

## **Report**

### **Deepening Democracy: Dialogue on the 'Bantustan Bills' 30 July 2019, Nelson Mandela Foundation, Johannesburg**

#### **Introduction**

On July 30<sup>th</sup> 2019, over fifty community activists, ANC veterans, researchers, lawyers, NGOs, government officials and journalists gathered in Johannesburg for a dialogue on two bills that particularly affect people living in rural South Africa. Community activists have labelled the Traditional and Khoi-San Leadership Bill (TKLB) and the Traditional Courts Bill (TCB) as the “Bantustan Bills” because they reinforce the boundaries of the old Bantustan tribal authorities. Introducing the dialogue, Khalil Goga of the Nelson Mandela Foundation warned that the bills could create a dual system of law and governance. ANC veteran Tim Wilson added that, “the struggle [against apartheid] was about one country with equal rights and everyone equal before the law. These bills are striving to make 17 million people second class citizens, under a different set of laws.” Humphrey Mugakula from Makuleke in Limpopo province remarked that the Bills do not give his community an advantage; instead “they take us back to the old boundaries of apartheid. It’s only the change of the names.”

The dialogue was organised by the Nelson Mandela Foundation (NMF) in collaboration with the Alliance for Rural Democracy (ARD), a civil society organisation, and the Land Accountability Research Centre (LARC) from the University of Cape Town. The organisers stressed that a key aim of the dialogue was to offer the space for people from rural areas to speak about how the bills would affect them, based on their life experiences. Other stakeholders often belittle people from rural areas, despite the fact that they are most directly affected by the pending legislation. At this dialogue, community representatives from around the country spoke at length and with “serious expertise and depth of knowledge” (in the words of ANC veteran Mavuso Msimang). Just speaking on the bills was no easy feat. LARC researcher Aninka Claassens pointed out that many of those who speak up about the capture of resources in their communities by elites, including by traditional leaders, face threats of violence.

#### **The Bills in Context**

LARC’s Director Nolundi Luwaya provided the background to the dialogue. She set out the political and historical origins of the TKLB and TCB. Luwaya explained how the bills would fit with existing legislation. She also analysed what the repercussions of the bills would be for people living in rural areas.

##### *Origins of the TKLB and TCB*

If passed the TKLB would replace the existing Traditional Leadership and Governance Framework Act (TLGFA). The TLGFA came into force in 2005. It serves as a “framework” which sets out the jurisdiction, roles and functions of traditional leaders and traditional councils. For example, the TLGFA assigns traditional leaders with roles to administer justice and land within their jurisdiction. The Traditional Courts Bill (scrapped a few years back but now back before the National Council of Provinces) and Communal Land Rights Act (struck down by the Constitutional Court in 2010) sought to give power to these administrative roles and functions.

Luwaya pointed out that the jurisdiction that the TLGFA assigns to traditional leaders and councils is highly controversial. Section 28 of the TLGFA deems the “tribal authorities that existed under the Bantu Authorities Act [1951] to be traditional councils and communities.” The Bantu Authorities Act (BAA) was a key piece of apartheid’s legal edifice. It consolidated previous segregationist legislation to define the boundaries of “tribal authorities.” According to the apartheid state, every black person in South Africa belonged to a homogenous ethnic “tribe.” In the state’s view, every black South African therefore fell under the jurisdiction and power of a chief who governed their tribal authority. These tribal authorities existed wall to wall within the former Bantustans, making up the building blocks of the notorious homeland system.

The BAA was not based on how black South Africans actually practiced customary law. Nor did it take account of the varied ways in which people defined their identities, traditions or affiliations to traditional leaders. Instead the BAA tried to force people to live under the banner of specific, essentialised identities. It broke up communities and divided families. It also played a role in destroying some of the bonds of accountability that had previously existed between traditional leaders and the people who recognised them. Through the BAA, traditional leaders became accountable not to their people, but to the government, which had the power to appoint or dismiss them. ARD National Coordinator Connie Mogale remarked that this did an injustice to the customary norm that a “chief is a chief by the people.” Mogale added, “The chief doesn’t come like a holy spirit from above...it must come from below.”

After apartheid ended, the homelands were dissolved and incorporated into a single South Africa. The BAA was repealed. Luwaya argued that there is no problem with recognising traditional leaders, as the TKLB professes to do. But, she pointed out, the TKLB would keep the same boundaries as the TLGFA. By retaining the old traditional authorities under the new guise of “traditional councils”, the current South African government does violence to the ways in which African communities manage their resources and define their identities. It imposes identities on people from above.

Luwaya noted that there has been some recognition from government of this problematic inheritance of the tribal authority system. The TLGFA was meant to turn over a new leaf by ensuring that a portion of the traditional council is elected, rather than appointed or inherited, and that a third of the council would be women. However, both Luwaya and Claassens pointed out that few traditional councils have met these requirements. Claassens argued this makes most existing traditional councils unlawful. In passing the TKLB, she believes the state hopes to paper over these cracks.

The first Traditional Courts Bill (TCB) was put before parliament in 2008. It was premised as a law that would recognize the exercise of justice in customary law settings. However, the bill was scrapped in 2012. Connie Mogale explained, “we [people living in rural areas] defeated the TCB thanks to our efforts and activism.” But a new version of the TCB is now back in parliament.

Luwaya explained that the new TCB would allow traditional leaders to establish and run their own courts. These courts already exist in many places. But the TCB, as it stands, would cause two major problems. First, it would not allow people to opt out of appearing before a traditional court. If summoned by a traditional leader who claims jurisdiction over them, they would have to attend. This means that people living in the former homelands would be subject to a different legal system from those living outside

of it, without recourse to other legal channels. Second, many traditional courts impose restrictions on women's participation. In some cases women are not allowed to attend court proceedings, or are forbidden from speaking. The TCB fails to address this imbalance.

The TKLB and TCB have not yet been passed. Yet, their existence already has had very real effects. Luwaya noted that Clause 24 of the TKLB allows traditional leaders to enter into business agreements "on behalf of their communities." The bill requires "consultation" but not "consent" of the affected communities. Already, there are many examples of traditional leaders signing deals with developers like mining companies, without the consent of the people they claim to represent. The passing of the TKLB would entrench this practice further. Similarly, some traditional leaders already impose penalties, summonses and restrictions on the people they call before traditional courts. Luwaya argued that if these practices were already happening without the sanction of the law, one can envisage they would be further entrenched were the TKLB and TCB to be passed.

## Themes Discussed

ARD National Coordinator Connie Mogale invited input from community activists and other participants. She prefaced the need for the discussion by explaining that as a long time rural land activist, she and her comrades have petitioned for laws that offer them security of land tenure. Over the past year, they have sat on government reference groups and informed politicians about the kind of law that would work with their realities. Public hearings on the TCB have often been announced with little advance notice. Nevertheless, Mogale and other community activists have tried to attend as many public hearings as possible, so as to tell the government about their challenges. Earlier in 2019, the ARD and its supporters marched to parliament in Cape Town with the refrain "We as rural people are saying, 'listen to us, we are our own advocates.'" After all this, Mogale said she was surprised to find that the recommendations that she and thousands of other community activists put forward are not in the TCB.

What follows are issues that community representatives raised at the dialogue:

- *The rights of communities affected by development or mining business*

Speakers described how the TKLB and TCB would compound an already dangerous and difficult situation for communities affected by big 'development' schemes like mining.

Nonhle Mbuthuma from the Amadiba Crisis Committee in Xolobeni, Eastern Cape, described how her community recently won a battle both inside and outside the courts to prevent an Australian company from mining titanium on the community's land. Over the past twenty years, the people of Xolobeni have suffered under the shadow of mining developments. Those who resisted the decision to mine have faced intimidation and violence. Sikhosiphi Bazooka Radebe, one of the leading voices of dissent, was murdered in 2018.

Mbuthuma emphasised that "we are not anti-development. We are for development. But we need the government to listen to the people." She explained that the Xolobeni community believed farming would offer them a more sustainable future than mining: "we said, *no, we don't eat titanium*. We eat mielies and sweet potato, which we grow. It was

a difficult argument to make to government. They believe minerals bring wealth. But we say children are sleeping with hunger on top of those minerals. In Xolobeni no children are suffering from hunger because we feed ourselves.”

Despite the Xolobeni community’s opposition to mining, the government continued to push for mining development. Mbuthuma said the community “felt we had to go to court. This was the most painful part. We thought the time had past when we had to take our own state to court. The apartheid regime didn’t listen. Now our own government wasn’t listening. History was repeating itself.”

Mbuthuma on their hard-fought victory: “It took time for the court to understand our point of view. Here were people saying they had land rights and wanted to make their own decision. Eventually in November 2018, the court said yes, the people of Xolobeni must have prior and informed consent. We were happy. This was the SA we fought for. This is democracy, where we can give consent and decide what is good for us.”

Sabela Dladla from Somkhele, KwaZulu-Natal, spoke about an open cast coal mine in his area. He explained that community members were not consulted about the decision to mine. Although mining began in 2013, they only learned about the company getting mining rights in 2017.

Dladla pointed out, “who gave consent to these mining rights? This is the question that kept bugging us.” The people who gave the go ahead were the Mtubatuba municipality, the local traditional council and the late traditional leader. These three bodies claimed the community had been consulted and had no objection.

Solomon Mabuza from Tenbosch in Mpumalanga also spoke about his community’s exclusion from development discussions and benefits. He argued that the local traditional council has taken control of the community’s land claim by doing business with commercial farmers and mining companies on the community’s land without adequate consultation. Mabuza stressed that as beneficiaries of land restitution, land claimants at Tenbosch should hold real rights to land. But instead local authorities have often issued them with more tenuous ‘Permission to Occupy’ (PTO) certificates. Mabuza appealed to the participants: “We need your help to shake the government and remind them that S.A. is for the people. It seems that now S.A. is for politicians and chiefs.”

Mbuthuma, Dladla and Mabuza spoke to how the bills would put their battles to confirm their land rights in serious jeopardy. If government passes the TKLB, commented Mbuthuma, “then it shows our government is undemocratic. It is also unconstitutional. You cannot give power to one person [like a traditional leader]. They will sell us alive. It is paving a way for corporations to take our land away from us.” Dladla added, “these Bills will make things worse. It will be even harder to identify our needs. Once these bills give them [traditional leaders] power, it will be a disaster. They are already entering into agreements with mining companies. We are trying to fight this. So it will be even worse when bills are passed.”

#### □ *Abuse of power by traditional leaders*

A recurring concern raised by participants was that the new bills would further sever the connection between traditional leaders and the people they claim to represent. Connie Mogale explained that the colonial, Union and apartheid governments undermined

indigenous accountability mechanisms and participatory decision-making practices. By making traditional leaders' authority dependent on government recognition rather than popular recognition, they distorted customary law. Mogale acknowledged that the magistrates' courts do not necessarily provide adequate access to justice for all South Africans, but warned that the TCB was not the answer. Mogale argued instead that, "laws should draw on existing good practice [of living customary law]."

Shirhami Shirinda addressed the issue of tribal levies. Shirinda is an advisor to the traditional leaders and royal family in his home village. He is also a lawyer for the Legal Resources Centre and has experience with customary law cases in Limpopo and Mpumalanga. Shirinda referred to evidence from the Zoutpansberg, which suggests that between 1948 and 1994, traditional leaders who were appointed by the government were collecting levies and taxes from people living in the 'reserve' areas (later called homelands or Bantustans). These traditional leaders claimed that the levies were for the direct upliftment of the community, but the money often went to state coffers or the pockets of chiefs. Shirinda warned that these practices continue in parts of the country today.

Aninka Claassens gave examples from the Eastern Cape where traditional leaders were also charging levies. She referred to the case of Nomakhwezi Base who bought plots of land in the 1990s. Recently Base was approached by a headwoman who demanded she pay R10 000 or face eviction. When Base refused, the headwoman's recruits began demolishing Base's house – until the Eastern Cape High Court interdicted their actions. If the TCB was in force, Base could not have obtained an order from the High Court. She would have been bound to the local traditional leader's court, which was unlikely to find in her favour.

Sabelo Dladla explained that there could be dangerous consequences to questioning traditional leaders' decisions. He elucidated that when people in Somkhele came together to discuss the mining in their area, their local *induna* banned them from meeting. Dladla said, "we had to act at the end of the day to defend our rights as the ordinary people. When we do so it seems like we are defying our chiefs. The problem is that some traditional leaders and their families are in business with mines. Therefore they feel we are challenging them. But they should be rallying behind us." Dladla's mother was hauled before the traditional council to explain why she was discussing mining issues with others. Once the traditional council heard her side of the story, they chastised the *induna*, saying he had no right to prevent people from meeting.

Shirhami Shirinda noted that similar issues to that Dladla described happen in Limpopo province. He gave the example of Patrick Mashego, a ward councilor from Sekhukhune who spoke up against corrupt traditional leaders. Now those leaders will not let Mashego visit certain villages to do his duties. In Makuleke, the beneficiaries of a land restitution claim are having difficulties with a local traditional leader who claims both the land and people belong to him. Humphrey Mugakula from Makuleke felt that the new bills would give traditional leaders additional powers. If the TCB was passed, the speakers warned that traditional leaders would have the power to expel people like Dladla's mother, Mugakula and Mashego from their communities.

Having heard these issues raised, a member of parliament in the audience, Ahmed Shaik Emam, acknowledged that things are very tough for people in rural areas. He noted the problems that people have had in securing their land rights in the face of traditional leaders or the Ingonyama Trust entering into business deals on their land. Emam offered

his support, saying, “people must rise up and fight this. People must recognize there is a common a fight.”

□ *The inability to opt out of traditional councils’ jurisdiction*

Many participants referred to the way in which the TKLB and TCB created a dual legal system, with people living in the former homelands being confined to the traditional courts, while people in other parts of South Africa had various legal forums at their disposal. People living within the old boundaries of traditional leaders’ jurisdiction therefore cannot opt out. Shirinda argued that via the TCB, “the government is trying to give traditional leaders powers that they never had in terms of custom. Personally I think in a democratic country these powers are not necessary. We vote for ward councilors and provincial people to be there.”

ANC veteran Mavuso Msimang argued that as the ANC, “we have not just sold out people in rural areas. We have adopted what the apartheid government used to do. We’ve always had traditional leaders. But a lot of them were created by the apartheid system. These are the people who are making decisions now. We are creating two nations: one that is beyond the pale and one that seems to matter because it is in towns and speaks English.”

Sabelo Dladla offered a picture of what life is like for people who live on Ingonyama Trust land – and warned that if the TKLB and TCB are passed, this scenario will become the norm for 17 million people. He explained that the Ingonyama Trust board grants leases to mines “without consulting those of us affected. One of our members tried to access a lease from Ingonyama Trust but he could not acquire a lease as Ingonyama had already granted it to a mining company. He had been there for ages, had a house but did not have a piece of paper saying ‘this is the land that I own.’” This is an example of the Trust failing to recognize people’s customary rights to land. Customary land rights are vital. They were key to the Xolobeni community winning their case in court.

□ *Women’s vulnerability under the TLKB and TCB*

A number of women spoke out at the dialogue about how the bills might affect them in particular. They gave examples of their existing challenges:

Sizani Ngubane of the Rural Women’s Movement in KwaZulu-Natal told the story of Mam Ngathi. When Mam Ngathi’s mother passed away in 2018, her nephew forcibly evicted her. The local traditional leader then sold 13 hectares of Mam Ngathi’s mother’s land at R40 000 per hectare. “That means he has made half a million on land owned by Mam Ngathi’s family!” exclaimed Ngubane. She asked how people with shared concerns about the bills could organize to help people like Mam Ngathi get their land back.

Nomonde Phindane from the Rural Women’s Assembly reported on a march on 9<sup>th</sup> April to the Eastern Cape House of Traditional Leaders in Bisho. Women from all over the province came to voice their issues. These issues included lack of land access, loss of inheritance rights, maltreatment by male family members and incidences of ukuthwala (for more on ukuthwala, see <https://www.customcontested.co.za/tag/ukuthwala/>). Phindane said the response of the House representative was that “no women have ever been violated in the name of custom.” Phindane noted that in many traditional courts, women cannot represent themselves. Instead a male family member must speak on their

behalf. She said she fears that “if the person violating my rights represents me there is no justice. That’s why I am really scared of the TCB.”

Shirhami Shirinda shared the story of Christinah Mothomokgolo from Limpopo province. When her husband died, her brothers-in-law stated their wish to “inherit” her as a wife, arguing it was their customary right to do so. When she refused, they made life difficult for her. She was accused of witchcraft and the failure to do the adequate funeral rites for her son. The traditional leader fined her R6 000 for her apparent actions. Participants spoke of the lack of recourse to justice available to someone like Mothomokgolo if the TCB was passed.

Zitha Hansungule of the Centre for Child Law asked about the impact the TCB might have on children, as well as mothers. Shirinda responded that, “in customs, not everything is good. If a woman had been found guilty for example, they could expel mother and children or just expel the mother. So it could be a problem for children, as traditional courts are not necessarily an ideal guardian for children.”

Nonhle Mbuthuma reminded everyone that customary law is different in each part of the country. She said that in Pondoland in the Eastern Cape, women are often given senior leadership roles. Unmarried women are also prioritised for access to land. But she warned that with the TKLB, the “government is pushing male traditional leaders on us. The TKLB will empower oppression of women.”

## **Concluding points**

Participants made the following common concluding points on the TKLB and TCB:

- The apartheid government distorted customary law by elevating features of it that would suit their divide and rule tactics. One of these tactics was to govern through patriarchal chiefs. In determining living customary law, it is therefore vital to consult all sectors of a community, and not just elites or those with the loudest voices.
- The TKLB and TCB pose a threat to the rights of at least 17 million people who live in the former homelands in South Africa. The ‘Bantustan Bills’ should be reviewed and possibly scrapped. Those in attendance should come together in solidarity to work towards these shared goals.
- Participants at the dialogue spoke in support of the findings of the Advisory Panel on Land Reform and Agriculture, including their recommendation to at least review and possibly also repeal the Ingonyama Trust.
- In light of abuse of power by some government bodies, traditional leaders or local elites, it is key to protect the land rights of people living in rural areas by safeguarding the Interim Protection of Informal Land Rights Act (IPILRA). This Act recognises customary rights to land, including rights that are not recorded in the deeds registry. It therefore protects people whose tenure is legally vulnerable because of past racially discriminatory laws and practices. IPILRA helped the Xolobeni community assert their rights against the government, mining company and their own traditional leaders. It also helped Grace Maledu and her community win their case in the Constitutional Court in 2018.

- In addition to supporting people in rural areas through legal mechanisms, participants also spoke about the need to support small-scale farmers and land reform beneficiaries.
  
- Tshepiso Thebyane of the Bakgatla ba Kgafela CPA in Rustenberg, North West pointed out that Khoi-San representatives had asked for a form of recognition from government but they did not necessarily request a “whole new law.” There was a sense from participants at the dialogue that the government was using the calls for recognition from Khoi San representatives to play political football.

*Report by Tara Weinberg for the Nelson Mandela Foundation*