

QUESTIONING THE LEGAL STATUS OF TRADITIONAL COUNCILS IN SOUTH AFRICA

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WHY IS THE LEGAL STATUS OF TRADITIONAL COUNCILS IMPORTANT?

It is important to know whether traditional councils currently have legal status because they are often put forward by the government and private actors as democratic institutions that represent communities. In practice, traditional councils are considered to be, and dealt with as community representatives in respect of development initiatives, service delivery agreements with local municipalities and mining deals. If traditional councils have no legal status they cannot act on a community's behalf in this way – their actions would be unlawful and legally unenforceable. They would also not have the legal basis to continue with the day-to-day administrative functions that they currently perform in some areas. In this context, it is important to interrogate whether traditional councils are legally and democratically constituted.

Furthermore, several policy proposals consider a role for traditional councils as, for example, authorities in land management or dispute resolution. As a result, the government is providing these councils with financial resources, tools and training. It is therefore important to ensure that government is not giving support to institutions that are not recognised in law and which may be illegitimate in some areas.

NATIONAL LAW RECOGNISING TRADITIONAL COUNCILS

Traditional councils were recognised by the Traditional Leadership and Governance Framework Act 41 of 2003 ('Framework Act'). This Framework Act gave official status to the tribal authorities that had been set up under an apartheid law called the Bantu Authorities Act of 1951 and that were still in existence at the time of the transition to democracy. Instead of being called 'tribal authorities', the Framework Act changed their name to 'traditional councils' but entrenched the same tribal boundaries that were used to set up the homeland system. Section 28(4) of the Framework Act states:

28. (4) A 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 contemplated in section 3 and must perform the functions referred to in section 4: Provided that such a tribal authority must comply with section 3(2) within seven years of the commencement of this Act.

Section 3(2) of the Framework Act says that two requirements must be met for tribal authorities to be deemed traditional councils, and thereby retain their legal status:

- At least a third of the total number of council members must be women.
- The council must consist of 60% members selected by the senior traditional leader (chief) and 40% members democratically elected from the traditional community. The senior traditional

leader is also a member of the council – he is the chairman and forms part of the 60%. After January 2010, all council members are in office for a period of 5 years.

At first, traditional councils were given until September 2005 to comply with these requirements, but because most did not do so, the Framework Act was amended in January 2010 to allow until September 2011 for compliance. Usually, changes to law cannot apply backwards in time. There is a serious question about whether parliament was allowed to give traditional councils additional time to meet the Framework Act's requirements almost five years after they were already supposed to have met them. There is also uncertainty about what the legal status of traditional councils is if they have failed to meet the requirements by September 2011, even after having been given additional time. This issue will be discussed in more detail later.

Furthermore, the council must have a number of members as stipulated by the Premier in each province. At first this number was a maximum of 30 for all traditional councils in the country, but since the Framework Act was amended in January 2010 each province's Premier is supposed to decide the number based either on the population size of the community or the number of recognised headmen. The numbers are then supposed to be published in the official *Provincial Gazette*.

PROVINCIAL RECOGNITION OF TRADITIONAL COUNCILS

Each province (except the Western Cape) has its own provincial law governed by the Framework Act, where the old tribal authorities are recognised as traditional councils. The provincial Acts must comply with the Framework Act and therefore include similar requirements for traditional councils to meet. Another potential legal issue is whether it was constitutional for provincial legislation to include powers for traditional councils or whether only national legislation is permitted to do so. This is an issue that will need to be explored in more detail in the future.

Eastern Cape

Section 4 of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 states the following:

4 *Transformation of tribal authorities and areas of jurisdiction*

- (1) *From 24 September 2004, all tribal authorities must be transformed into traditional councils in accordance with Section 28(4) of the Framework Act.*
- (2) *The boundaries of the Traditional Councils referred to in subsection (1) are those that existed in respect of the former tribal authorities prior to 24 September 2004.*
- (3) *The Premier may alter the boundaries of any traditional council referred to in subsection (1) in accordance with prescribed procedures.*

This provision confirms that the tribal authorities existing in the Eastern Cape before and during the transition to democracy are the ones to be recognised as traditional councils today. However, they must meet the two requirements set out in the Framework Act. The Eastern Cape Act specifies that traditional councils can only have between 9 and 30 members. The Premier of the Eastern Cape has the power to change the boundaries of traditional councils.

KwaZulu-Natal

The KwaZulu-Natal Act does not have a specific provision converting the old tribal authorities into today's traditional councils. However, it is subject to the Framework Act, including the provision about the transition from tribal authorities to traditional councils. In addition to the requirement for one third women and 40% elected members, the KwaZulu-Natal Act specifies that there can be a maximum of 30 traditional council members. However, the Premier issued a notice in 2008 in which he identified traditional council members that exceed the KwaZulu-Natal Act's 30 member limit.

In large traditional communities where groups of people are split into different geographical areas, the KwaZulu-Natal Act allows for the recognition of sub-communities. In terms of the national Framework Act, these sub-communities can then have their own traditional sub-council which must meet the same composition and gender requirements as ordinary traditional councils.

Limpopo

Section 33(5) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 states the following:

33. (5) A tribal authority or tribal council that, immediately before the commencement of this Act, existed under the provisions of any law, is deemed to be a traditional council established under this Act: Provided that such traditional council must comply with the provisions of Section 4 within one year of the commencement of this Act.

Similarly to the Framework Act and the other provincial Acts, the Limpopo Act requires traditional councils to have 40% elected members and at least one third of all the members must be women. The Limpopo Act sets a limit of 30 members for each traditional council in Limpopo.

North West

Section 43 of the North West Traditional Leadership and Governance Act 2 of 2005 states the following about the transition of tribal authorities to traditional councils:

43. Transitional arrangements

(1) All tribal authorities established in terms of Act No. 23 of 1978 shall continue until such time that it is substituted by the newly reconstituted traditional councils contemplated in Section [6]. ...

(3) (a) The Premier must, by notice in the Provincial Gazette, within one year of the commencement of this Act disestablish Regional Authorities, Community Authorities, and tribal authorities that have been established in terms of applicable legislation before the commencement of this Act.

The North West Act is different to the other provincial Acts in that it refers specifically to the old tribal authorities established under a 1978 law of the former Bophuthatswana government. However, these tribal authorities were the descendants of the ones that were set up by the apartheid government in the 1950s and 60s before the Bophuthatswana homeland was formed. The North West's wording of the provision converting tribal authorities into traditional councils is also different to the other Acts. The possible implications of this will be set out later. According to the North West Act the old tribal authorities must have at most 30 members and at least one third of those members must be women in order to be newly reconstituted traditional councils. However, in compliance with the amended Framework Act, since 2011 the Premier has issued notices specifying different member numbers for each traditional council in

the North West – some of which exceed the earlier 30 member limit – based on the estimated population served by the council. The North West Act does not include a specific provision about the election of members to traditional councils, but since the North West Act is subject to the Framework Act, 40% of traditional council members in the North West will have to be elected.

MEETING THE FRAMEWORK ACT'S REQUIREMENTS

An important legal question arises out of these provisions: What is the legal status of traditional councils if they have not met the composition requirements set out in the Framework Act and repeated in the provincial Acts? For example, does a traditional council continue to exist even if it has not had an election for 40% of its members, or does it no longer have legal status? None of the provisions explicitly provide an answer. At least two interpretations are possible:

- a. The first interpretation is that because s 28(4) of the Framework Act uses words like 'provided that' and 'must comply', old tribal authorities will transition into new traditional councils *only on condition* that they meet the gender and composition requirements within the specified time period. This would mean that as soon as they have not met the requirements in time, traditional councils automatically do not have any legal status.
- b. The second interpretation is that because s 28(4) of the Framework Act does not specifically say that the legal status of traditional councils will fall away if they do not comply with the gender and composition requirements in time, we cannot infer that consequence from the provision. This would mean that traditional councils retain their legal status despite not complying with the requirements and despite the wording of the provisions.

As pointed out earlier, the provision in the North West Act is worded differently to s 28(4) of the Framework Act. The two interpretations above may therefore not apply to the North West. This is because the North West Act explicitly extends the life of tribal authorities in the province until they are replaced with traditional councils that meet the gender and composition requirements. This could mean that the legal status of the existing authorities does not end if they fail to meet the requirements by a specific time. However, it seems that (similar to the Framework Act) the North West Act envisioned that it would only take one year for the tribal authorities to achieve this and be reconstituted as traditional councils. This is clear from s 33(3)(a) of the North West Act, which required all tribal authorities to be disestablished within one year of the North West Act coming into existence. This disestablishment does not seem to have ever been done by the Premier. On 15 July 2008, the Premier issued a notice in the Provincial Gazette which attempted to 'reconstitute' Traditional Councils. However, because this notice was released out of time, it is doubtful whether it can actually have any legal force.

Both the September 2005 and September 2011 deadlines have now passed and, depending on how all of these provisions are interpreted, traditional councils may or may not currently have legal status in South Africa. This is because, almost nine years after the Framework Act came into effect, most provincial governments have failed to hold proper democratic elections for a 40% portion of traditional council members. Even where traditional councils *do* consist of 40% elected members, the gender composition requirements have often not been met.

Government has said that although the boundaries of traditional communities and councils are highly contested because of their apartheid origins, trying to undo them would open a 'floodgate of problems'. The resulting doubt about traditional council jurisdictions is a significant obstacle to holding successful

elections. Research has shown that there were serious flaws and irregularities in the election processes that took place in the Eastern Cape and KwaZulu-Natal. In North West, the provincial government declared traditional council elections held in September and November 2011 to be null and void on 30 April 2013. This means that even if in reality a form of elections was held in the North West in 2011, the law does not acknowledge its occurrence. Most recently, elections for all traditional councils in the North West were scheduled for 6 July 2013. However, these did not take place and were postponed by the Premier. As such, these traditional councils currently have not met the 40% elected member composition requirement. In Limpopo, the situation is worse – to date, no elections have taken place for traditional council members at all.

Taken together, this factual context and the uncertainty created by the wording of the Acts' provisions mean that at present the legal status of all traditional councils is in serious doubt.

WHAT HAVE THE COURTS SAID ABOUT THE STATUS OF TRADITIONAL COUNCILS?

The status of traditional councils in the North West in particular has been questioned in several court cases:

- In 2010, Judge Landman in the North West High Court (Mafikeng) said that as soon as the Framework Act came into effect, the old tribal authorities were destroyed and new traditional councils put in their place, but that these new councils had not been properly reconstituted and did not meet the gender and composition requirements. However, the judge said that councils had until 23 September 2011 to meet the requirements. To date this has not been done, bringing into question whether these councils now exist. [*Mogale v Maakane and Others*]
- On the same day that the above decision was made, Judge Legodi in the North Gauteng High Court (Pretoria) decided differently on the question of North West traditional councils' status. This judge decided that new traditional councils did not exist in the North West because they had not had elections and did not meet the gender representation requirements. However, he then said that because of the wording of the North West Act the old tribal authorities that were established under the 1978 Bophuthatswana law would continue to operate until they became properly constituted traditional councils. Thus, he decided that although there are no legally valid 'traditional councils' in North West, there are still legally valid 'tribal authorities'. [*Traditional Authority of the Bapo ba Mogale Community v Kenoshi and Another*]
- In June 2011, Judge Hendricks in the North West High Court said that the term of office of members of a traditional council had expired in 2010. As a result, those members were no longer in their positions and had no right to try to stop the process of electing new members. The judge also acknowledged that no new members had yet been elected to replace those whose term had ended. This begs the question: if those people were no longer members and there were no new members elected to the council, can it be said that the council still exists? [*Maakane and Others v Premier of the North West and Others*]
- In September 2011, only 3 months after his previous decision, Judge Hendricks again heard a case about the status of traditional councils in the North West High Court. Directly contradicting what he decided previously, Judge Hendricks said that although the term of office of certain traditional council members had expired, they had to remain in their positions until new members were

elected. As a result, the traditional council would continue to exist despite not having new elected members. [*Pilane and Another v Pheto and Others*]

It is difficult to understand the implications of these judgments because each one seems to treat the status of traditional councils differently, with different results in each case. In respect of the last two cases, the same judge makes two contradictory decisions on a similar issue. Why were these two cases treated differently? One possibility is that in the first case traditional council members were challenging a traditional leader, and were found to have no status, whereas in the second case the traditional council was under attack from community activists. The outcome in both cases favoured senior traditional leaders.

What is clear from the judgments is that there is much confusion about the current status of traditional councils, even within the courts. Key provisions in the legislation have not been properly followed by government and it may now be impossible for government to legally fix its mistakes.

IS GOVERNMENT AWARE OF THE ISSUE?

There are indications that government is aware of the problem regarding the status of traditional councils. We understand that a circular was issued by the North West provincial government in April 2011 warning traditional councils that they do not have the legal authority to enter into transactions and valid contracts. This indicates that the failure to hold elections, or to ensure that elections were validly and properly held in the provinces where they did take place, has major repercussions for the legal status of existing traditional councils.

The question arises as to why the provinces have failed to hold elections to meet the composition requirements for traditional councils. The requirements were very low – only 40% of the members of traditional councils have to be elected, while 60% are appointed by the senior traditional leaders. Only a third of council members need to be women, but even this low target is often not met.

This indicates that claims that traditional councils are transformed and elected structures are hollow in the first place, and that, in addition, there has been insufficient political will to implement even the low composition requirements set out in law.