



**LRG**  
Law, Race and Gender  
Research Unit

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# Law, Custom & Rights

Newsletter of the Law, Race and Gender Research Unit.



## Main Feature

# Traditional Council Elections in 3 provinces

KwaZulu Natal, Limpopo and North West.

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Promoting justice through research and dialogue



# Editorial Notes

BY MAZIBUKO K. JARA

**This edition of Law, Custom and Rights focuses on traditional council elections that take place in terms of the Traditional Leadership and Governance Framework Act, 41 of 2003 (Framework Act).** Several articles in this edition indicate that the provincial governments of KwaZulu-Natal, Limpopo and North West provinces are preparing to hold traditional council elections in the near future. The Framework Act sets out the terms of government's recognition of the institution of traditional leadership. It converts the tribal authorities established by the Bantu Authorities Act of

Peasants' Revolt). They said that the Act would trap people into tribal subject status under chiefs who had collaborated with forced removals and co-operated with the Bantustan policy. They also objected to the fact that traditional leaders would continue to select the majority of council members.

The portfolio committee responded by assuring members of the public that tribal authorities would only have one year in which to hold the necessary elections and that the election process would be the beginning of the transformation of traditional councils. Those tribal authorities who refused to meet the composition requirements would not be converted to traditional councils and would fall away as defunct entities not recognised by law. **The committee sold the new Act as a reform measure that would fundamentally change the patriarchal leanings of pre-existing traditional systems by including women and elected representatives.** The election provisions were thus pivotal to the rationale that the Act was transformative as opposed to retrogressive – and were used to justify the resuscitation and entrenchment of discredited apartheid boundaries.

However 8 years later and elections have still not taken place in Limpopo province and large parts of Mpumalanga. The 'elections' that have taken place in provinces such as KwaZulu-Natal, North West and the Eastern Cape have been fraught with contradictions and difficulties as the articles in this newsletter attest. The KwaZulu-Natal elections involved less than 2% off the potential electorate, raising questions concerning whether they can be deemed to have been elections in the true sense of the word. Instead of acting against those tribal authorities and provinces that have refused to play ball government has instead repeatedly amended the law to extend the qualification period from the initial one year to nine. Notwithstanding these numerous extensions tribal authorities that remain 'untransformed' happily call themselves 'traditional councils', some such as the Matlala tribal authority in Limpopo referring to itself as 'Matlala Local Government'.

The articles contained in this edition suggest that the regulations governing elections are haphazard and differ from province to province. They highlight the lack of information and notice to rural communities that would enable them to prepare and participate effectively in such elections. Insofar as the legitimacy of the Framework Act depends on the promise of elections, the track record of the elections held so far and the regulations governing them exposes this to be an empty, indeed cynical, promise. 🌸

A painted mural at the University of Cape Town's main campus.



1951 into the traditional councils of the future and thereby entrenches the controversial tribal boundaries inherited from apartheid as the areas of jurisdiction of traditional leaders. In effect the Act overlays the system of elected local government ushered in by the new Constitution with the map of separate tribal identities created by apartheid and thereby entrenches the tension between elected and traditional structures with overlapping jurisdictional areas.

Section 28 of the Framework Act deems all past tribal authorities created in terms of the apartheid-era laws to be traditional councils provided that they comply with new composition requirements. These are that they must incorporate 40% elected members and ensure that 30% of council members are women. This means that the senior traditional leader still selects the majority (60%) of the members of the traditional council.

When the Framework Bill was first debated community activists strenuously objected to section 28 on the basis that it revives and entrenches disputed tribal boundaries that had led to rural uprisings in the 1960s (Govan Mbeki 1964 The

# Past KwaZulu Natal traditional council elections flawed

BY JEAN REDPATH

**“Democracy” and “traditional leadership” are often considered to be incompatible.** South African legislation attempts to bridge this divide by requiring traditional councils, successors to apartheid-era “tribal authorities”, to be “re-constituted” through the democratic election of 40% of their membership. A further requirement is that 30% of the total membership of traditional councils must be comprised of women. Supporters of traditional leadership point to these electoral and gender requirements, introduced by the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act), as evidence of the democratisation of traditional leadership. Closer analysis suggests this view is flawed.

That traditional leadership has a place in the post-constitutional era is due to compromise provisions of the Constitution, which recognise both traditional leadership and customary law “subject to the Constitution”. The Constitution further provides that national legislation may provide a role for traditional leadership as an institution at local level on matters affecting local communities. **This “role at local level” must however be seen in the light of the broader constitutional framework providing for “wall-to-wall” local government with constitutionally defined comprehensive functional areas of responsibility.**

Government has chosen to provide a role for traditional leadership with the passage of the Framework Act, which makes provision for the recognition of traditional communities and traditional leaders, and establishes houses of traditional leaders as well as a

provincial legislatures.

Although the Framework Act was passed in 2003, the deadline for the reconstitution of traditional councils has repeatedly required extension as provinces failed to pass the necessary legislation and failed to hold elections. The current deadline is September 2011. Limpopo has never held its elections while the North West has reconstituted three of its traditional councils at the time of writing. Legal experts differ on the implications of the failure to hold elections in time; some say there are no implications spelled out in the Framework Act while others maintain that the deeming of tribal councils to be traditional councils provided for in the Framework Act falls away if the deadline is not met.

**Some provinces have met the deadline for reconstitution, but analysis of the available evidence suggests this is in form only. For example, KwaZulu-Natal (KZN), which has extensive legislation around traditional leadership and customary law inherited from the pre-constitutional era, has passed legislation governing traditional leadership and has ostensibly held elections after which traditional councils were reconstituted. However analysis of the returns of these elections, published by the KZN House of Traditional Leaders, leaves serious doubt as to whether the elections in KZN can be termed “democratic” as required by the Framework Act.**

The KZN regulations provide for the election processes (including the nomination process) to be overseen by “an independent election agency” appointed by

**Although the Framework Act was passed in 2003, the deadline for the reconstitution of traditional councils has repeatedly required extension as provinces failed to pass the necessary legislation and failed to hold elections.**

Commission on Traditional Leadership Disputes and Claims. The Framework Act further provides “guiding principles for the allocation of roles and functions” to “traditional councils and traditional leaders” by

the relevant Department. Although the Independent Electoral Commission (IEC) was reportedly appointed in relation to the KZN elections, when contacted by Quanta Research Services, the IEC said it was not

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# Past KwaZulu Natal traditional council elections flawed

in a position to attest to the probity of the election processes and “had no institutional memory” of these elections. While IEC ballot boxes and banners may have been used in the election process, there is no evidence a voters’ roll was compiled and used in these elections, as required by KZN provincial regulation.

Most importantly perhaps, popular participation in the elections was extremely low. Comparing the number of votes cast with population figures from Census 2001 for the areas in KZN province which fall under traditional councils shows that less than 2% of the voting age population voted in these elections. Given that there has been population growth since 2001 the figure of 2% is most certainly a lower estimate. The maximum level of participation in any traditional council area calculated was 20%, pointing to very low levels of participation in the remaining areas.

## QUICK FACT

The maximum level of participation in any traditional council area calculated was 20%, pointing to very low levels of participation in the remaining areas.

Indeed in many traditional councils there was no competitive election at all – in such areas all candidates nominated were elected, with some nominees recording no votes at all. This suggests that the nomination process, rather than the elections, were of primary importance in determining the “elected” component of the membership of traditional councils. The provincial regulations in relation to nominations provide that the Inkosi (chief) must convene and preside over an Imbizo (traditional meeting) where the nomination and seconding of candidates takes place by show of hands. This suggests a great deal of control over the nomination process by the Inkosi - who also appoints the selected 60% selected component of the membership of traditional councils.

Research is currently under way to determine levels of participation and the probity of traditional council elections held in other provinces; however anecdotal evidence currently available suggests elections in other provinces have exhibited similar trends as found in KZN. This suggests traditional council elections have not been democratic in any real sense.

Existing provincial KZN legislation affirms a range of powers and functions of traditional leaders. **The existence of “democratic traditional councils” are often invoked as justification for the continued exercise of such powers by traditional leaders.** The KwaZulu Act on the Code of Zulu Law 16 of 1985 provides that “chiefs and headmen have authority

to require compliance by the people under their jurisdiction with their duties under Zulu law and may give orders for that purpose”. Clearly, many provisions of the Code of Zulu Law or other old-order legislation are in conflict with the Constitution. But such provisions must first be declared unconstitutional by the Constitutional Court or repealed through an Act of Parliament. Before such a declaration or repeal, these provisions remain on the statute books. In this situation, traditional leaders are likely to continue to apply customary laws and to exercise such powers as they have previously enjoyed – and claim even greater legitimacy on the basis of “democratic” elections of traditional councils.

Furthermore, although traditional councils themselves currently have a limited role, the possibility exists for the expansion of their functions in terms of the guiding principles provided for in the Framework Act, which lists a range of functional areas on which provincial legislatures may legislate a role for “traditional councils or traditional leaders”. The list includes education, health, land administration, the administration of justice, safety and security, and the registration of births, deaths and customary marriages. Indeed the Communal Land Rights Act of 2004 (CLRA) (subsequently declared unconstitutional on procedural grounds) sought to permit traditional councils, where they exist, to act as land administration committees, representing a community owning communal land, and having the powers and duties conferred on it by CLRA and the rules of such a community.

Thus the possibility exists that “reconstituted” traditional councils could in the future be allocated a range of important functions, largely on the basis that they have been legitimised by compliance with the electoral and gender requirements contained in the Framework Act.

**The evidence from KZN that less than 2% of the affected population participated in the reconstitution process strongly suggests that the elections have not enjoyed sufficient popular participation to accord traditional councils – and by extension traditional leadership - democratic legitimacy.** 🌿

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# Confusion Marks Traditional Council Elections in North West

BY LISA HEEMAN

**On 15 April 2011, the Local Government and Traditional Affairs MEC Paul Sebegoe announced elections for 56 traditional councils in North West to be held until May 15.** National legislation provides that 60% of the members of a traditional council are to be appointed by the traditional leader while the remaining 40% are to be democratically elected by the public.

Traditional council elections have been conducted before in North West. Even though no comprehensive report on their establishment exists accounts from the province suggest that the first round of elections suffered from serious flaws. In 2011, the MEC asked the Electoral Institute for the Sustainability of Democracy in Africa (EISA) to run the follow-up elections as an independent and professional agency.

Leadership and Governance Act (Act 2 of 2005) governs who qualifies to stand for traditional council elections. But this law does not provide the necessary detailed information to govern procedures for nominations, the voters' roll, elections, complaints, settling of disputes, swearing in of councilors and procedures for the inaugural meetings of traditional councils.

The nomination process, and in Bodibe ultimately the elections, were hampered by disagreements over who qualified to vote and stand for the elections. The complications and complaints voiced by community members could have been avoided if a clear set of rules had been introduced prior to the process. It is worth noting that laws in other provinces indeed provide more detailed guidelines for the overall election process.

**The main challenge to the process in North West is lack of transparency and clarity with regard to regulations applied. The legal basis is extremely thin.**

## HIGHLIGHT

Aware of shortcomings in the election process, the Executive Council has not declared the results of the two elections in the Baphalane and Barolong Tlou le Tou communities to date.

As of June 8, apparently only three of the 56 traditional communities had embarked on the election process. These were the Baphalane, Barolong Tlou le Tou and Tau Rapulana communities. Nomination sessions were held at community meetings in Ramokokastad in Moses Kotane Municipality, Kagisano-Ganyesa in newly merged Kagisano-Molopo Local Municipality and Bodibe in Ditsobotla Municipality. Subsequently, elections were conducted in the first two cases, whereas the elections were obstructed by discontented youth in Bodibe. Aware of shortcomings in the election process, the Executive Council has not declared the results of the two elections in the Baphalane and Barolong Tlou le Tou communities to date. Meanwhile, the Executive Council plans to complete elections for all traditional councils in North West within the next two months. In view of these upcoming elections, the process should be reviewed and adjusted drawing from the experiences in the first three communities.

The main challenge to the process in the North West is lack of transparency and clarity with regard to the regulations being applied. The North West Traditional

There is strong evidence that not even basic guidelines existed before embarking on the process. As the rules are only defined step by step, the system becomes highly vulnerable to manipulation. In addition, the agency running the elections has no grounding to play its role to anticipate challenges and advise government on a comprehensive approach. Hence, the nomination and election process becomes extremely unpredictable. In absence of clear and accessible guidelines, the rural communities and the general public are barred from meaningful participation.

To begin with, the election dates have not been announced by the Executive Council in the Gazette. While the regulations in other provinces, for example in Limpopo, require the Premier to publish the date and the name of the traditional council in due time, the applicable legislation in North West remains silent on this issue. The responsible MEC revealed in April that plans were in motion but did not provide more details on the electoral process. Part of the complaints of communities relate directly to this lack of information.

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# Confusion Marks Traditional Council Elections in North West

Some communities that have been clustered together with others claimed that they had not been informed of the elections and that they had been unaware of the nominations and elections in their cluster. These problems show that some communities will not be represented in the newly elected traditional councils.

This confused situation has resulted in inconsistencies. For example, it was unclear whether traditional leaders should announce their pick for the 60% traditional council members first or whether the communities should have their vote of the remaining 40% of the councilors beforehand. Another example concerns what steps would be followed to meet the requirement of 30% women representation.

Experiences from nominations and elections in North West as well as in other provinces show that the voices of women, youth and other marginalized groups are



**In view of the powers that traditional councils have under existing and currently proposed laws, their legitimacy is under scrutiny.**

often not heard and excluded from the process. As traditional councils are expected to contribute to the transformation of the traditional leadership and governance structure in line with constitutional values (like democratic governance and gender equality), appropriate rules and strategies are necessary to balance unequal powers and to meet the (constitutional) promise of a democratic and participatory process.



**HIGHLIGHT**

In localities where there were problems with the elections, communities may be wholly excluded from representation in traditional councils.

In view of the powers that traditional councils have under existing and currently proposed laws, their legitimacy is under scrutiny. Since their decisions affect the lives of a high number of people living in traditional communities it is suggested for government to adopt clear and specific rules governing the establishment of authoritative bodies like these. 🌸

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# Pending Traditional Council Elections in KwaZulu-Natal and Limpopo

BY MAZIBUKO K. JARA

**All indications are that the KwaZulu-Natal (KZN) provincial government is preparing for traditional council (re)-elections during 2011.** The elections are mandated by the Traditional Leadership and Governance Framework Act ("Framework Act"), Act 41 of 2003. This is a national law that creates a framework applicable to all provinces. In terms of that framework each provinces is required to enact their own provincial laws and regulations that regulate the holding of traditional council elections. The Framework Act deems the tribal authorities created during the apartheid dispensation to be traditional councils provided that elections take place in which 40% of traditional council members are elected. In addition 30% of the members of traditional councils must be women. Tribal authorities will lose their status and powers if elections are not held. This includes the traditional authorities of Limpopo.

## KZN IEC RECEIVES TIMETABLE

In her 2010/11 Budget Vote speech, the KZN MEC for Local Government (Ms. Nomusa Dube) announced that a key focus for her department for 2011 will be

and a budget from the provincial government to run traditional council elections in that province before September. However there has been no official notice (government gazette) announcing these elections yet. This official notice will be the main way in which affected communities will receive information about these pending elections.

## CHALLENGES FOR RURAL PEOPLE

The pending traditional council elections in the KZN and Limpopo provinces present a massive challenge for people living in rural areas. Similar elections have taken place in the Eastern Cape, KZN and North West provinces before. All these elections had many problems. In the Eastern Cape, many community based organisations and civics objected to the elections. **They argued that the new traditional councils were similar to the hated tribal authorities of the past and forced rural people to be governed by unelected structures. In the 2006 round of KZN elections there were apparently insufficient funds to hire the IEC to monitor and support the traditional council elections (see article in this edition by**

## Tribal authorities will lose their status and powers if elections are not held.

preparations for traditional council elections. In a 30th March 2011 press release, the MEC stated that *"This is also a year in which we will witness the consolidation of democracy within the institution of traditional leaders through the holding of Traditional Council Elections"*. In her 2011/12 Budget Vote Speech, the MEC stated that *"another exciting project that we will undertake shortly after the Local Government Elections, will be that of the election of new members of Traditional Councils. The term of the current serving members has expired... The IEC has agreed to once again render its support to the department and conduct these elections in a free and fair manner. We are already commencing with awareness campaigns and education programmes to communities"*.

Meanwhile, in line with the prioritisation of traditional council elections by the MEC, in May 2011, the KwaZulu-Natal provincial office of the Independent Electoral Commission (IEC) has received a timetable

**Jean Redpath**). Yet, the IEC ballot boxes and other equipment were used, creating the impression that the elections were properly monitored and run by the IEC, whereas this was not the case. In the North West, the election process was supervised by the Provincial House of Traditional Leaders. We have received reports that ordinary people in various areas who attempted to nominate their own candidates were ignored by the person in charge of the nomination meetings who seemed to accept only those nominations consistent with a pre-agreed list of names.

**These problems underline the need for rural communities to know what the elections will be about, understand how they will be affected, and know what they can do to ensure the elections happen freely and fairly.** 🌿

*Mazibuko K. Jara is a senior researcher at the LRG (mazibuko@amandla.org.za)*

# 2011 Budget Speech for Traditional Affairs

**On 31 May 2011, the Acting Minister for Cooperative Governance and Traditional Affairs (COGTA), Minister Nathi Mthethwa, presented the COGTA budget vote to parliament.** Below is an edited extract that covers issues relevant to traditional affairs from the Acting Minister's speech.

## IMPORTANCE OF TRADITIONAL LEADERS

**Traditional leadership institutions have played a critical role in creating employment and generation of wealth.**

They have identified land suitable for industrial and agricultural purposes in rural areas and pilots are already being rolled out in the following provinces, KZN, Limpopo and the Eastern Cape.

CoGTA will be working closely with municipalities and traditional leaders to release the land for development. We will also provide institutional support to municipalities that have been granted housing accreditation status. The programme will be in the six metropolitans, two districts (Frances Baard and Pixley ka Seme) that were granted Level 2 Accreditation status for housing provision.

## BILLS FOR 2011

**The National Traditional Affairs Bill\*** will be introduced in Parliament in 2011/12 with the intent of removing all obstacles that hinder service delivery.

The DTA has commenced with the work to consolidate the Traditional Leadership and Governance Framework Act, 2003 and the National House of Traditional Leaders Act, 2009, into a single piece of legislation. This has resulted in the drafting of the National Traditional Affairs Bill which will ensure an integrated approach in dealing with matters relating to traditional affairs. In addition to the consolidation of existing laws, the Bill seeks to provide for the recognition of Khoi-San communities, their structures and leadership positions.

## POLICY AND INITIATIVES ON TRADITIONAL LEADERSHIP AND INSTITUTIONS

**The strategic role of the new Department of Traditional Affairs** is to ensure that the institution is transformed and integrated into the democratic governance system. It will also partner with the Khoi-San leadership and communities.

## TRADITIONAL LEADERSHIP DISPUTES

**The members of the Commission on Traditional Leadership Disputes and Claims assumed duty on 01 January 2011 and their term will be for a period not exceeding five years\*\*.** The Department of Traditional Affairs (DTA) is tasked with ensuring that the Commission operates well and in close contact with the Provinces. The Commission will be finalising over 100 claims and disputes during this financial year.

Assessment of the state of traditional governance

The DTA also coordinated the project on the assessment of the state of governance within the area of traditional affairs.

To date, six provincial assessments were conducted in Northern Cape, Mpumalanga, Free State, Eastern Cape, Gauteng and Limpopo, whilst the North West and Kwa-Zulu Natal provinces will be assessed at a later date.

*The preliminary findings from these assessments revealed the following cross-cutting issues:*

- i. Support to the institutions of Traditional leadership is minimal in most provinces;
- ii. Limited resources to support the institutions; and
- iii. Poor relations between elected local government Councillors and traditional leaders, in some provinces amongst other things.

The national composite report will inform a number of the Department's projects for the next medium-term expenditure framework, including a sector wide strategy.

## \* THE NATIONAL TRADITIONAL AFFAIRS BILL

Since June 2011, a Draft (Version 3) of the Bill has been in circulation. The Bill was presented for comment to the National and Provincial Houses of Traditional Leaders and Provincial MECs. There is no evidence of consultation of rural communities and organisations who have previously raised concerns with past traditional leadership laws.

The Bill proposes to repeal the Traditional Leadership and Governance Framework Act (Act 41 of 2003) and the National House of Traditional Leaders Act (Act 22 of 2009). In addition, the Bill also introduces proposed amendments to the Remuneration of Public Office Bearers Act (Act 20 of 1998) and the Local Government: Municipal Structures Act (Act 117 of 1998).

**The next edition of Law, Custom and Rights will provide a detailed analysis of the Bill and what implications it has for rights, democracy and governance in rural areas.** This Bill raises controversial issues concerning the power, roles, functions and status of traditional leaders.

**At the time of printing, the Department of Traditional Affairs had just issued a notice of public consultations on the Bill. These consultations will run from 20 August to 16 September.**

*The Department may be contacted as follows:*

- Dr R A Bester - 082 377 4557, email – rinaldib@kogta.gov.za
- Mnr/Mr J Meiring - 082 370 1656
- Me T Ramsumair - 073 305 5835
- Mnr/Mr F Louw - 082 781 9890

**\*\* Members of the Commission on Traditional Leadership Disputes and Claims**

1. Bagudi Jonathan Tolo - Chairperson.
2. Yvonne Thokozile Mbatha - Deputy Chairperson.
3. Malefetsane Joel Mafereka - Member.
4. Nokuzola Mndende - Member.
5. Ramokona Tryphina Kgatla - Member.



# Where is the Traditional Courts Bill?

BY SINDISO MNISI WEEKS

**When the Traditional Courts Bill (B15-2008) was first introduced**, the Chapter 9 institutions, many civil society organisations, COSATU and ordinary rural people strongly conveyed to the Portfolio Committee on Justice and Constitutional Development that the TCB would most likely be unconstitutional on the grounds that it was drafted without consulting the rural public. We have since reiterated this message to the Portfolio Committee at every opportunity. It surely helped that the Constitutional Court had emphasised, in the *Tongoane (CLARA)* case last May, that public participation in law-making is central to the constitutional vision of democracy.

The Portfolio Committee finally heeded these warnings. In December 2010, it proposed to extend the application of the surviving sections of the Black Administration Act of 1927 until 30 December 2012 and thereby postpone the passing of the TCB. In his notice to the Speaker of Parliament, the Chief Whip of the ANC motivated that the extension was “for the purposes of obtaining greater public input and consensus on contentious issues”.

The Portfolio Committee has since gone further in its attention to the need for rural consultations. On the recommendation of the ANC Study Group on Justice in April 2011, the Portfolio Committee agreed to recommend that the Department of Justice and Constitutional Development withdraw the Bill from the National Assembly (NA) and reintroduce it in the National Council of Provinces (NCOP). This is supposed to allow the Select Committee in the NCOP to use its more extensive experience at conducting provincial consultations to do so before the Bill comes to the NA for final consideration.

When presenting the budget vote speech for the Department of Justice on 10 June 2011, Deputy Minister Andries Nel told parliament that: *“The Traditional Courts Bill ... has been outstanding for a long time. The Minister will soon be engaging with this House with a view to facilitate the re-introduction of this Bill in this House in view of the legislative competence of provinces on subject matter of the Bill. The Bill has been withdrawn from the National Assembly”*.

The withdrawal of the TCB from parliament is a positive development. However, the TCB has such big substantive problems that it should not be considered any further. We have therefore written to Minister Radebe to ask that

the Department withhold reintroduction of the TCB to the NCOP. We wrote: *“At this stage, the Department has the benefit of the documents and information gathered in the initial hearings held by the Portfolio Committee. It can use these to guide it on what process is necessary for the drafting of a more constitutional replacement for the Traditional Courts Bill. Drafting legislation in full consultation with rural people would enable the Department to arrive at legislation that is more suitable to meet the justice needs of rural people. The Portfolio Committee’s recommendation that the Minister withdraw the Bill from the National Assembly presents the Department with the opportunity for just this. We therefore encourage the Minister to fully seize this opportunity.”* 🌸

*Sindiso Mnisi Weeks is a senior researcher with the Law, Race and Gender Research Unit (sindiso.mnisi@uct.ac.za).*

## WHAT CAN YOU DO?

**Concerned communities can write to the Minister of Justice and Constitutional Development to express their views on the TCB, and particularly demand that future legislation affecting rural people be drafted in full consultation with ordinary rural people, not just their chiefs. People can forward your correspondence, addressed to the Minister, to his Personal Assistant:**

**Ms Kgomotso Maditla:**

**PRETORIA:** Tel: 012-357 8217, Fax: 012-315 1749;

**E-mail:** kmaditla@justice.gov.za

**CAPE TOWN:** Tel: 021-467 1700, Fax: 021-467 1730.

# Community authorities being disestablished in Limpopo

BY MAZIBUKO K. JARA AND SHIRHAMI SHIRINDA

In December 2010, the Limpopo provincial government released a draft Limpopo Traditional Leadership Institutions Amendment Bill (General Notice 410 of 2010). The Bill amends the Limpopo Traditional Leadership and Institutions Act, 6 of 2005. The Bill empowers the Limpopo Premier to “disestablish any community authority” that may still exist in Limpopo. The Bill also empowers the Premier to regulate the legal, practical and other consequences of the disestablishment. This includes the fate of assets, liabilities, administrative, staff and other records of a community authority. At the time of writing officials in the Limpopo Department of Local Government and Housing Portfolio Committee and in the provincial legislature could not confirm whether the Bill had been passed and what evidence exists regarding public participation in the processing and passing of the Bill.

**This Bill puts into effect provisions of Section 28 of the Traditional Leadership and Governance Framework Act, 41 of 2003 (Framework Act). Whilst the Framework Act entrenches tribal authorities as supposedly transformed traditional councils, it does away with elected community authorities that existed independently of, and side-by-side with tribal authorities: there is simply no provision for the continuation of community authorities.**

**In the apartheid era, community authorities existed alongside and separate from tribal authorities.** Often, they were established for people who were forcibly removed from their original lands and resettled under a different tribal authority on some other land within the former Bantustans. Other community authorities, especially in the former Lebowa, were established in areas outside the jurisdiction of any traditional leaders: these were areas such as mission stations and privately purchased farms. These are typically administered by a chairman and committee who is elected or nominated by their respective communities for five-year terms.

In Limpopo many community authorities are collections of two or more smaller tribes, each of which was considered by the apartheid government as too small to form its own tribal authority. This is especially common in the former Gazankulu. The situation was complicated by the processes of consolidation of homelands which led to the forced removals of massive numbers of people who, in the logic of apartheid-era ethnic-based tribal structures, happened to belong to the ‘wrong’ ethnic group. These forced removals led to many groups losing their land and being forced to be structural minorities under a tribal authority they were not previously part of.

In Limpopo most community authorities are led by independent headmen, who are not appointed by chiefs but whose positions are nevertheless hereditary. Some are led by groups of independent headmen, with a 5-year rotating chairmanship. The official 1999 Status Quo Report on Traditional Leadership and Institutions recorded that there were 10 chairmen, 51 independent headmen and 189 chiefs for some 209 traditional and community authorities in the six regions of the Limpopo province. The Status Quo Report shows that the chairmen and

independent headmen ran community authorities. This suggests a total of 61 community authorities in the province.

In the context of apartheid-imposed tribal identities and structures, community authorities secured some breathing space away from instrumentalised tribal rule. The disestablishment of community authorities leaves members of such authorities without an option but to be included under a traditional council regime that had been rejected in the past by many community authorities. Some community authorities still do not recognise tribal authority structures and prefer to be independent of them. Some other community authorities and their leaders would prefer their status to be converted to that of a traditional council led by an officially recognised traditional leader. The law, however, does not provide for any consultation whatsoever with community authorities before their disestablishment. Nor had the various community authorities that we spoke to been consulted about the amendment act in Limpopo.

**The Valdezia Community Authority (located outside Elim in Limpopo) has expressed concern that the disestablishment of community authorities may lead to a situation where its members, land and other assets are absorbed into neighbouring tribal authorities.** The Valdezia community resides on land owned by the Evangelical Presbyterian Church which has decided to transfer the land to the community through a sale to government. The disestablishment of this community authority means that this land and all assets are rendered insecure, despite the fact that the community is well established and has lived on the land for many decades.

## CAN COMMUNITIES OPT OUT OF IMPOSED TRADITIONAL COUNCILS?

Section 7 of the Framework Act suggests that it would be possible for communities to apply for the disestablishment of disputed ‘traditional communities.’ However the provision requires the majority of the community, that is the traditional community, to apply for the traditional community to be disestablished. This provision structurally discriminates against groups of people who, as a result of past forced removals, are minorities within larger traditional communities. Such structural minorities are effectively disabled from making such an application. Further, the option of “opting out” is undermined by Section 28 of the Framework Act. This section deems all past tribal authorities to be traditional council notwithstanding the disputed boundaries inherited from apartheid. This makes it virtually impossible for sub-groups to withdraw from tribal authorities that were wrongly given authority over them under the old Black Authorities Act. 🌸

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Shirhami Shirinda is a legal researcher at the LRC (shirhami@lrc.org.za)*

**QUICK FACT**  
Some community authorities still do not recognise tribal authority structures and prefer to be independent of them.



# Collecting Evidence on Tribal Levies

## The LRG has come across various cases of tribal levies being imposed on rural dwellers in some parts of the country.

Following these reports, the LRG is collecting evidence that may be used to inform future law, policy and litigation challenging the legal and constitutional validity of such levies. This short piece outlines what information to look for in collecting evidence that could be used in future litigation.

Rural residents have to provide proof of residence when they apply for IDs or social security grants or bank accounts. In many cases they are told to obtain such 'proof-of-address' letters from the local traditional authority. Yet some traditional authorities have declined to issue the required proof of address on the basis that the applicants owe unpaid tribal levies - in some cases going back over many years. This is different from urban areas where a municipality bill or credit bill may serve as proof of residence.

The 2003 White Paper on Traditional Leadership stated that *"The authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and the double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities"*. Yet, section 25 of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005 provides that a *"traditional council may, with the approval of the Premier, levy traditional council rates"* and that *"any taxpayer who fails to pay the levy may be dealt with in accordance with the customary laws of the traditional community concerned"*.

**There is little evidence available on the scale, extent and scope of demands for tribal levies in all provinces. Thus there is an urgent need to obtain more information in this regard. Through this newsletter, the LRG appeals to rural communities to report cases and evidence of tribal levies. The following are examples of the kind of information that can help LRG researchers:**

1. A sworn affidavit (official statement signed in front of a police officer) by an affected person which details how they were refused a proof of letter address due to their failure to pay up their levies;
2. A sworn affidavit by an affected person showing how a government department or bank refused their application for an ID or a social security grant or a bank account simply because the applicant did not have a proof of address letter stamped by the tribal office;
3. A list of levies that your rural community pays to a tribal office, what the levies are for, to whom they are paid, what they are used for and how the traditional council accounts and reports back to the community for their use;
4. Copies of stamps from the tribal office; and
5. An invoice issued by a tribal office confirming that an individual owes tribal levies.

Relevant information is not limited to the above. There could be other examples that exist in different localities.

*If rural residents have to get a tribal office stamp for their proof of address letters when they apply for IDs or social security grants or bank accounts, these are useful points to consider:*

1. *If an applicant has no birth certificate, they may approach the Department of Home Affairs to apply for an ID book. In the case of an applicant not having a birth certificate, the Department may have to request a proof of address.*
2. *A proof of address may also be required when a resident has to apply for a late registration of birth.*
3. *Another department that may require proofs of address is the South African Social Security Agency (SASSA) when applicants have to apply for social security grants.*
4. *Do the departments or private banks accept a letter stamped by a residents' committee as proof of address? Do they insist on a letter from the traditional authority?*
5. *In each case, it is advisable to record down the responses of the officials of the Department.*

The above points can help LRG researchers for follow-up of any information that rural dwellers may bring forward.

### Who to contact?

#### Legal Resources Centre (LRC)

For legal advice and action.

**LRC Lawyer:** Wilmien Wilcomb

Tel: 021 423 8285, Email: wilmien@lrc.org.za

**LRC representative in Limpopo:** Mr. Shirhami Shirhinda

Tel: 015 516 1414, Cell: 082 464 7906, Fax: 086 729 0014,

Email: shirhami@lrc.org.za

#### Law, Race and Gender Research Unit (University of Cape Town)

For assistance with research, training and information

Aninka Claassens: 084 510 2333, Email: aninka@icon.co.za

Mazibuko K. Jara: 083 651 0271, Email: mazibuko@amandla.org.za

Office tel: 021 650 5906

### PLANNED PROVINCIAL WORKSHOPS ON TRADITIONAL COUNCIL ELECTIONS

Working with various rural organisations and communities in the KwaZulu Natal, Limpopo and North West provinces, **the Legal Resources Centre and the LRG are preparing for workshops to be held in these provinces before the end of 2011.** These workshops will focus on pending traditional council elections, the Traditional Courts Bill, and the National Traditional Affairs Bill.

**If interested, please contact Mazibuko K. Jara at the LRG: cell: 083 651 0271, tel: 021 650 5906 and email: mazibuko@amandla.org.za.**

## Announcements

### SA CRIME QUARTERLY FOCUSES ON TRADITIONAL JUSTICE

The March edition of *SA Crime Quarterly* (No. 35) had a special theme focus on *Balancing law and tradition: the regulation of Traditional Justice in South Africa*.

It has the following articles.

1. **The Traditional Courts Bill:** Controversy around process, substance and implications - by Sindiso Mnisi-Weeks
2. **Resurgence of tribal levies:** Double taxation for the rural poor - by Aninka Claassens
3. **Balancing law and tradition:** The TCB and its relation to African systems of justice administration - by Chief Phathekile Holomisa
4. **The Traditional Courts Bill:** A silent coup? - by Nomboniso Gasia
5. **Beyond the Traditional Courts Bill:** Regulating customary courts in line with living customary law and the Constitution - by Sindiso Mnisi Weeks
6. **On the record:** Interview with Deputy Minister of Cooperative Governance and Traditional Affairs, Yunus Carrim - by Mazibuko K. Jara

**This special edition was co-edited by the LRG.**

*SA Crime Quarterly* is published by the Institute for Security Studies. The edition is available online from [www.iss.co.za](http://www.iss.co.za).

### CASE SURVEY FINDINGS ON MARRIAGE, WOMEN, CUSTOMARY LAW AND THE CONSTITUTION

During 2009 and 2010, the Community Agency for Social Enquiry (CASE, [www.case.org.za](http://www.case.org.za)) conducted a survey of 3,000 adult women living in three rural, ex-homeland, areas of South Africa. The research project also included focus group discussions with separate groups of women and men in rural villages in Keismammahoek (Eastern Cape), Msinga (KwaZulu Natal) and Ramatlabama (North West). The three areas have different dominant languages – Xhosa, Zulu and Tswana respectively – and different cultures and customs. They also have different histories under colonial times and apartheid that have affected how people live. The main aim of the project was to see whether and, if so, how women's access to land had changed over time. Marital status can be an important determinant of women's access to land. The survey therefore included questions about relationships.

The findings show strong evidence of a large increase in the number of unmarried rural women getting residential sites in their own right. This research seems to contradict the oft-repeated claims that customary law denies women access to land except through their husbands, fathers or brothers. The findings of the survey have been published in two popular leaflets by CASE and the LRG:

1. **Single women, customary law and the Constitution:** Findings from the rural women and land survey
2. **Marriage and relationships:** Findings from the rural women and land survey

These two leaflets are available in English, seTswana, isiXhosa and isiZulu. They can be found on [www.uct.ac.za/lrg](http://www.uct.ac.za/lrg) and [www.case.org.za](http://www.case.org.za). The full survey report is also available on the CASE website.

### ATLANTIC PHILANTHROPIES ANNOUNCES FUNDS FOR DEFENCE OF DEMOCRACY AND FOR RURAL MOBILISATION

In April 2011, the Atlantic Philanthropies in collaboration with HIVOS and the Multi-Agency Grants Initiative (MAGI) set up two funds:

1. Rural Mobilisation Fund
2. Defence of Democracy Rapid Response Fund

**The Rural Mobilisation Fund** seeks to place resources in the hands of communities, opposing:

- Evictions from farms
- The *Communal Land Rights Act* and other retrogressive legislation proposed in the former Bantustan (communal) areas
- Unconstitutional aspects of communal law
- Granting of concessions to private sector companies of mining rights and rights to exploit bio-diversity
- Pollution of water sources and air quality
- Unfair tenure

The Fund will also place resources in the hands of rural communities seeking access to health, education and housing, in terms of Section 27 of the Constitution.

The Democracy Fund has been established as a small-grants facility to counter threats to democracy, freedom of expression and human rights focused on the target countries of South Africa, Zimbabwe, Malawi and Zambia. 🌸

**Who to contact?**

**Multi-Agency Grants Initiative (MAGI)**

Zak Mbele, Tel: 011 726 1090,

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