuse.

However many women have taken advantage of the post-apartheid political environment and its focus on the values of equality and democracy to push for more equal access to resources, and in particular for residential sites for families headed by single mothers. They have justified these changes as consistent with the underlying customary principle that member families are entitled to land to fulfil their basic needs. The post apartheid political environment has meant that traditional leaders have had to be careful in relation to women, or risk reinforcing their reputation for patriarchy as they did when they opposed the equality provisions during the Constitutional negotiations.

Women's organisations are concerned that the new laws symbolise a shift in governments previously unequivocal support for the principles of equality and equal citizenship rights in rural areas which will have far reaching implications on the balance of power within which women struggle for change at the local level. The bill removes the incentive for traditional leaders to accommodate the countervailing views of women in the interpretation and development of customary law. This is not to say that all traditional leaders are insensitive to the plight of rural women, many have supported the processes of change that are underway, but others continue to oppose women's appointment as traditional leaders, and frown on women's attempts to speak out or represent themselves in traditional courts. In this regard traditional leaders' opposition to the 30% quota for women in the TLGFA is instructive. It was because of chiefly opposition that a provision was inserted enabling the quota to be decreased despite the fact that women constitute 59% of the population in "tribal areas".

Women's concerns about the changing balance of power heralded by the new laws are borne out by reports of newly appointed women members not being informed of traditional council meetings in some parts of Kwa Zulu Natal, reports of traditional councils justifying the banning of community meetings in North West and Eastern Cape by reference to the new laws, and the resurgence at scale of traditional leaders extorting excessive tribal levies in Limpopo.

What the bill says about women

Contrary to the South African Law Commission recommendations the Traditional Courts bill does not require the courts to include women members. However it contains a general provision that the presiding officer must ensure that the rights contained in the Bill of Rights are observed and respected, and in particular "that women are afforded full and equal participation in the proceedings, as men are".

Instead of including specific provisions to address the problems faced by women in traditional courts, it puts the onus on the presiding officer to ensure that women are fairly treated. This means that when problems arise women cannot demand the enforcement of clear legal provisions; instead they are forced to direct their challenges at the failure of the presiding officer. This is a heavy burden to place on women given the unequal power dynamics in rural areas, and the isolation and poverty of many rural women.

The two most serious problems facing women in traditional courts is that generally the courts are composed of male councillors who are not sympathetic to women's issues, and women are not allowed to speak or represent themselves, but have to rely on male relatives to put their case. This puts women at a serious disadvantage, particularly in cases arising from disputes with their male relatives, or where they have no adult male relatives available to represent them.

Clause 9(3)(a) bars lawyers from traditional courts. Clause 9(3)(b) provides that a party 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". Instead of providing explicitly that women should be allowed to represent themselves if they so choose, the bill enables the

continuation of the practice of male relatives representing women "in accordance with customary law and custom". This is justified on the basis that men, too, may be represented by their wives; a far-fetched possibility which attempts to cloak the continuation of inequality in even-handedness.

South African citizens or tribal subjects?

The bill is justified as urgently necessary so that the provisions of the discriminatory 1927 Black Administration Act dealing with tribal courts can finally be repealed. In this urgency we should not lose sight of the reasons that some sections of the Black Administration Act are still in force and why it took so long to repeal the hated Bantu Authorities Act of 1951. For years the South African Law Commission's attempts to introduce measures to replace these laws were rebuffed by the traditional leadership lobby, which opposed the repeal of their old apartheid powers until other laws securing their position were put in place.

It is instructive that the Law Commission's 2003 recommendations in respect of customary courts and its draft bill are not reflected in the current bill, or even mentioned in the memorandum accompanying the bill which states that the bill was drafted in consultation with the National House of Traditional Leaders. Traditional leaders had objected to the Law Commission's recommendation that "opting out" of the jurisdiction of customary courts must be allowed. They said that it would undermine their authority if people living within their jurisdictional areas were able to choose to appear in the magistrates' courts or high courts instead.

Because tribal authorities were established virtually wall-to-wall in the former homelands, this means the 17 million people who live in those areas cannot opt of courts run by traditional leaders they do not necessarily support. It deprives those 17 million South Africans of the right to be represented by a lawyer, or to represent themselves if they are women. Moreover it makes them vulnerable to the extraordinary sanctions proposed by the bill, including forced labour and the cancellation of customary entitlements.

Who makes customary law?

The bill authorises the senior traditional leader, as presiding officer, to unilaterally determine the content of customary law. This undermines the democratic potential inherent in current processes of mutual accommodation taking place in rural areas, as women and men negotiate and develop ways of combining the underlying values of customary law with the principles of the Constitution. Living customary law grows out of processes of adaptation and change that reflect the voices, views and struggles of a range of different interests and sectors in rural society. Instead of encouraging the process of democratisation that is underway, the bill ignores the reality that it is councillors and community members who play the pre-eminent role in interrogating and debating the merits of cases in customary courts, and centralises authority exclusively in the presiding officer.

Traditional leaders have long resisted the establishment of elected local government in their areas, and have demanded more substantive governmental powers. They reiterate that, customarily, traditional leaders had governmental powers. Because their demands cannot be met within the framework of the Constitution, it appears that the new laws signal an accommodation with traditional leaders that will enable them to push the open-ended customary law arena to the limit.

Yet chiefly versions of customary law are deeply disputed in many areas, especially in relation to the extortion of tribal levies, the selling of land allocations and unilateral mining and investment deals. The new laws change the balance of power in rural areas, making it much more difficult for rural people to challenge abuse of power by traditional leaders, or to hold them to account.

The powers contained in the bill are not consistent with the underlying practices and values of customary law, which are consensual and based on voluntary affiliation and not on apartheid boundaries. In many areas customary courts continue to operate according to these principles, existing at all levels of society whether or not they are officially recognised under the Black Administration Act. Courts like that, run by respected and dedicated rural people do not need laws like this to prop them up. Instead of building on existing practice and positive changes in rural area, the bill uses the model of the 1927 Black Administration Act to prop up

colonial constructs of unilateral chiefly power. In line with that model the drafters of the bill did not consult ordinary rural people about how to support and enhance customary law and legal processes, but relied exclusively on the input of traditional leaders whose own interests are directly at stake.