

**SUBMISSION TO JUSTICE PORTFOLIO COMMITTEE ON THE
TRADITIONAL COURTS BILL**

Mary de Haas

1. The relevance of my academic and research background to this submission

I make this submission in a dual capacity (1) as an anthropologist who has engaged in extensive research on customary law, particularly as it affects women, and on traditional leadership in kwaZulu-Natal. And (2) as an independent researcher and activist on matters relating to human rights in kwaZulu-Natal, particularly violence. My submission is thus informed by thirty years of research in these fields, up until the present time. During this period I have also acted as an expert witness in cases relating to custom and tradition.

2. Why this legislation should not be passed

While some of my comments may have general relevance for South Africa as a whole, they are directed primarily to the situation in kwaZulu-Natal, because of my familiarity with grass roots dynamics in many rural areas of the province. There are also specific dynamics in this province which are not present elsewhere, largely because of it having been subject to codified customary law since British colonial conquest (exceptional in Africa since customary law is, by its very nature, unwritten and malleable; this codification was carried out with a clear political purpose, i.e. ensuring subjugation of the population concerned).

This codification (and misinterpretation) of customary law led to the appalling oppression of women for over a century, since it gave them the status of perpetual minors – and, in turn, shaped perceptions and norms about gender relationships in this province. Although this section was repealed in the 1980s, by the homeland government, new provisions relating to the administration of law and order, policing, and freedom of movement – which served the ends of apartheid – were introduced, and the powers of traditional leaders were reinforced. These provisions were subsequently described by a Supreme Court (as such courts were then termed) Judge as ‘Draconian in scope and content’¹ While this legislation, and that on traditional leadership subsequently passed by the KwaZulu homeland, have now been superseded by new national and provincial legislation on traditional leadership which is in line with Constitutional requirements, it is as a result of its legacy, and complicity on the part of the SAPS, that some traditional leaders have continued, up until the present time, to abuse the powers accorded them in law with impunity.

My main criticism can be summarised under two headings (1) That if passed this legislation will simply perpetuate and entrench abuses which are already taking place and (2) it is discriminatory and perpetuates colonial and apartheid categories and practices.

¹ ‘On the relativity of relevance : ‘Traditional’ weapons and cultural massacres 1991 Association of Anthropologists of Southern Africa conference September 1991; ‘African Women, Marriage and the question of Not Very Customary Law in Natal’ 1988 Workshop on Regionalism and Restructuring, University of Natal

2.1.Facilitating abuse of power by traditional leaders

Although traditional leaders already have powers to hear petty matters, this legislation will reinforce abuse of power by those who are so inclined. Although it may appear from the legislation that abuse of power will not be possible, because of oversight by the Director-General (in terms of the keeping of registers, records etc) and political appointees (the Minister and Premiers of provinces), first hand experience shows that none of these functionaries take any action when the law is being broken by traditional leaders, despite it being drawn to their attention :

2.1.1. The case of Chief Mathaba of the eMacambini area :

While this case represents an extreme example of abuse, it also shows that despite the sheer scale of abuse no action is taken by those with power to stop it.

I provide only a very short summary here – more detail is available about eMacambini and nearby Mangete – including an open letter to then Premier of KZN Ndebele - on my web site www.violencemonitor.com

(i) Since approximately 1990 Mathaba has been linked to horrific violence, especially against ANC supporters, which is well documented. The TRC made findings against him, implicating him in hit squad activities and other gross violations of human rights, including murder, attempted murder and arson (Volume 5, p235)

(ii) Mathaba orchestrated the illegal invasion of nearby Mangete farms owned by people previously designated ‘coloureds’ from 1993 onwards. Mangete residents suffered a reign of criminal terror, including armed robbery, rape, and malicious damage to property (burning of sugar cane). Mathaba is the First Respondent in a High Court Interdict brought by the owners, which he has ignored – so he is in contempt of court (Durban and Coast High Court 1931/96) and in breach of the law

(iii) Shortly before the April 2004 elections ANC supporter Walter Buthelezi obtained an Interdict against Mathaba after the chief threatened him with death for putting up ANC posters (3565/2004)

(iv) After being threatened by Mathaba when she approached him for certain documents at his traditional court, there were several attempts to attack Mrs Sibongile Zungu, a leading ANC activist and 2006 local government election candidate. These attacks culminated in the burning down of her house (accompanied by attempts to shoot the family) in February 2007. Miraculously the family escaped, but two grandchildren were injured by exploding shrapnel. No one has been brought to book, which is usual.

(v) Mathaba lodged a land claim *on behalf of* persons he had directed to settle illegally on Mangete land. The claim was settled in 2002, with land purchased, and monies due, being placed in a Trust controlled by him. To date the claimants have never received land and monies due to them. Several weeks ago they approached the Land Claims Commission and the Master of the Supreme Court to obtain access to Trust documents, but, thus far, have received no assistance whatsoever.

(vi) Mathaba, as a member of the Provincial Legislature until the recent elections (as well as a chief) made a false declaration to the legislature in the Register of Members Interests : He declared items which are now registered in other people’s names, and did not declare interests he holds. That goods he claimed were his were registered in the names of others was discovered when the Sheriff of the High Court went to attach these goods for outstanding court costs which have not yet been paid.

What is of relevance to my argument about the failure of persons in government, and organs of state, to act against traditional leaders breaking the law with impunity is that I have, repeatedly in some cases, drawn most of the facts detailed above – especially those relating to Mathaba breaking the law - to relevant government officials, viz the then provincial MEC for Traditional Leadership and Local Government, the then National Minister in that portfolio, the then Premier of the Province, and the then Speaker of the provincial legislature. My letter to the Speaker was faxed, and sent registered mail. The registered letter was returned to me by the post office, uncollected.

2.1.2. Other cases of abuse – and contestations over chiefship

While, as mentioned, the case of Mathaba represents an extreme position of abuse, it is by no means the only one. Residents in a number of rural areas have provided me with detailed information about people who have been forced by leaders abusing their power to leave their ancestral lands, or have been attacked and/or had their homes burnt down after being threatened by traditional leadership. The problem of abuse of power is also exacerbated in KZN by the overlap between politics and leadership. (which is not permitted in certain other African countries).

Also of relevance are ongoing disputes around chiefship, which have not been attended to by the Commission established for that purpose. One of the disputed leadership positions involves a man who has also been widely linked to violence, including in affidavits, TRC submissions, and an Urgent Action launched by Amnesty International post-1994. A journalist from a leading American newspaper described to me, around the mid 1990s, how she had witnessed women being obliged to approach this leader, in his court, on their knees. The man who was spearheading the submission to the Commission contesting the chiefship was murdered, and no one has ever been brought to book.

With regard to the Commission on Traditional Leadership, formerly headed by Prof Nhlapo, I have followed up several cases on behalf of affected parties, yet responses are not received. I make this point to reinforce my argument that Directors-General are not necessarily carrying out the tasks they are already designated to do, but will now – in terms of the legislation – be given additional duties to keep records.

In the areas in which there is abuse of power by traditional leadership there are complaints from community members about collusion (even through acts of omission) between leaders and local police.

2.2. This legislation is discriminatory

It is stated that this legislation is guided by non-racialism and non-sexism, yet it forces people living in traditional areas to comply with directives given by leaders, and **does not give them the choice of opting out of a system which can be extremely repressive** (depending on the person of the traditional leader). It is important to stress that, in pre-colonial times, so-called tribes were fluid entities, which people could move out of (many people were not subject to chiefs when Shepstone took over as Administrator of Native Affairs in the 1850s, so he created new tribes and new chiefs)

Tribal boundaries became fixed under colonialism, which system also subverted the institution of chiefship, taking away the elements of democracy which had hitherto

existed (participation by adult men in the affairs of the community). *There is no democracy in many traditional areas, particularly where a climate of fear exists.* At the same time, despite freedom of movement, the land that they have access to is the only form of security for many people.

This legislation further jeopardises people's land-related security because of penalties traditional leaders may impose.

3. Miscellaneous comments:

3.1. Section 2(iii) mentions preservation customs, traditions etc. Important customs are preserved within families, not artificially constructed tribes (or traditional communities as they are now called)

3.2. Powers of designation are far too wide (e.g. 4.4.) As indicated, there is no real democracy in a number of traditional areas, and councils are appointed by leaders based on a system of patronage.

3.3. Despite it aiming to be 'non sexist' this legislation does not recognise the extent to which women in many rural areas are oppressed (especially given the history of KZN) by the highly authoritarian system of traditional leadership (and areas under female leaders are not necessarily more democratic, for the system encourages autocracy rather than democracy).

4. Conclusion

This legislation rests on pillars of colonialism and apartheid : Artificially constructed tribes and traditional leaders, both of which were designed to facilitate indirect rule. Far too little progress has been made in democratising traditional institutions, despite existing legislation, which facilitates the type of power abuse I have described above. Chiefs are still not 'chiefs by their people' as they were in the past. To make matters worse, the subjects of this legislation are the most powerless, vulnerable sectors of our society. This legislation does nothing to empower them – quite the reverse. It cannot, in itself, lead to the type of 'social cohesion, co-existence, peace and harmony' it refers to (Sec 2(i))

Mary de Haas,
1 September 2009