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Your Ref:
Our Ref: HJS/mc/

21 July 2010

The Chair
Portfolio Committee on Rural Development and Land Reform
Parliament
Cape Town

Att: The Secretary
Ms. P. Nyamza
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Dear Mr Sizani

20 July 2010: Public Hearings on the Blacks Authorities Act Repeal Bill

The Legal Resources Centre is a non-profit public interest law firm. Much of the work of our organisation is devoted to representing poor rural communities, and our comments on the Blacks Authorities Act Repeal Bill [B 9—2010] ISBN 978-1-77037-639-7 ["BAA repeal bill"] on behalf of such communities. Our clients include the communities that successfully challenged the constitutionality of the Communal Land Rights Act of 2004.[1]

We submitted comments to the department and your committee on the Communal Land Rights Bill in 2003, and to the relevant committees on the Traditional Leadership and Governance Framework Bill in 2003 and the Traditional Courts Bill in 2008. The BAA repeal bill is of course related to the package of rural governance statutes relevant to rural communities.

[1] *Tongoane and Others v The Minister of Agriculture and Land Affairs and Others* CCT 100-09. The Legal Resources Centre, with Webber Wentzel attorneys, represented four communities Kalkfontein, Makuleke, Makgobistad and Dixie in a challenge on the constitutionality of the Communal Land Rights Act of 2004. The act was declared unconstitutional by the Constitutional Court in May 2010. The LRC represents a number of communities in court litigation and administrative representations concerning the impact of the Traditional Leadership and Governance Framework Act including the communities of Daggakraal, Pilane, Xalanga and others. The LRC represents numerous rural communities in land claims, including litigation in the Land Claims Court.

We wholeheartedly endorse the overall objective repeal of obsolete statutes and the current and future series of public hearings and debate about any new bill dealing with communal land and the Traditional Courts Bill currently under consideration by your sister committee. But such repeals of old statutes and the introduction of new statutes occur within a particular historical context. Also, new law must comply with the letter of the Constitution and serve its spirit. It is in this light that we make our observations below.

We also attach a longer outline of the historic and current legal regime, and the relevance of the constitutional regime to governance systems and their impact on rural communities. Our concerns with sections 5 and 20 of the Traditional Leadership and Governance Framework Act are also elaborated upon.

The current context for law reform:

a) The order and the judgment of the Constitutional Court declaring the Communal Land Rights Act unconstitutional have important implications for law reform. The court insisted that any new law that impacts on living customary law, must comply with section 76 of the Constitution. The provincial legislative assemblies will have to get involved and provincial hearings will have to be held. This did not happen in 2003 when the Traditional Leadership and Governance Framework Bill was considered by the Local and Provincial Government Portfolio Committee under the chairmanship of former MP, Yunus Carim.

b) Rural communities now have an opportunity to participate in the law making process. First, the Minister for Rural Development and Land Reform is preparing a new green paper policy about rural development. Once a policy has been discussed, this may lead to new draft bills prepared by the department. Any new bill on communal land tenure reform must be dealt with by parliament and the provincial assemblies which must provide for public participation which should include public hearings.

c) Opposition to the CLRA and those parts of the Traditional Leadership and Governance Framework Act of 2003 and the Traditional Courts Bill of 2008 that reinforce discriminatory and undemocratic old apartheid laws, is not opposition to the institution of traditional leadership, or to customary law. There is widespread acceptance of the valuable role played by customary law and the need for indigenous legal processes to be recognised and supported. Our concern relates to the distortion of customary law, and the way in which the new laws bolster unilateral chiefly power and undermine indigenous accountability mechanisms. The laws are criticised for entrenching the colonial and apartheid distortions and divisions that were central to the creation of the Bantustan political system and used to justify the denial of equal citizenship to all South Africans.

d) The resolutions of the African National Congress 52nd National Conference held in Polokwane in December 2007 are relevant to the lawmaking initiatives of the governing party in Parliament. The TLGFA and its provincial counterparts predate the Polokwane resolutions, and they are the subject matter of the resolutions. Various resolutions under the chapter heading Rural Development, Land Reform and Agrarian Change and resolution 84 under Social Transformation, read as

follows[2]:

> *"Strengthen the voice of rural South Africans, empower poor communities and build the momentum behind agrarian change and land reform by supporting the self-organisation of rural people; working together with progressive movements and organisations and building forums and structures through which rural people can articulate their demands and interests...*
>
> *"Build stronger state capacity and devote greater resources to the challenges of rural development, land reform and agrarian change...*
>
> *"Ensure that the allocation of customary land be democratised in a manner which empowers rural women and* ***supports the building of democratic community structures at village level****, capable of driving and coordinating local development processes. The ANC will further engage with traditional leaders, including Contralesa, to ensure that disposal of land without proper consultation with communities and local governments is discontinued.*
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> *"84 The allocation of customary land be democratised and should not only be the preserve of the traditional leaders"*

The context of the BAA Repeal Bill

1. The Black Authorities Act of 1951 represented the Apartheid government's abuse of parliamentary sovereignty in order to enable state organs and their delegates to yield power arbitrarily and without question. When those in the position of power may define for themselves what that power entails, their subjects become unable to defend themselves against the potential of tyranny.

2. History tells us that this abuse was applied as a means of subordinating the majority black population of South Africa. The Black Authorities Act represented the arbitrary subordination of the rural black population: arbitrary, as in the words of Albert Luthuli, it was 'neither democratic nor African'. The BAA Repeal Bill describes it thus: "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".

3. As many other colonial attempts to 'codify' custom, the BAA represented a distorted version of the custom tailored to serve the needs of an all powerful minority government that did not even allow the subjects of this Act the most basic rights of citizenship.

4. The end of the tyranny of Apartheid was marked by what has been described as a 'constitutional revolution' based on three principles: civil and political rights to be accorded to all regardless of race; the doctrine of parliamentary sovereignty to be

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[2] Other relevant resolutions include a) the curbing and monitoring of policing functions of the "traditional authorities" and their alignment with SAPS functions; b) "there must be an alignment of traditional courts with our new constitutional dispensation and particular attention must be paid to the incorporation and development of our indigenous law"; c) "traditional leaders should be mobilised to play a more significant role in promoting peace and stability in rural areas".

replaced by that of constitutional supremacy[3] and the strong centralised government replaced by a decentralised system of governance.

5. The repeal of the Black Authorities Act signals one of the significant final steps in removing the traces of parliamentary sovereignty and 'indirect rule' from our democracy. However, if the repeal is to be more than a mere symbolic act, it is crucial that the Act that is to fill the void left by the repeal will be true to the principles of a constitutional democracy and will ensure that, as far as possible, the damage done by the BAA, is undone.

The nature of the Bantu Authorities Act of 1951

6. The Bantu or Black Authorities Act was enacted to 'provide for the establishment of certain Black authorities and to *define their functions'*. While the system of parliamentary sovereignty meant that these authorities could be created and their functions defined merely by the enactment of a statute, there was further no need to align these functions with any constitutional principles.

7. In a constitutional democracy, power and authority can only be lawful if it is derived from the Constitution – any statutorily created function that cannot be traced back to a constitutional mandate, is unlawful. As such, the BAA is a glaring example of the difference between the old order and the new: it is no longer possible for the legislator to – at will – 'establish' authorities and 'define' their functions.

8. However, the repeal of the Black Authorities Act should not merely be a formal exercise erasing a law that would be procedurally inconsistent with our new constitution. The repeal rather opens the way for a new system of rural traditional leadership to be established which is sourced from the Constitution and that is thus consistent with all constitutional principles and values.

9. We propose that an exercise for planning a new system would involve the fresh establishment of traditional councils taking into account customary law and the constitutional principles. This means that section 28, which allows for the continuation of the illegitimate BAA tribal authorities, should be repealed by this Repeal Bill. Further, section 5 and 20 of the TLGFA should direct provincial law makers to ensure the alignment of traditional council roles with the governmental powers and functions of local and provincial government. The Constitution prohibits overlap in this regard.

The Constitution as the source of traditional leadership

10. The Constitution provides for traditional leaders in chapter 12:

    211 Recognition

[3] Section 2 of the Constitution declares it the "supreme law of the Republic".

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

212 Role of traditional leaders

(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-
(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and
(b) national legislation may establish a council of traditional leaders.

11. Section 211(1) protects the "institution, status and role of traditional leadership, *according to customary law*" – and not a statutory distortion of such customary law.[4] Customary law is thus the principal source of recognition of traditional leadership in terms of the Constitution – and subject to the Constitution.

12. Section 212(2) provides for the only basis for the conferral of any new statutory role upon traditional leaders outside of residual customary law role recognised in section 211.

13. It should be noted that the Constitutional Court has held that the 'role' of traditional leaders envisaged by section 212(2) of the Constitution does not include the governmental role they played (partly in terms of the BAA) under Apartheid – and therefore national legislation providing for these roles may not include governmental 'powers and functions' awarded to the traditional leaders in terms of apartheid legislation.[5]

14. In summary, any authority that traditional leaders have must be grounded in customary law. Any national legislation providing for a role for traditional leaders outside of customary law may not provide for any governmental powers.

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[4] In *Shilubana v Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 45: *'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*'.

[5] The Constitutional Court held: *"Had the framers intended to guarantee and require express institutionalisation of governmental powers and functions for traditional leaders, they could easily have included the words 'powers and functions' in the first sentence of the CPXIII. The non-derogation provision in CP XVII would represent a surprisingly oblique way of achieving what the framers of the [constitutional principles] could have done directly. …"*

15. This interpretation is consistent with section 41(1) of the Constitution that provides that "in the Republic, government is constituted as national, provincial and local spheres of government" - with no reference to an additional sphere of government constituted by traditional leadership.

16. There are very important reasons why governance should never be extended beyond the spheres provided for in the Constitution. Accountable governance is a central feature of our constitutional democracy. Accountability takes various forms: from the recall of leaders and elections to motions of no confidence. The institution of traditional leadership as regulated by the Traditional Leadership and Governance Framework Act does not allow for such checks and balances and neither for countervailing decision making institutions under customary law. In these circumstances, traditional leaders cannot be held accountable under statute or customary law.

17. In addition, we submit that the provisions of the Traditional Leadership and Governance Framework Act, and in particular sections 5 and 20, confer powers that are broad and extend beyond those which would be conferred upon a traditional leader by customary law. They are generally of a public, governmental character and fall within fields of legislative and executive competence in the national and provincial spheres of government.

The Constitution as the guarantor of fundamental human rights

18. The BAA Repeal Bill states that the "provisions of the Act are both obsolete and repugnant to the values of human rights enshrined in the Constitution of the Republic of South Africa, 1996". While this assertion is broad, we are privileged to have had the opportunity yesterday and today to hear from some of the people on the ground what the specific impact of the provisions of the BAA on the rights of rural communities is. We should ensure that the new legislation does not fall into the same traps.

19. The legislation that will be enacted to fill the void left by the BAA – to the extent that it indeed does leave a void, as some of the institutions it created were explicitly linked to the creation of homelands and are now thus irrelevant – must emanate from the Constitution and be consistent with the values and principles it upholds.

20. The Constitutional Court in an earlier judgment concerning the certification of the constitution rejected the argument that tribal authorities created by apartheid statutes kept all their powers and remained constitutional and legitimate governance institutions.[6] In the *Tongoane* judgment the Chief Justice emphasised the relationship between the apartheid tribal authorities and the newly named traditional councils:

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[6] *In Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 774 (CC).

> *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.*

21. Much of the substance of the institutions, and their powers and functions created by the BAA are confirmed and continued by post-apartheid legislation including the Traditional Leadership and Governance Framework Act and its provincial counterparts. It is hard to find justification for this development: it is common cause that the BAA was not a legitimate codification of customary law, practice or even of the status quo of the rural areas at the time of its enactment[7] and therefore it cannot be said that its contents deserve to be entrenched as customary law or as the historical continuation of a situation that predates Apartheid.

22. We repeat ourselves: the repeal of the Black Authorities Act should not merely be a formal exercise erasing a law that would be procedurally inconsistent with our new constitution. The repeal rather opens the way for a new system of rural traditional leadership to be established which is sourced from the Constitution and that is thus consistent with all constitutional principles and values.

Thank you for the opportunity to address your committee.

Yours faithfully

LEGAL RESOURCES CENTRE

Per: Nomfundo Gobodo and Shirhami Shirhinda

[7] See for example the boundaries declared by the BAA .