



Initial Submission on the Black Authorities Act Repeal Bill (B9-2010)

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Executive Summary

LRG welcomes the repeal of the Black Authorities Act 68 of 1951 (BAA) as an important step in moving away from our apartheid past.

However, LRG submits that it is an inadequate step on its own. The submission draws attention to a set of post-1994 measures and legal provisions that, in effect, entrench and even exacerbate the legacy of the very Act that is the subject of the repeal. It asks the Portfolio Committee on Rural Development and Land Reform to take notice of these, and take decisive steps to ensure that the legacy of the BAA is done away with.

The submission shows section 28 of the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA), which is spuriously titled 'transitional arrangements' and hidden in the back of the TLGFA, to accomplish two damaging things. (i) It does not discontinue the traditional authorities established by the BAA but instead provides for their continuation as traditional councils. (ii) It provides for the disestablishment of elected community authorities that exist independently of traditional authorities, forcing them under the authority of traditional authorities that they resisted being subjected to under apartheid. The TLGFA also makes it near-impossible for communities to withdraw from traditional authorities that were wrongly assigned authority over them under the BAA.

Whilst the TLGFA provides for the election of 40% of members of traditional councils, these elections have been a failure in the provinces in which they have been conducted so far: North West, KwaZulu Natal and most recently Eastern Cape. Rural people who prefer a democratic system of authority continue to object to traditional leaders' being allowed to appoint 60% of members of traditional councils.

Finally, the TLGFA permits that traditional councils can continue to impose tribal levies. This is despite the fact that the Constitution restricts this power to national, provincial and local government and requires that it be exercised subject to very strict processes that the TLGFA does

not replicate. This TLGFA permission also runs counter to the government's own statements, previously, that 'double taxation of people must be avoided [and thus] [t]raditional leadership structures should no longer impose statutory taxes and levies on communities.'

With reference to the recent Constitutional Court decision declaring the Communal Land Rights Act 11 of 2004 (CLARA) unconstitutional, CLARA is shown to build upon – and not eliminate – the BAA's boundaries and authorities. CLARA, in fact, extends the powers of the traditional authorities in the BAA to include wide-ranging land administration powers. Furthermore, as the Court found, CLARA did not involve sufficient public participation in its passing because it avoided the more demanding legislative route of section 76 of the Constitution. Section 76 gives the provinces and their constituents a bigger role to play than section 75, which was used instead. Lastly, CLARA does not show adequate respect to the systems of living customary law that it finds on the ground and seeks to 'repeal or amend' by its terms.

The Traditional Courts Bill B15-2008 (TCB) is proven to replicate the same errors made by the TLGFA and CLARA in adopting the boundaries and authority structures created by apartheid legislation – namely, the BAA and the Black Administration Act 28 of 1927. Likewise, the TCB extends the powers of these undemocratic structures, including the power to impose severe sanctions on people on whom the traditional authority is imposed. The TCB centralises all decision-making and law-making power to the 'senior traditional leader' thus excluding community councillors and dispute resolution forums that exist at lower levels in the community. It is also poor in ensuring public participation: it was drafted without consulting the rural public whom it most affects, especially women, and does not provide for their active involvement in the courts.

This submission therefore shows that, though the repeal of the Black Authorities Act is represented as a big victory over apartheid and its oppression of rural people, the *legacy* of the Act is being entrenched by recent legislation, and not repealed. As reflected in its policy speeches, government's aim is to 'institutionalise traditional leadership'. It is submitted that this policy approach actually dates right back to the 19th Century when Frederick Lugard articulated the policy of 'indirect rule'. This policy was embodied by three specific institutional dimensions: (i) the recognition of the traditional leaders (Native Administration), (ii) the establishment of Native Courts, and (iii) Native Treasuries to which the indigenous leaders collected the taxes from their subjects. This dated three-part policy with colonial origins that was later entrenched by apartheid legislation, including the BAA, is largely realised in the TLGFA, CLARA and TCB today.

In sum, what the new legislation does, especially the TCB, is re-create second-class citizenship for people living in the former homelands. They become insulated from the reach of the laws applying to other South Africans and subject to customary law as defined and interpreted by traditional leaders. The consensual nature of customary law is undermined when it is applied within fixed jurisdictional boundaries derived from the BAA as is done in the TLGFA, CLARA and TCB. This result is inconsistent with the government's stated aim of undoing the legacy of the Bantu Authorities Act.

Having demonstrated how important but insufficient the BAA repeal legislation is, we ask this committee, which is responsible for the repeal of the BAA, to engage with other parliamentary committees and structures to *effectively* eliminate the legacy of the Act. In particular, we stress the importance of proper consultation with the rural people directly affected by these laws. The legislative process has thus far been dominated by privileging the voices of the traditional leader lobby – the very sector that stands to gain from the laws – over the voices of the rural public.

1. Introduction: Who We Are

The Law, Race and Gender (LRG) Research Unit was established in 1994 as a research and training unit in UCT's Faculty of Law. The initial goal of LRG was to produce socio-legal research that informed evidence-based training of judicial officers. To this end, LRG's empirical research has included studies of the functioning of the justice system, including the Family Advocate, the Divorce Courts, unrepresented accused, lay assessors, and the family courts.

Presently, the main project of LRG is the Rural Women's Action-Research (RWAR) project. The RWAR project is part of a wider collaborative initiative that seeks to support struggles for change by rural people, particularly women, in South Africa. The project focuses on land rights, but includes related issues of poverty, inheritance, succession, marriage, women's standing and representation in community structures and before traditional courts, rural governance, citizenship and access to human rights in general by rural women. An explicit concern is that of power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level. It seeks to understand the complexities and opportunities in the processes of contestation and change underway in rural areas and aims to provide targeted forms of support to those engaged in struggles that challenge patriarchal and autocratic power relations in former homeland areas.

The project embodies a rights-based approach, focusing on the realisation of socio-economic rights. It is also concerned with citizenship and governance through its focus on women's decision-making status in community forums that allocate and adjudicate land, and on contested interpretations and applications of customary law. A key concern of the project is to support women in their efforts to improve access to, and control over land. The project thus has a livelihoods and development aspect.

2. Main Argument in Summary

LRG welcomes the repeal of the Black Authorities Act 68 of 1951 (BAA). The repeal is an important historical and symbolic step in moving away from our apartheid past. As the Black Authorities Act Repeal Bill (B9-2010) itself states, *'the Black Authorities Act, 1951 (Act No. 68 of 1951)... established statutory "tribal", regional and territorial authorities to (amongst other things) generally administer the affairs of Blacks'*. Beyond this symbolic repeal itself, the key issue that remains for today and the future concerns whether the repeal on its own will be sufficient to undo the legacy left by the BAA, or whether additional steps are necessary. In the context of the repeal we consider it important to draw the attention of parliament to a set of post-1994 measures and legal provisions that, in effect, entrench and even exacerbate the legacy of the very Act that is the subject of the repeal. We also draw the attention of parliament to recent policy pronouncements by government that seek to use apartheid-era tribal authorities as institutions with governance powers.

2.1. BAA Legacy Lives On

In particular, we draw attention to section 28 of the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). This section of the TLGFA entrenches apartheid-era tribal boundaries and authorities on a wall-to-wall basis in virtually all rural areas in the former apartheid

homelands. In effect, section 28 of the TLGFA perpetuates and legitimates these apartheid-era tribal boundaries and authorities. In other words, section 28 of the TLGFA essentially extends the very Black Authorities Act that is being repealed today, as well as elements of the earlier Black Administration Act 38 of 1927. These laws gave the Union and apartheid governments draconian powers to exercise indirect rule over millions of dispossessed black people dumped in so-called native reserves held in trust by the state. In the March 2010 Constitutional Court hearing on the Communal Land Rights Act 11 of 2004 (CLARA),¹ Deputy Chief Justice Dikgang Moseneke expressed serious concern about using *'the Black Authorities Act of 1951 as a platform for land reform'*. He described CLARA's reliance on the BAA as *'simply incredible'*.

In the context of section 28 of the TLGFA and the equivalent transitional mechanisms in the provincial laws enacted pursuant to it, the repeal of the BAA therefore falls far short of what is required to address the legacy of apartheid in the rural areas of our country. Drawing from extensive textual and empirical research in the former homelands, the LRG present to parliament arguments and evidence that demonstrate the consequences for rural people of the BAA. We also depict the current state of affairs vis-à-vis recent legislation that ostensibly seeks to remedy apartheid's effects but instead further entrenches them.

We think that, for this repeal to be a genuine act of liberation and democratisation of the former homelands, parliament should not ignore problematic and controversial post-apartheid legislative developments. These developments essentially work together to refashion the old tribal authorities as 'traditional councils' without much transformation of their content, purpose, functions and powers. The new laws give traditional councils the very kinds of unaccountable governance powers they had as traditional authorities under the BAA which contributed to various abuses and ultimately led to their loss of legitimacy in many areas. A close examination of the TLGFA, CLARA, and Traditional Courts Bill B15-2008 (TCB) – as provided below – reveals this.

Of the BAA, the Repeal Bill states that:

1.2 The Act was a legislative cornerstone of apartheid by means of which Black people were controlled and dehumanised, and is reminiscent of past division and discrimination. The provisions of the Bill are both obsolete and repugnant to the values and human rights enshrined in the Constitution of the Republic of South Africa, 1996 (the Constitution).

1.3 The proposed repeal is also in line with the investigation and report of the South African Law Reform Commission on obsolete and redundant legislative provisions, which report was adopted by the Department of Justice and Constitutional Development.

Whilst the LRG agrees with the assessment articulated by the drafters in clause 1.2, it is submitted that the transitional mechanisms of the TLGFA (namely, section 28) preserve and entrench the 'obsolete and repugnant' boundaries, authority structures and power relations between traditional leaders and their 'subjects' established by the BAA. It is therefore inconsistent to highlight the repeal of the BAA when the structures it created are now deemed to be new 'traditional councils' under the TLGFA with enhanced powers in terms of CLARA and the TCB, as described in detail below.

This submission therefore sets out the fundamental ways in which the legislation that government has enacted to replace the BAA has in large part reinforced the apartheid architecture. This recent

¹ The judgment in this case is *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, CCT 100-09, judgment delivered on 11 May 2010.

legislation has thus perpetuated the ‘dehumanisation and discrimination’ experienced by people in the former homelands, instead of broadening constitutional values and human rights to them.

We also draw attention to the fact that, whereas the Repeal Bill states that:

KwaZulu-Natal supports the proposed repeal of the Act on the basis that the cut-off date in clause 1 (31 December 2010) will afford sufficient time for the passage of its Bill on the Code of Local Government Law. Limpopo has not recorded any objection or identified any consequential legal vacuum.

We are concerned that, despite concerted effort, we have not been able to obtain a copy of the KZN Bill, and it would seem not to exist.

2.2. Recent Policy Pronouncements: Apartheid-Era Tribal Authorities to Gain Governance Powers

In addition to the problematic provisions of the TLGFA outlined above, the committee should also take note of recent policy pronouncements by government:

- i. Response by President Jacob Zuma to the debate on his opening address to the National House of Traditional Leaders: 20 April 2010;
- ii. Budget Vote by Minister Sicelo Shiceka: 22 April 2010;
- iii. Speech by Minister Sicelo Shiceka to the National Council of Provinces (NCOP) on the passing of amendments to Traditional Leaders Bills: 10 November 2009; and
- iv. Speech by Deputy Minister Yunus Carrim to the Traditional Councils, Local Government & Rural Local Governance Summit, eThekweni: 05 May 05 2010.

These speeches provided platforms for government to make significant policy pronouncements that build on the problematic provisions of the TLGFA concerning the powers of converted apartheid-era tribal authorities. Through their speeches, the President, the Minister and the Deputy Minister of Traditional Affairs have announced the following:

- i. *‘The Department of Traditional Affairs is about to release proposed guidelines on the allocation of roles and delegation of functions to traditional leaders and traditional councils by organs of state in terms of the Traditional Leadership and Governance Framework Act. All the affected Departments will have a chance to align their plans with what the guidelines intend to achieve.’* (President Zuma speech).
- ii. *‘The Department is also reviewing the need for implementing the Communal Property Association Act in traditional communities.’* (President Zuma speech).
- iii. *‘Traditional councils are meant to contribute to the system of cooperative governance’.* (Deputy Minister Carrim’s speech)
- iv. *‘National and provincial government departments may also allocate to traditional councils roles in land administration; agriculture; administration of justice; safety and security; health; welfare; arts and culture; tourism; registration of births, deaths and customary*

marriages; and the management of natural resources.’ (Deputy Minister Carrim’s speech)

- v. *‘Consideration needs to be given to making it necessary for traditional councils to be represented in ward committees, through changes in policy or regulation or legislation.’* (Deputy Minister Carrim’s speech).

The above speeches allude to significant measures that will expand the powers and functions of apartheid-era tribal authorities, pursuant to the TLGFA’s adaptation of the BAA model of authority. Whilst these are not yet law or official policy, should they become official, they will create a 4th tier of government that is not provided for in the Constitution.

2.3. What We Ask Parliament to Do

In light of the new laws that entrench what the BAA created and the pending government policy processes, we ask parliament to note the irony of repealing the BAA whilst its key provisions live on in new legislation as highlighted in this submission. We also ask parliament to take official notice of the concerns of the Constitutional Court regarding the reliance on the BAA’s tribal authorities and boundaries as a basis for post-apartheid land reform. We urge the Portfolio Committee on Rural Development and Land Reform to draw the attention of the Portfolio Committee on Justice and Constitutional Development to the concerns raised in this submission regarding the perpetuation of the BAA in current territorial boundaries, traditional institutions and local practices in the former homelands. We also encourage this committee to take notice of the concerns tabled here as it proceeds to consider what will replace CLARA as the legislation required by section 25(6) of the Constitution.

We now turn to the relationship between the BAA, and the TLGFA, CLARA and TCB.

3. **The Black Authorities Act 68 of 1951 and the Traditional Leadership and Governance Framework Act 41 of 2003**

As the legislation founding the framework of the government’s recognition of the institution of traditional leadership, the Traditional Leadership and Governance Framework Act establishes the primary traditional structures and their boundaries of territorial and subject-matter jurisdiction. It therefore brings these structures into being, and describes their powers and functions. This submission focuses on three areas of greatest controversy. First, it looks at the boundaries that the TLGFA establishes as marking the jurisdictions of the traditional structures founded by it (namely, the old boundaries established by the BAA for the traditional authorities instituted by same). Second, it sets out the power of taxation that the TLGFA permits the traditional authorities. And, third, it discusses the means by which the TLGFA prescribes that the traditional structures should be constituted.

3.1. Boundaries and Authority

The Repeal Bill notes:

- 1.9 The Act also affects the concurrent functional areas of “indigenous law and customary law” and “traditional leadership” listed in Schedule 4 to the Constitution. In view of the enactment of the

Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), legislative alternatives for the provisions of the Act affecting those areas are no longer required. The cut-off periods for the continued existence of the old community, regional and other authorities mentioned in section 28(5) and (6)(a) of the Traditional Leadership and Governance Framework Act, 2003, have expired.

However, it must be noted that this is an incomplete – and, consequently, deceptive – telling of what has taken place with regard to community, regional and other authorities in the TLGFA. It could be understood to suggest that traditional authorities have been discontinued when, in fact, the TLGFA reasserts old boundaries that were established by the BAA. It does this by deeming the former traditional authorities to be traditional councils in terms of the innocuous section 3, on condition that they comply with the requirements in section 3(2) within a year of the Act’s commencement, therefore before 24 September 2005.²

Section 28(1) of the TLGFA states the following:

Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26.

Section 28(3) goes on to deem any *“tribe” that, immediately before the commencement of this Act, had been established and was still recognised as such is deemed to be a traditional community contemplated in section 2* Section 28(4) continues in this same vein, stating that any *‘tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council’*

Finally, Section 28(5) states that

[a]ny community authority that had been established in terms of applicable legislation and still existed as such immediately before the commencement of this Act, continues to exist until it is disestablished in accordance with provincial legislation

The Traditional Leadership and Governance Framework Amendment Act 23 of 2009 (TLGFA Amendment) has extended the transitional period for traditional authorities to comply with section 3(2) of the TLGFA and thus be converted into traditional councils until 24 September 2011. This means that today the former traditional authorities have effectively become traditional councils (whether transformed or not) under the TLGFA and *‘must perform the functions referred to in section 4’* of the TLGFA.³

As a matter of contrast with the case of traditional authorities, the TLGFA Amendment extended the existence of elected community authorities only until 24 September 2009. This means that they had ceased to exist even by the time the TLGFA Amendment was promulgated in December 2009. Moreover, an important disadvantage that elected community authorities suffer in contrast to traditional authorities is that the TLGFA only provides for their disestablishment and integration into a (sometimes Commission-approved) traditional council.⁴ The TLGFA makes no provision for the continuation of community authorities. Despite the use of apparently enabling language in

² Traditional Leadership and Governance Framework Amendment Act 41 of 2003, Section 28(4)

³ Section 28(4)

⁴ Section 28(5)

sections 2 and 3 which suggests that it would be possible for a community authority to continue (or a ‘traditional community’ that is not subject to the authority of a traditional leader), this suggestion is categorically undermined by section 28(5).

That the traditional councils established by the TLGFA are the very same traditional authorities brought into being by the BAA is an uncontroversial claim. In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*,⁵ the Chief Justice notes that:

The Black Authorities Act gave the State President the authority to *establish* “with due regard to native law and custom” tribal authorities for African “tribes” as the basic unit of administration in the areas to which the provisions of CLARA apply. . . . *It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act, 2003* (the Traditional Leadership Act). And in terms of section 21 of CLARA, these traditional councils may exercise powers and perform functions relating to the administration of communal land. (emphasis added)

The Court finally declares that ‘[u]nder apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands.’⁶ It is difficult to see how such an undemocratic process can acquire different (that is, democratic) significance in the present but this is what the government has tried to persuade people is the case with its adoption of the same model, in the TLGFA, used by the apartheid state in the BAA.

In summary, what the above shows is that (i) the traditional authorities established by the BAA do not in fact cease to exist but are converted into traditional councils through what is spuriously titled ‘transitional arrangements’ hidden in the back of the TLGFA. It also shows that (ii) elected community authorities cease to exist and are rendered a non-option henceforth.

This latter point is of great significance in light of the long history of community authorities that, under apartheid, resisted being included under traditional authorities to which they were not genuinely affiliated and whose authority they did not recognise. In the context of violent and resisted forced removals by the apartheid government and imposed traditional identities, boundaries and authorities,⁷ those communities that managed to gain recognition as community authorities secured themselves some refuge from a deleterious process under an unjust regime. Now, such communities will automatically be included under a traditional council that they (still) do not recognise; yet, it will take place under a democratic dispensation that purportedly protects their rights.

Whilst it exists, the mechanism for withdrawal from a traditional council’s boundaries in the TLGFA is inadequate and makes it virtually impossible for sub-groups put within disputed boundaries to withdraw. Section 7 requires that the whole community apply to the Premier for the withdrawal of its recognition as a community. It also necessitates consultation with the provincial house of traditional leaders and the king/queen having official jurisdiction over the community; this is despite that these bodies might be less than keen on supporting a sub-group’s application to be recognised as independent from the traditional council and community. This therefore creates a bias in favour of traditional councils and places an unfair burden on community sub-groups (especially unfair on those that were already recognised as community authorities) to show why they ought to be permitted to be independent.

⁵ CCT 100-09, judgment delivered on 11 May 2010, at para 24

⁶ *Tongonae*, para 25

⁷ See para 25 in *Tongoane*

It is worth recalling that government has acknowledged many times the need to investigate and weed out the illegitimate traditional leaders and boundaries created by apartheid but has, as yet, failed to do so despite attempts such as the Ralushai and Nhlapo commissions. Furthermore, last we heard (23 February 2010), the President is still studying the recommendations of the Nhlapo commission. These results have yet to be released to the public.

3.2. Tribal Levies

The White Paper on Traditional Leadership and Governance⁸ states that

The authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities.

This recognised the significant role that back-breaking tribal levies and taxes played in the subjection of black people during colonialism and apartheid.

Yet, in the TLGFA, a different approach to that articulated in the White Paper was taken. There is therefore no similar provision outlawing levies or taxes. Instead, there is a detailed description of the reporting and auditing requirements of traditional councils and their relationship, financially and otherwise, with provinces. Section 4(2) of the TLGFA prescribes that:

Applicable provincial legislation must regulate the performance of functions by a traditional council by at least requiring a traditional council to —

- (a) keep proper records;
- (b) have its financial statements audited;
- (c) disclose the receipt of gifts; ...

Section 4(3) then says that:

A traditional council must — ...

- (b) meet at least once a year with its traditional community to give account of the activities and finances of the traditional council and levies received by the traditional council.

The TLGFA therefore provides for the possibility that traditional councils will impose levies. This reverts to the long and documented history of colonial and apartheid government approaches which shored up traditional authorities' progressively oppressive powers over their people using taxation. The TLGFA permits this despite the fact that the Constitution (in sections 43 and 104) vests powers of this kind in national and provincial government only, and permits provinces to delegate only to their municipalities, as per section 104(1)(c). Chapter 13 of the Constitution, which (in sections 226 through 230A) deals specifically with 'Provincial and Local Financial Matters', anticipates that revenue will be raised only by national, provincial and local government. Strict procedures are put in place by the Constitution for Money Bills in section 228(2)(b) to check the provincial power of taxation:

⁸ (July 2003) GG25438, published on 10 September 2003. Issued by Minister for Provincial and Local Government.

The power of a provincial legislature to impose taxes, levies, duties and surcharges — ...

(b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

The TLGFA does not replicate this accountability procedure for traditional councils; their levying powers must therefore be unconstitutional. It is also submitted that this is the case despite Chapter 12 because section 211(1) subjects '[t]he institution, status and role of traditional leadership' to the Constitution.

Amongst the provinces, Limpopo has enacted legislation that explicitly creates a process for traditional council levies. Section 25 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 provides that:

(1) A traditional council may, with the approval of the Premier, levy a traditional council rate upon every taxpayer of the traditional area concerned.

(2) The levy of a traditional council rate under subsection 1 should be made known by the Premier by notice in the Gazette and shall be of force from the date mentioned in such notice.

(3) Any taxpayer who fails to pay the traditional council levy may be dealt with in accordance with the customary laws of the traditional community concerned.

On the other hand, North West, Northern Cape and Eastern Cape all ban levies:

A Traditional Council may not impose any levy to be paid by any member of the traditional community or by any section of members of the traditional community.⁹

However, their legislation permits gifts and voluntary contributions. Free State, KwaZulu Natal and Mpumalanga say nothing explicit in their legislation about levies, but do contain sections on voluntary contributions and gifts. Within the regulations for each of these provincial acts, there is no further discussion of levies or taxes.

Concerning voluntary contributions, in the words adopted by the Eastern Cape:

(1) A traditional council may request members of a traditional community or any section of a traditional community, to make a voluntary contribution.

(2) No such contribution must be collected unless the majority of the members of such traditional community have, at a meeting convened for the purpose, consented to the payment of such voluntary contribution.

(3) Such voluntary contributions must only be made for purposes of financing a specific project.¹⁰

Most of the provinces use similar wording and, yet, while a few of the provinces mention this process (a meeting) by which such 'voluntary' contributions are decided upon, some do not. Even where a meeting is mandated, the wording of this section suggests that to call the contributions 'voluntary' is somewhat misleading as they might become binding as long as they are pursuant to a meeting and a vote.

⁹ Section 30 of Eastern Cape Traditional Leadership and Governance Act 4 of 2005

¹⁰ Section 31 of Eastern Cape Traditional Leadership and Governance Act 4 of 2005

Recent studies have shown that levying practices continue and are widespread despite the legislation above.¹¹ They include annual taxes, as well as ad hoc levies. Such ad hoc levies might be for the maintenance of the chief – for instance, to purchase a car for the chief, or a traditional skirt for his wife, or even to send his children to (sometimes private) school. The latter category of taxes is difficult to dissociate from the ‘special rates’ levied during colonialism and apartheid.¹² Other ‘special’ rates include fines for cohabiting while unmarried, and for falling pregnant out of wedlock; levies for the removal of mourning clothes, and for hosting a traditional feast; and charges for obtaining proof of residence, and for having an RDP house built by government for you. When people object and/or cannot pay these various taxes they are severely punished by being denied the proof of residence stamp that they need to obtain an identity document, open a bank account and function in the formal economy. They might also be brought to the traditional court where a number of traditional court fines are also charged, often at similarly exorbitant rates.

Members of rural communities complain about this being double taxation (they pay VAT and then have to pay tribal levies). They speak of finding ever-increasing and inflated tribal levies particularly burdensome in light of rural poverty and the desperate need for development rather than further extortion. Women making up the large majority of rural people, and many of them being unemployed, they complain of having to pay the expensive levies out of the minimal child, disability or pension grants that they receive from government, which worsens their poverty.

3.3. Failure to Effect Electoral Procedures

As mentioned, section 28(4) of the TLGFA provides that tribal authorities created in terms of the BAA are deemed to become traditional councils but permits them a period of seven years to adhere to section 3(2). This section requires that they change their composition to incorporate 40% elected members and ensure that 30% of the council are women (except where exemption is sought from the Premier on the basis that ‘*an insufficient number of women are available to participate in [the] traditional council*’).¹³ This means the senior traditional leader may select 60% of the members of the traditional council.

The elections held so far in the Eastern Cape, KwaZulu Natal and North West provinces for the 40% elected quota have been fundamentally flawed and have not complied with the provincial regulations governing them. For instance, the elections were meant to have been held throughout the Eastern Cape in early March of this year. However many traditional leaders objected to having to include elected members and many community based organisations and civics objected to the electoral process on the basis that it reinforced contested apartheid boundaries and subjected the people to largely unelected structures.

Evidence collected by LRG and concerned rural organisations shows how the traditional elections were held under conditions that fall far below acceptable standards for elections. The experiences in Peddie (Ndlambe, Nobumba and Prudhoe), Ndlambe (Mncotsho and Tshabho), King William’s Town (most villages under the jurisdictions of the AmaNtinde, ImiDange, ImiDushane, ImiQayi, Khambashe and Rharhabe traditional councils) and Keiskammahoek (Keiskammahoek North) all point to the following problems:

¹¹ See (July 2009) Draft Report on the Consultative Process on Communal Contributions Paid in Traditional Communities Within KwaZulu-Natal, Maurice Webb Race Relations Unit, UKZN

¹² See Native Affairs Act 23 of 1920, Native Taxation and Development Act 41 of 1925, Bantu Authorities Act 68 of 1951 and Bantu Taxation Act 92 of 1969

¹³ Section 3(2)(d)

- i. The communities did not know of the proclamations by the Premier of their community's traditional community status or the purpose of their traditional council. They also were not aware of the Premier's announcement that traditional elections would be held, and his call for the nomination of candidates as required by the provincial regulations governing traditional council elections.
- ii. In all these areas, there is no evidence that community meetings were held on traditional council elections that meet the 50%+1 quorum/threshold required in terms of the provincial regulations.
- iii. A large number of King William's Town villages rejected the traditional elections through objection letters sent to the MEC. The same was done by several organisations (SANCO, Ilizwi Lamafama Small Farmers' Union and the Rural People's Movement). These organisations also actively met and corresponded with the MEC's office which failed to reply to the concerns they raised. Four meetings were held with the MEC who informed them that the elections will go ahead so as to show President Zuma that he is an MEC with integrity. The MEC admitted in these meetings that the traditional council elections process was not properly done. The MEC also publicly admitted that government *'failed to properly inform communities about the provincial traditional council elections'*. He did this through a press conference held a week after the traditional council elections were held.¹⁴

In KwaZulu-Natal we understand that there were insufficient funds to hire the IEC to monitor and support the traditional council elections. 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 North West we have been informed that the election process was supervised by the Provincial House of Traditional Leaders. We have also received complaints from ordinary people in various areas who attempted to nominate their own candidates but were ignored by the person in charge who accepted only those nominations consistent with a pre-agreed list of names.

The 60% assigned to the senior traditional leader to appoint was objected to in the process of drafting the TLGFA. Many rural people objected to this on the basis that they wanted to ensure democratic processes for the leadership structures that would prevail in the former homelands subsequent to the end of apartheid. They objected to the perpetuation of the divide between homeland areas and the cities, wherein those who live in the former would continue to be 'subjects' while those who inhabit the latter would be 'citizens'. The fact that people continue to object to it is therefore no surprise. This concern also relates back to that about the apartheid boundaries and jurisdictions of authority established by the BAA that the TLGFA preserves as shown above.

4. The Black Authorities Act 68 of 1951 and the Communal Land Rights Act 11 of 2004

The Communal Land Rights Act is the legislation that was enacted to provide for the exercise of the land administration function assigned in section 20(1)(b) of the TLGFA. This submission details some of the objections raised to CLARA, focusing specifically on concerns that relate most profoundly to the legacy of the BAA as it is expressed in the TLGFA. Namely, those concerns pertaining to traditional council boundaries, authorities and their extended powers; and the degree

¹⁴ 18 March 2010. 'Traditional council voting fiasco'. Front page article in EC Today Newspaper. Article written by Mandlenkosi Mxengi.

of public participation in the process of CLARA's enactment and the determination of customary law.

The Constitutional Court's decision to declare CLARA unconstitutional in the challenge¹⁵ by four rural communities against CLARA is significant here as it took these communities challenging the legislation over years for it to be realised that it was not in keeping with the Constitution. The Constitutional Court decision itself was reached on procedural grounds, as the Act had been passed by an incorrect and less cumbersome procedure in parliament (that of section 76 instead of that of section 75 of the Constitution).¹⁶ However, some statements made by the Court in its judgment, such as those already quoted as drawing the link between the TLGFA traditional councils and the BAA traditional authorities, render the decision of substantive importance also.

4.1. Boundaries, Authority and Extended Power

Depending upon the TLGFA's boundaries, CLARA permits that the traditional council (formerly, traditional authority) might be the land administration committee¹⁷ that will operate in terms of community rules.¹⁸ As pointed out previously, Chief Justice Ngcobo, writing on behalf of the unanimous Court, explicitly acknowledges the continuous relationship between CLARA and the old apartheid structures imposed by the BAA.¹⁹ Namely, the traditional councils that the TLGFA establishes are in fact the very same old traditional authorities that existed under the Bantustan system which was formed on the back of forced removals, and imposed boundaries and authorities. The Court is alarmed by this troubling continuity. Yet, in fact, people have repeatedly spoken out against the TLGFA, CLARA and TCB (which is presently before the Portfolio Committee on Justice and Constitutional Development) in attempts to draw the government's attention to this fault, to no avail. Now, in this judgment the Court not only recognises the adoption of the BAA model of black administration but identifies that the unconstitutional CLARA even *extends* powers²⁰ held by the apartheid-established bodies of authority.²¹ In the Court's words,

traditional leaders, through traditional councils, will now have wide-ranging powers in relation to the administration of communal land.²²

¹⁵ *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, CCT 100-09, judgment delivered on 11 May 2010

¹⁶ *Tongoane* at paras 110-12

¹⁷ Section 21(2)

¹⁸ Section 19

¹⁹ *Tongoane* at para 24-5

²⁰ *Tongoane* at para 80.

²¹ *Ibid* at para 22:

“The Black Land Act and the Development Trust and Land Act, together with the regulations made under these statutes, must be read together with the Black Administration Act and the Bantu Authorities Act, 195137 (now the Black Authorities Act). The latter statutes formed part of the colonial and apartheid legislative scheme for the control of African people. ... As will appear below, the Black Authorities Act established a tribal structure for the administration of African people in African areas.”

²² *Ibid* at para 80.

4.2. Lack of Public Participation in Making of Act and Development of Customary Law

The Court found the process by which CLARA was passed wanting on the basis that the provinces had been excluded from playing the weighty role that the Constitution assigns them in the passing of legislation that affects their constituents.²³ Therefore, in its statements, the Court emphasised that ‘our Constitution manifestly contemplated public participation in the legislative and other processes of the National Council of Provinces, including those of its committees’.²⁴

In the Court’s retelling of the history of the formation of the former homelands, the counter-democratic (and thus unconstitutional) nature of the process of CLARA’s promulgation is situated within the important context of the undemocratic policy move of basing the TLGFA on the BAA, as set out above. And, the Court goes to great lengths to show the significance of this.²⁵ Democracy, freedom and public participation are the cornerstones of our constitutional order. They are values that ought not to be deviated from in the manner in which the government has done in these pieces of legislation.²⁶

Simultaneously, in this strong claim made for the respect of public voices in the making of laws that affect rural people, the Court reaffirms the sentiments articulated in its previous decisions. In this line of decisions, it has duly recognised customary law as a legitimate source of South African law in terms of the Constitution.²⁷ The Court points out specifically that the presence of living customary law as a form of regulation on the ground is not equivalent to a legal vacuum. It is rather a genuine presence that must be treated with due respect, even if it is to be interfered with.²⁸ This

²³ *Tongoane* at para 66:

“These procedural safeguards are designed to give more weight to the voices of the provinces in legislation substantially affecting them. But they are more than just procedural safeguards; they are fundamental to the role of the NCOP in ensuring ‘that provincial interests are taken into account in the national sphere of government’, and for ‘providing a national forum for public consideration of issues affecting the provinces.’ *They also provide citizens within each province with the opportunity to express their views to their respective provincial legislatures on the legislation under consideration. They do this through the public involvement process that provincial legislatures, in terms of section 118(1)(a) of the Constitution, must facilitate.*” (emphasis added)

²⁴ *Tongoane* at para 106; also see *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 211.

²⁵ See *Tongoane* at para 25, where the Court describes:

“Under apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands. ... Section 5(1)(b) of the Black Administration Act became the most powerful tool to effect the removal of African people from ‘white’ South Africa into areas reserved for them under this Act and the Development Trust and Land Act. And as we noted in *DVB Behuising*, ‘[t]hese removals resulted in untold suffering.’ The forced removals of African people from the land which they occupied to the limited amount of land reserved for them by the apartheid state resulted in the majority of African people being dispossessed of their land. It also left a majority of them without legally secure tenure in land.”

²⁶ See sections 1 and 7 of the Constitution. Also see *Doctors for Life* at para 211, and *Tongoane* at paras 106-07.

²⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at paras 307-8; *Bhe and Others v Magistrate, Khayelitsha and Others*; *Shibi v Sithole and Others* 2005 (1) SA 580 (CC) at para 45; *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC), at para 20; *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) in para 52; *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 45.

²⁸ *Tongoane* at para 90 reads:

connects with the concept of public participation by signifying the importance of the role of the public, not just in the process of promulgating legislation, but also in its implementation and/or the ongoing development of complementary living laws.

This aspect of the judgment is therefore a welcome reminder to the government not to exclude the multiple voices that form the essence of the democracy established by our Constitution. And, whereas, in the BAA, the use of the term '*with due regard to native law and custom*' was nothing but mere lip-service, the Court seems to enjoin the government not to allow the term to disintegrate into a mere platitude in the present day. As it has declared in previous judgments, therefore:

As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development *by communities of their own laws* to meet the needs of a rapidly changing society *must be respected and facilitated*.²⁹ (emphasis added)

CLARA permits traditional structures that were artificially formed and centralised by the apartheid state in order to effect its own rule over the majority black population to make decisions about land rights in communal areas at the macro level.³⁰ In doing so, it runs counter to the customary law lived and developed by communities themselves. This is because customary law in fact often provides for a more inclusive model of decision-making concerning land: this takes place at multiple levels of the community depending on who uses the land. CLARA also hereby gives the most decision-making power to structures in which women may have the most limited participation. (This is as compared to the greater participation women might enjoy in forums existing at lower, less intimidating levels of authority.) This means that women might not have an equal say in how land rights are determined and structured. CLARA therefore perpetuates the patterns of oppression and exclusion suffered by women under apartheid. These were entrenched by the formalisation of patriarchy that was eventualised through the establishment of the male-only and 'hostile-to-women' structures of authority established by the BAA.

“whether the community rules adopted under the provisions of CLARA replicate, record or codify indigenous law or represent an entirely new set of rules which replace the indigenous-law-based system of land administration, the result is the same: a substantial impact on the indigenous law that regulates communal land in a particular community.”

Also see para 79 (as well as para 89):

“the field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend.”

²⁹ *Shilubana* at para 45

³⁰ Section 24(2)

5. The Black Authorities Act 68 of 1951 and the Traditional Courts Bill B15-2008

The Traditional Courts Bill seeks to regulate the customary courts that operate in communal areas and bring them in line with the Constitution. However, in adopting a model that is very much in keeping with the centralised and patriarchal framework that the BAA (and Black Administration Act 38 of 1927) ingrained, it rather entrenches the fatal flaws imposed during colonialism and apartheid. Moreover, by operating in tandem with the TLGFA it entrenches the same contested BAA boundaries yet again. It also gives extraordinary powers to traditional leaders to punish anyone who attempts to challenge their apartheid-manipulated boundaries. The problems with the TCB may be summarised as follows. Firstly, power is centralised to a ‘senior traditional leader’. This means that the powers of an essentially undemocratic court are extended even to the point of also permitting oppressive sanctions. These sanctions include the continuation of fining practices, which, as mentioned beforehand, occur presently to exploitative degrees (disproportionately affecting women). Secondly, choice is denied people in that opting out of traditional court jurisdiction is not permitted. Again this relates back to the fact that the jurisdictional boundaries established by the BAA are retained and rural people in the former homelands are forcibly ‘subjected’ to traditional authority in the former homelands.

It is submitted that some statements made by the Constitutional Court in *Tongoane* shed light on the TCB’s inconsistency with the Constitution. This is for three main reasons. Firstly, like CLARA, the TCB is founded on jurisdictional boundaries established by the BAA. Secondly, it was also drafted without consulting ordinary rural citizens, but only traditional leaders. Ordinary people are therefore forcibly confined to arbitrary apartheid jurisdictions. Thirdly, the TCB does not respect the living customary law practices that exist on the ground. It too is therefore likely to be found to be unconstitutional. In light of the above, the President’s assurances to the National House of Traditional Leaders that ‘[w]e are confident that the Bill will go through Parliament this year and will mark the end of the Black Administration Act’³¹ are very worrying.

5.1. Centralisation and Extension of Power, Granting Permission to Impose Extremely Oppressive Sanctions

The South African Law Reform Commission (SALRC) recommended the recognition of the contribution of respected councillors (male or female) who emerge organically from within communities at its lower hierarchical levels and have a proven track record of resolving disputes in a customary setting. Yet, first, the TCB makes no provision for the role of traditional councils and instead centralises all decision-making powers to the ‘senior traditional leader’. It thereby distorts customary practices on the ground and retains the BAA model of centralisation that recognised only a nominal role for the councillors, at best. And, second, the TCB does not recognise customary courts at any of the lower levels than the community-wide chief’s court.

By these omissions, it also disadvantages women. In the first case, this is because the vast majority of senior traditional leaders are men. The SALRC had therefore recommended that women’s

³¹ 20 April 2010. Response by the South African President to the debate on his opening address to the National House of Traditional Leaders, Pretoria.

representation in the councils that hear and decide disputes be guaranteed by law. In the second instance, it is because there are strong indications that decentralised power enables women greater possibilities for influencing the living customary law. The TCB's failure to expressly recognise the full range of traditional courts that currently operate – family, clan, ward, village councils and meetings – silences countervailing voices. It also precludes strong women councillors from emerging through participation and experience in co-existing decentralised dispute resolution forums.

Having then centralised power to the individual senior traditional leader the TCB extends this individual's powers to allow him to determine and impose heavy sanctions. Certain of these sanctions are controversial because of the nature of the far-reaching powers they imply for traditional leaders acting as presiding officers. For example, according to clause 10(2)(g), the traditional court may issue:

an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court.

5.2. Denial of Right to Choose and Restrictive Jurisdictional Boundaries

In clauses 5(1) and 6, the TCB denies rural residents the entitlement to choose their forum by preventing them from opting-out of their local traditional courts' jurisdiction. In fact, it makes it an offence for anyone within the jurisdiction of a traditional court, even a passer-by, not to appear before it, if summoned. It thereby undermines the consensual character of customary law. This, again, contradicts the SALRC's recommendation that people be permitted to opt out of traditional court jurisdiction. Instead, it supports traditional leaders' arguments that allowing people to opt out would undermine their authority. It is important to note that there is evidence to suggest that having diverse dispute resolution forums from which to choose increases the accountability of traditional courts by permitting people to avoid certain courts if they are thought to be illegitimate, or known to be biased. More than that, it must be remembered that the authority that might be thought to be undermined by allowing people to opt out of traditional court jurisdiction is one established by the Black Administration Act and BAA.

I shall not recount the argument already repeatedly made above concerning the nature of the jurisdictional boundaries that exist to demarcate the boundaries of authority of traditional leaders in South Africa today. Suffice it to say that, as with CLARA, the TCB adopts the same jurisdictional boundaries reinforced by the TLGFA, which in turn were first delineated in terms of the BAA. Hence, these are the same boundaries which the repeal of the BAA will not affect, regardless of representations that attempt to convince us that the BAA is being repealed in favour of constitutional alternatives.

5.3. Lack of Public Participation in Drafting of Bill and Running of Courts

Given the importance of public participation recently articulated by the Constitutional Court it is evident that the TCB falls short of adherence. The memorandum to the TCB itself states that in its drafting the Department of Justice and Constitutional Development consulted with traditional

leaders at national and provincial level – i.e. people who make up the very institutions at issue – but not with ordinary people from diverse quarters.

Women and children make up most of the rural constituencies, and often find themselves in a vulnerable position in relation to male-dominated traditional institutions as those formed by the BAA. Women face particular problems in customary courts and are therefore the people most adversely affected by the TCB's failings. Failure to consult them is apparently reflected in many of the problems with the TCB.

Finally, the powers given to traditional courts in the TCB override in-built indigenous protections that serious matters such as the cancellation of land rights be debated with the community at various levels, and ultimately require the endorsement of a general meeting of the entire community. Again, the TCB does not recognise these levels of debate and decision-making and instead vests legal authority exclusively in the senior traditional leader in his role as presiding officer. To this extent, the TCB is at odds with customary principles. Instead, it favours the more patriarchal and centralised notion of power that is embodied in the BAA's model of traditional authority. It also undermines important checks and balances built into customary dispute resolution processes.

While the TCB presumes to conform to the Constitution, it offends several constitutional entitlements. And, although it is said to give expression to customary law, in fact, it has more in common with the legacy of apartheid legislation that it is meant to replace than with the reality of negotiated change and living customary law on the ground.

6. Conclusion

We have set out in great detail here how the legislation adopted to regulate the realm of traditional leadership in democratic South Africa has largely followed in the footsteps of the BAA, rather than overhauling the BAA's legacy. In sum, what the new legislation does, especially the TCB, is re-create second-class citizenship for people living in the former homelands. They become insulated from the reach of the laws applying to other South Africans and subject to customary law as defined and interpreted by traditional leaders. The consensual nature of customary law is undermined when it is applied within fixed jurisdictional boundaries derived from the BAA as is done in the TLGFA, CLARA and TCB. This result is inconsistent with the government's stated aim of undoing the legacy of the Bantu Authorities Act.

A final note on the three pieces of recent legislation and where they fit in the government's approach to the former homelands. There are several statements in government that are worth noting, about 'the institutionalisation of traditional leadership'. The common phrases used include '*recognition and promotion ... of the institution of traditional leadership*', which appears repeatedly along with the words, 'status', 'role and place' (of the institution, of traditional leadership, traditional councils and traditional leaders). The interesting thing is how the 'institution' is embraced as fitting into the government's goals whilst scarcely reflected upon as the bastion of the legacy of the BAA and other apartheid-building pieces of legislation. For instance, in President Zuma's speech at the opening of the National House of Traditional Leaders on 23 February 2010, he noted that government has 'passed several laws since the founding of our democratic republic, to give effect to [the] constitutional *recognition of the institution* of traditional leadership.' Furthermore, the COGTA budget vote document in February 2010 repeatedly mentions '*promoting the role and place of the institution of traditional leadership*' as its objective and only once mentions

‘empowering communities’, thus making it clear that the establishment of the new department of traditional leadership is mostly about ‘*institutionalising* traditional leadership’.

It is unfortunate that the government should fail to see that ‘the institutionalisation of traditional leadership’ dates right back to the 19th Century when Frederick Lugard articulated the policy of ‘indirect rule’.³² This policy was embodied by three specific institutional reforms: (i) the recognition of the traditional leaders (Native Administration), (ii) the establishment of Native Courts, and (iii) Native Treasuries to which the indigenous leaders collected the taxes from their subjects. As demonstrated above, this dated three-part policy with colonial origins that was later entrenched by apartheid legislation, including the BAA, is largely realised in the TLGFA, CLARA and TCB today. In light of this evidence, to make as if the repeal of the Black Authorities Act is a big victory over apartheid and its oppression of rural people is disingenuous when, in fact, as shown above, the legacy of the BAA is being entrenched and not repealed.

It is for the above reasons then that we ask parliament to:

- i. Take notice of the fact that the key structures and boundaries created by the BAA live on in the TLGFA, the CLRA and the TCB;
- ii. Take notice of the concerns of the Constitutional Court regarding the reliance on BAA tribal authorities and boundaries as a basis for post-apartheid land reform;
- iii. Take notice of the implications of recent government policy pronouncements that would confer governance powers on BAA-inspired traditional councils; and
- iv. Take clear and decisive steps to do away with the legacy of the BAA as perpetuated in the cited laws.

We ask this committee, which is responsible for the repeal of the BAA, to engage with other parliamentary committees and structures to *effectively* eliminate the legacy of the Act. In particular, we stress the importance of proper consultation with the rural people directly affected by these laws. The legislative process has thus far been dominated by privileging the voices of the traditional leader lobby – the very sector that stands to gain from the laws – over the voices of ordinary rural people. We have consistently asked the Portfolio Committee on Justice and Constitutional Development to undertake proper consultation with rural people about the TCB, but to no avail so far. President Zuma has subsequently announced that the Bill will be passed by the end of this year. As shown, this course is not in keeping with the democratic values South Africa espouses. By contrast, the requests we put above are consistent with the motivation given for the repeal of the Bantu Authorities Act.

³² Lugard, F. J. D. (1922). The Dual Mandate in British Tropical Africa. Edinburgh, William Blackwood and Sons at 200-03