

Baseline Report

LONGITUDINAL STUDY: THE EFFECT OF THE LEGISLATED POWERS OF TRADITIONAL AUTHORITIES ON RURAL WOMEN'S RIGHTS IN SOUTH AFRICA

Democracy and Governance Programme of the
Human Sciences Research Council in Partnership
with the Centre for Applied Legal Studies



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EXECUTIVE SUMMARY

1. Introduction

This is a summary of the first report for the project *Longitudinal Study: The Effect of the Legislated Powers Of Traditional Authorities On Rural Women's Rights In South Africa*. The project was conceived of, designed and convened by the Democracy and Governance Programme of the HSRC in 2003-4, to respond to new legislation entrenching the powers of traditional leaders in South Africa, and to assess its likely impact on the rights of rural women. This summary report offers an assessment of the progress of the legislation, as well as initial findings from the baseline studies conducted in six rural communities in September-October 2005.

Legislation entrenching the powers of traditional leaders in the form of the *Traditional Leadership and Governance Framework Act 2003* (TLGFA), and the *Communal Land Rights Act 2004* (CLRA) will impact most directly on rural women. There are two main areas of concern: the equal rights of political representation and participation at local government level (there is a significant area of overlap in power between elected local government authorities and traditional authorities); and equal rights of access to, and ownership of resources, in particular land.¹ The two Acts cannot be considered in isolation from one another, as they are designed to work in tandem, and both rely on the legal recognition of the customary powers of traditional leaders. At this stage the study focuses on the TLGFA in the first instance as the CLRA is yet to be implemented.

The Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand is a partner in the project and has been instrumental in compiling the legal analysis. Professor Francine van Driel from the University of Nijmegen in the Netherlands has also contributed to the research. The Programme for Land and Agrarian Studies (PLAAS) at the University of the Western Cape plays an advisory role on the land rights aspects of the research. The Office on the Status of Women in the Presidency (OSW) of the government of South Africa, have also agreed to lend their support where appropriate, although they are not to be directly involved in the research. The Foundation for Human Rights (FHR) and the South Africa-Netherlands Research Programme on Alternatives in Development (SANPAD) have given financial support to the project, along with the HSRC's own contribution. Funding is currently being sought for the 2006-7 and 2007-8 tranches of the study.

The research team would like to thank all our partners for their support in the project.

The decision to circulate only an executive summary at this stage rather than the full research report was based on two considerations. Firstly, the report reflects preliminary research findings only, and many of these will have to be verified in the next tranche of research. As many of these findings are also sensitive, it was felt that to disseminate specific details from any of the fieldwork sites at this stage would be premature. Secondly, the costs of publication mean that dissemination of a final product in full must necessarily wait until the next phase of the research has been completed.

2. Current Debates: Gender, Tradition, Land, Power and Politics

2.1 "Democracy Compromised"?

Initially, post-1994, there had been a move away from support for the powers of traditional leaders with the advent of reformed developmental local government, with elected local leadership. Furthermore, an ambitious programme of democratic land reform and administration had been embarked on. In particular, it was recognised that rural women would need to be included in the

¹ This is significant for the baseline study as it is important to establish what the *current* situation is for women *vis-à-vis* their socio-economic status, and especially their access to rights in land. This will then allow the study to draw conclusions about the impact of the CLRA when it begins to be implemented.

structures of land administration.² The ANC, in order to live up to its non-racial, non-sexist struggle credentials was obliged in effect to play down the role of traditional leaders, many of whom had been complicit in the apartheid system, and indeed many of whom were ciphers of that system. However many high-ranking traditional leaders are also quite comfortable wearing a liberal democratic hat too, and simultaneously hold elected positions as members of parliament, or in provincial or local government. Far from democracy being anathema to tradition, it can serve to expand their area of authority. By 2000 the political pressure from traditional leaders for their role and powers to be recognised had become intense, with threats to boycott the elections in rural areas. By the time of the run-up to the 2004 national election, this pressure could no longer be ignored. The legislation is therefore regarded by some as being a politically motivated deal struck with traditional leaders in order to secure their cooperation in rural areas.

There is also political tension that may be of particular concern because it puts traditional leaders in rural areas on a potential collision course with elected local government representatives, as their areas of authority overlap, and the TLGFA does not specify how this is to be resolved. This could lead to explosive confrontations in areas where party allegiance is contested, in particular in KwaZulu-Natal. A major test for the TLGFA and its effect on rural communities will be the upcoming local government elections in 2006. This in turn has implications for this study, in particular the KwaZulu-Natal sector of the study, which is something that is flagged for particular attention in the next tranche of the study.

2.2 Social and Economic Rights, Inequality and Discrimination

In addition to the political dynamics surrounding the TLGFA and the CLRA, further issues and national debates arise in the context of the economic marginalisation of rural people, and the mobilisation of particular identities to maintain elements of power. Both of these have particular implications for rural women.

According to the South African Institute of Race Relations (SAIRR), since 1996 poverty in South Africa has increased, and more significantly inequality *within* race groups has also increased. Between 1996 and 2004, the rate of poverty – measured as those living on less than US\$1 per day – had more than doubled from 4.5% in 1996 to 9.1% in 2004. This was however down from the peak of 9.7% in 2002. SAIRR's figures also reflect that the population group to have experienced the greatest rate of increase in inequality are Black South Africans, as inequality among Blacks has increased by 20.75% since 1996. According to SAIRR, what this means is that "[t]hese increases in inequality point to rapidly rising incomes for small sections of [this] population group, whilst little financial benefit has accrued to the lowest income earners since 1996" (SAIRR, 2005: 1-2).

This is significant for this study because the status of rural Black South Africans as the economically most marginalized segment of South African society is well documented, and in particular, given the concentration of women in the rural areas of the former homelands, the impact of poverty is acute. Therefore, with poverty on the increase, along with intra-racial inequality, the spiral of poverty as experienced in particular by rural women, is likely to be underestimated and masked by an overall increase in prosperity for a smaller, more vocal, segment of that population group. For a further account of how this affects rural women in terms of their access to land, see Fair Share's *Economic Justice Update*, 6(1).

This increase in poverty and therefore in the urgency of access to resources, in particular land, for rural women is therefore of critical importance. It is also important to consider this in light of the tight nexus between culture, gender and power. This study therefore needs to pay careful attention to how the legislation is being implemented and interpreted to give effect to women's rights of access. If it is indeed an opportunity to progressively develop customary law and tradition to bring it in line with the Constitution, then this is the standard to which it will have to be held and carefully scrutinised.

² Ntsebeza, L. 2005. "Rural Governance and Citizenship in post-1994 South Africa: Democracy Compromised?" in Southall, R., Daniel, J. and Lutchman, J. (eds). *The State of the Nation 2004-5*. Cape Town: HSRC Press: 58-59

2.3 Defining “Culture”

As is noted below, the ambiguous treatment of culture in the legislation as something that is commonly understood and unchanging gives rise to problems of interpretation. This treatment of culture may also be a barrier to the legislation meeting its aim of the progressive transformation of customary law to bring it in line with the Constitutional demands of gender equality, but it may also provide an opportunity to do exactly the opposite.

This project has attempted not to be prescriptive about defining culture but rather to treat it in a subjective manner. However some reflection on what rights are derived from claims of culture is necessary, as the legislation assumes that the content of culture and tradition is something that can be agreed on in particular communities.

2.4 Culture and Human Rights: South African and International Law

The notion of the collective rights of cultural, religious and linguistic communities is a frequently contested one, because of the varying resonance that it has in different parts of the world. South Africa is a paradigm case of diversity, and therefore the relevance of the rights of distinct cultural, linguistic and religious communities here is especially pressing.

The recognition of the breadth and depth of this diversity, as well as the need to safeguard it, are woven into the fabric of South Africa’s human rights dispensation. In addition to the domestically enacted legislation, South Africa also has a number of obligations under international law pertaining to the rights of cultural, religious and linguistic communities. These are outlined in an Appendix to the report.

3. **Legal analysis**

At the time of the baseline research, five provinces with Provincial Houses of Traditional Leaders – including the three provinces identified for research sites, Limpopo, KwaZulu-Natal and Eastern Cape - had draft Bills dealing with the powers of traditional leaders. The Eastern Cape provincial legislature passed the Bill in December 2005; the other two provinces had still to pass the provincial law prior to implementation. Despite this, the TLGFA was partially implemented in KwaZulu-Natal with elections for 105 traditional councils held in September 2005.³

The provincial Bills address issues of traditional leadership and traditional communities, and the procedures to be followed in the appointment of traditional authorities and recognition of traditional communities. They stipulate different periods within which the premier can decide to recognise a community as traditional or not.⁴ Some provinces require the premier to refer the applications to the provincial house of traditional leaders which in turn is expected to forward a copy of the application to the relevant houses of traditional leaders at local level based on interest in the matter.

The Bills recommend the strengthening of traditional councils and altering their composition. For the purposes of the research project, what is significant is that they provide for 40% of the new or reformed Traditional Councils to be elected, and for 33% of members of these Traditional Councils to be women. They give the powers to appoint a traditional authority if there is a vacancy to the royal family. The Bills specifically mention that women may be appointed successors to the position of a traditional leader but complicate the whole process by inserting a caveat that this should be done in accordance with customary law. The provincial Bills are consistent with regard to some of the information required from the community applying. Namely - that a community is lead

³ The KwaZulu-Natal Bill was assented to on 1 December 2005, becoming Act 5 of 2006.

⁴ In accordance with section 3(2) of the Limpopo draft Bill, s 3(1) of the North West (NW) Draft Bill, s 5(2) of the Eastern Cape (EC) Draft Bill, s 2(1) of the KwaZulu-Natal Draft Bill and s 3(2) of the FS Draft Bill.

by a traditional leader [s 2(1)(a)] and observes a system of customary law [s 2(1)(b) of the TLGFA].⁵ But the details required from the community applying differ from province to province.⁶

Neither the national TLGFA nor any of the provincial Bills stipulate who or what is the authoritative source on customary law. This (probably intentional) ambiguity presents an important opportunity for stakeholders who have been excluded in the recent past to pursue leadership positions. Research shows that in the pre-apartheid era leadership was not based solely on hereditary succession but also on merit, by having proven oneself as a skilful leader. Depending on the community, these traditions could be revived to open up competition for leadership to a wider circle in the royal family, women, and to other members of the community. Premiers, Provincial Houses of Traditional Leaders, and courts should draw on local knowledge to revive older customary practices for recognising traditional leaders and communities which are less rigid and in harmony with the Constitution.

This ambiguity in the content of customary law can lead to positive results. Formal customary law without constitutional influence is condemned for its failure to reflect changes on the ground. While living customary law is condemned for its fluidity, what is recommended is customary law which reflects the experiences of the families of traditional authorities and changes in the institution as a result of social and economic factors. For example, there are many families of traditional authorities without male children. Many young people, some of whom are members of a traditional authority's family, die. These families often do not like the throne to leave their houses to the next family member in accordance with succession following male lineage. It is therefore the customary law, which is inclusive of women as required by the provisions of the Constitution and the TLGFA which should influence the decisions of the royal family in deciding succession matters.

A traditional leader will continue to be recognised in accordance with customary law.⁷ While customary law is still not clearly defined, it is clear that it is subject to the Constitution and the TLGFA, because the Constitution applies to all law including customary law. The customary law followed when recognising a traditional leader should not contradict the provisions of the Constitution, especially the provision of gender equality.⁸ This suggests that if women are the majority members of the community, the council should consist of more women than men, exceeding the 33% quota laid down by the legislation.

4. Baseline research: selection of field sites and methodology

After the selection of fieldworkers and a July conceptual workshop and training session, the provincial teams engaged in a process of consultation with key institutions and individuals in each province, holding of provincial stakeholder meetings, and compiling of desktop research. By the time of the fieldwork start-up workshop at the end of August 2005, each team had identified two field sites and compiled community profiles of each site. The basic unit of analysis is the traditional or tribal authority, with a particular village within that traditional authority being the focus of participatory exercises, focus groups etc.

The following points are important to note in justification of the selection of sites:

⁵ Section 3(3) of the Limpopo draft Bill allows the premier a period of 3 months within which to decide whether to accord recognition or not. Once decided the premier has to publish such decision within 30 days s 3(4) of the Limpopo draft Bill. The Free State (FS) Draft Bill stipulates 3 months within which a decision to recognise or not should be reached and communicated to the community [S3(5) of the Draft Bill]]. KwaZulu-Natal gives the premier a period of 3 months [s 2(5) of the Draft Bill]]. Eastern Cape (EC) Draft Bill allows the premier to stipulate the period (s 5(2)(b) refers to a prescribed period)] and North West prescribes 12 months.

⁶ The Limpopo Draft Bill requires for example, the description of the community s 3(2)(a), the name of the community s 3(2)(c), the name of the senior traditional leader [s 3(2)(d)], the names of the persons regarded as the community's leaders [s 3(2)(e)], the envisaged number of councillors [s 3(2)(f)] and the description of the area where the community resides [s 3(2)(g)].

⁷ Section 13(1) op cit.

⁸ Section 9 of Act 108 of 1996.

In Limpopo province, it was difficult to select only two sites, as there are three large language communities (and former homelands – Lebowa, Venda and Gazankulu). However, owing to the severe budgetary constraints of the project, only two sites are possible in each of the three provinces that the study focuses on, and so a judgment had to be made by the team in this regard, while acknowledging that this is not ideal. In the end, of the two that were selected, one is Xitsonga and one Tshivenda:

- Muyexe village, in the Xhiviti Tribal Authority, is situated in the Giyani Local Municipality, Mopani District. Language Xitsonga; formerly in Gazankulu.
- Tshaulu village, in the Bohwana Traditional Authority, is situated in the Thulamela Local Municipality, Vhembe District Municipality. Language TshiVenda; formerly in Venda.

In KwaZulu-Natal, two contrasting sites were selected, one in the deep rural area of northern KwaZulu-Natal and one in the peri-urban area between Durban and Pietermaritzburg, to provide interesting comparative data. Both are isiZulu-speaking communities of the former KwaZulu homeland:

- Mngamunde Village, KwaMandlakazi Tribal Authority, in the Nongoma Magisterial District.
- Nonothi Village, KwaXimba Tribal Authority, in the Cato Ridge area which falls under the eThekweni Municipality.

In the Eastern Cape, one site was selected in each of the two former homelands, the Transkei and Ciskei, to reflect the different patterns of land ownership and traditional authority due to early colonial settlement. Both are isiXhosa-speaking communities:

- Zibi Village, in the Mgwala Tribal Authority, in the Nkonkobe Local Municipality, under Amatole District Municipality.
- Sithembe Village, in the Ebhotwe Traditional Authority, situated in the King Sabatha Dalindyebo Local Municipality, under the OR Tambo District Municipality.

All six sites are under the leadership of traditional authorities, and three of the six case studies currently have women chiefs (chieftainesses) who are regents (acting on behalf of the chief).

The baseline fieldwork was conducted during September and October 2005, with the participation of the adult population of the villages who are normally resident during the year (in other words, migrant workers and those who only return to their village in December were not included in the study).

The first step in the fieldwork process was the holding of a community meeting at which the research project was explained, and the agreement of both leadership and residents was obtained for participation in the research process. At these meetings, the numbers of men/women present, and participating, was noted. While dissemination of information on the two Acts is not the primary aim of the project, it was important for the provincial team leaders to ascertain at provincial level the plans of government departments around dissemination and implementation of the Acts. At the community meetings, research teams were to give basic information on the Acts, to ascertain the level of knowledge among leadership and the general community, and to document the concerns and queries of residents.

During the consultation process and the community meetings, the fieldworkers identified key informants in the community; the second step of the fieldwork was to conduct interviews with these informants.

The third step in the baseline study was conducted through participant observation and participatory exercises. The latter involved constructing a detailed political and socio-economic profile of the village through using PRA methods such as mapping, timelines and institutional/venn diagrams. Focus group meetings were also used as a means of ascertaining opinions of men and women separately. It was also stressed that fieldworkers should be extra careful to not accept domination or participation by a few, and to ensure the participation of women especially.

In addition, participant observation methods were used with the objective of coming to an in-depth understanding of the cultural and social practices of each village through the observation of day-to-day life in the village, including attendance (where appropriate) of local meetings and events, engaging in informal conversations, and participating in day-to-day activities. Field researchers were asked to keep detailed logbooks of their observations, their informants, the opinions expressed, etc. as they were trained to do in the July workshop; and to note in particular when observations were repeated.

Regarding the participation of women in decision-making, research teams were required to define this broadly (i.e. not only on traditional councils which may not have been established or reconstituted yet); but to look at local committees, participation in IDPs, and the influence of women roleplayers in traditional and local government structures.

5. Findings of the baseline research

5.1 Socio-economic profile and development challenges:

Although there were some variations between the field sites in terms of socio-economic profile, it is possible to argue that in general they are typical of rural communities in the former homeland areas, in the following respects:

- Subsistence: The majority of the population in the fieldwork sites practise subsistence agriculture, and keeping of livestock for personal subsistence is widespread. There is very little commercial agriculture or indeed production of crops or livestock on any scale for profit.
- Formal employment is almost non-existent in these communities. There is a small amount of income obtained from remittances from community members who are in salaried or waged employment elsewhere.
- Dependence on government grants (old age pensions, disability grants and child support grants) account for most of the disposable income in these areas
- HIV/AIDS is having a serious impact on the rural population, in particular in KwaZulu-Natal. The gender dynamics of the spread of HIV/AIDS is not a specific focus of our case studies, yet it is known that young women are at the highest risk of contracting the disease.
- The impact, if any, on traditional leadership is unclear at this stage; yet it is apparent that traditional leaders will play a role in the future in terms of handling the crisis generated by the spread of the disease; and that traditional practices have already become a controversial point in this regard (for example, legislation outlawing virginity testing).

The monitoring of the implementation of the CLRA and TLGFA in these areas will of necessity link into the broader debate around sustainable rural development and poverty alleviation: how such communities utilise land and other available resources effectively, how services are provided, and ultimately how people's livelihoods are qualitatively improved.

Service delivery, in particular clean water and good roads, was clearly identified as a problem by community members in all six case studies. The role, if any, of traditional leaders in terms of service delivery is significant for our study. Although the legislation and government policies provide for a co-operative relationship between traditional leaders and local government officials, in some of our case studies there are clear tensions between local government and the traditional leaders. There are also cases where both the traditional leader and councillor seem to privatise community resources for their own use.

As traditional leaders are institutionalised in terms of the new legislation, and receive remuneration from the state, they then become civil servants who have responsibilities in terms of delivery of services, development etc. They will also presumably fall under the existing legislation for public

servants. There will need to be clearly defined roles for traditional leaders as well as local councillors in terms of responsibility for service delivery.

5.2 Current role of traditional authorities

The roles played by existing traditional leaders and traditional councils in the six field sites did not differ fundamentally. It must be noted that current or existing practices are documented in the report, and not the ideal or legislated roles of traditional leaders. However, in all field sites traditional leaders are respected and in some cases the opinion was expressed that the dignity of traditional leaders should be restored.

One of the key roles of traditional leaders is the allocation of land, for both residential and agricultural purposes. In most of the case studies, land is still held communally, and in such cases traditional leaders retain their role in allocation of land. The exception to this in our case studies was Zibi village, where land is held under quitrent title, and the chief does not allocate land. In the other cases, the precise role of traditional leaders in land allocation needs further study. It was clear that in some cases their role in controlling resources (especially land) is controversial. In some cases women's lack of access to land, which is controlled by the all-male traditional leadership, is a serious cause of dissatisfaction. In other areas, although chiefs and traditional leaders still control land access, they claim that women do have access to land.⁹ This question is critical for the study, as the implementation of the CLRA will be interdependent with the TLGFA. While the CLRA provides that where a traditional council exists, that structure *may* serve as the Land Allocation Committee, it was stressed by the DLA that this is not necessarily the case, and that a Land Allocation Committee in terms of the CLRA may be established independently of a traditional authority.¹⁰ Similarly, people may form a Communal Property Association independently of traditional authority. Central to this issue is what kind of landholding people want – whether individual title or communal land – and whether women, in particular, are able to articulate their opinions and needs in this regard. While in none of our six case studies has the CLRA been implemented yet, the institutional role of traditional leaders in land allocation is likely to be redefined by the implementation of the two acts. The increased representation of women (one-third in both the traditional councils and the land allocation committees) may well have an impact on how and to whom land is allocated in the future.

The other key role of traditional leaders, from our case studies, is the administration of traditional law and custom. One of the chief's functions is presiding over the traditional court, and ruling on matters which fall under its jurisdiction (such as land and inheritance disputes). In some cases traditional leaders co-operate closely with the police; yet they feel that their powers in administering law - for instance, imposing fines or confiscating property - have eroded and this has led to an increase in crime. This needs to be noted in light of the jurisdiction that traditional leaders had under the *Black Administration Act* of 1927 (which is in the process of being repealed), and the recommendations made by the *Traditional Courts Bill*, which suggests that traditional courts be staffed by people who are well versed in customary law. Positions in these courts would be filled on the basis of merit in this respect.

The overlapping and confusion of roles between traditional councils and municipal councils was a consistent observation in all six cases. While the relationship varies from case to case, there are many instances where traditional authorities seem threatened by municipal council officials; in some the local councillors and officials are regarded with overt hostility; in others, the relationship is co-operative. In the Limpopo and Eastern Cape case studies, where most residents are ANC supporters and the council is ANC-dominated, the tension between the two institutions does not take a political form. Even though there are tensions between traditional authorities and elected local government, there is in principle, support by the traditional leaders for the ANC government and for the policy of co-operative governance between local and traditional authorities. In KwaZulu-

⁹ It must be noted that it could be argued that this position is correct, as the current land laws and policies that are in place, provision is made for women to be allocated land as a right.

¹⁰ Interview with a senior DLA official, Port Elizabeth, 19 August 2005

Natal, the situation is more complex, as IFP-aligned traditional leaders have openly opposed ANC-led councils, not to mention the new TLGFA itself and the newly-defined roles of traditional leaders. Municipal and traditional boundaries and the demarcation of boundaries and areas of jurisdiction is also a source of tension. In most cases the traditional leaders feel threatened or undermined by the elected councillors, and are fearful that their traditional roles and powers are being eroded.

Concerning resources other than land, the roles of traditional leaders and local government are in many cases not clearly defined; this has led to conflicts over resources and relationships of clientilism with either traditional leaders or councillors in order to access resources.

5.3 Local government

The local government elections have been called for the 1st of March 2006. It is not clear at this stage whether provincial governments (with the exception of KwaZulu-Natal) will hold back on the implementation of the TLGFA until the elections are over, and the political situation is clearer. In the case of KwaZulu-Natal, it seems that one of the reasons for the ANC pushing ahead with the implementation of the TLGFA prior to the elections (and prior to the provincial legislation being passed) is that it is speculated that the ANC will benefit from the newly-institutionalised traditional councils in the local elections.

Because of the tension around local elections, especially in KwaZulu-Natal, but also in parts of the Eastern Cape, the second phase of fieldwork for this project is going to be postponed until mid-March, when the newly-elected municipal councils will be in place. Any shifts in political orientation at local government level will need to be taken into account in the next phase of fieldwork.

5.4 Implementation of the legislation

The TLGFA has not yet been consistently implemented in any of the provinces under review. Limpopo and Eastern Cape have passed provincial legislation to enable the TLGFA to be put into effect, although in the Eastern Cape the provincial law was passed only in December 2005. Provincial departments plan to oversee the implementation of the laws this year (2006). In KwaZulu-Natal, the TLGFA was implemented in November 2005, by means of holding elections for approximately half of the existing traditional authorities. This was challenged in court by the House of Traditional Leaders, as the provincial legislation had not yet been passed. However, the case was won by the Provincial government, which continued with the elections as planned.

The current constitution and status of traditional authorities varies considerably. In Limpopo, traditional councils have been constituted with 40% of elected members, seemingly in anticipation of the implementation of the act. In Eastern Cape, the older tribal authorities are entirely appointed at the higher level (headmen) and elected by villagers at the lower level (subheadmen); more recently formed traditional councils are entirely elected. In Kwazulu-Natal, as outlined above, about half of the traditional councils have been recently reconstituted in conformity with the TLGFA; the remainder are presumably still appointed according to custom.

5.5 Participation of women

As noted above, there is an acceptance in principle by most traditional leaders of the idea that women should be better represented in institutions of traditional leadership. There is a perception that it is advantageous to have women representatives in terms of gaining access to government resources (e.g. for development projects). However, the situation on the ground in most of our case studies is that traditional leadership is still firmly in the hands of men. In some areas (such as rural KwaZulu-Natal) the system is particularly patriarchal. In other cases, even where there is no in-principle opposition to women holding positions, this does not often happen. It was noted that even in those cases where there are female chiefs or regents, this does not mean that women in general in those communities have greater access to land or power. Moreover, even when women do become represented on traditional councils, representation does not in itself mean effective

participation, nor power in the sense of influencing decisions about access to resources. For example, in one of the Limpopo case studies, 40% of the traditional council are women; yet their decision-making power is limited. Moreover, in all the case studies the lack of women's participation in community meetings was observed – even in situations where women were very willing to participate in PRA exercises outside of a formal meeting called by the chief. Women often expressed their fear or hesitancy of speaking out, as they do not wish to incur the disapproval of the chief or headman.

Our concluding analysis on this point is that the empowerment of women to participate through legislation such as the TLGFA and CLRA is important; and that the one-third representation of women should be enforced and monitored, as it opens a space for greater participation of women in decision making. It is also an attempt to limit inherently undemocratic practices and to hold traditional leadership to account through democratic processes. However, formal representation can be countered by patriarchal cultural norms and practices. In communities which are governed by patriarchal 'traditions' (however these are defined), the empowering of women to use the space that has been opened up for them, is of great importance. Yet, whether it is in fact possible to legislate effectively on matters of tradition and culture is a moot point.

5.6 Opposition to the legislation

The baseline research involved interviews with traditional leaders at provincial level, and revealed clear differences between provinces in relation to the new legislation. In KwaZulu-Natal, there has been clear opposition to the TLGFA, as outlined above. In Limpopo, there is interest but a clear lack of knowledge on the details and implications of the legislation. In the Eastern Cape, there is support from traditional leaders for the legislation in principle. However, there have been certain aspects of the legislation which have been contested by provincial traditional leaders, relating in particular to the demarcation of boundaries and the payment of traditional leaders.

5.7 Knowledge of the legislation

This situation is also reflected in the knowledge of the new legislation, where in the Eastern Cape the HTL is well-informed and is making some efforts to consult and keep chiefs informed of developments. Even so, it seems that at local level traditional leaders are dependent on the kings or senior chiefs for information, and ordinary people are dependent on the information which their chief has. In KwaZulu-Natal, there is opposition from the HTL to the legislation, so it is likely that the political will does not exist for disseminating information among chiefs, except perhaps to gain support for their opposition. In Limpopo, there is little knowledge of the legislation. Traditional leaders in the villages selected as case studies were all aware of the legislation; but in Limpopo there was a request to the project team to supply copies of the legislation.

Among councillors, there was uneven knowledge of the legislation in all three provinces. Among ordinary residents of the villages, there was even less knowledge. In relation to the CLRA, there is a clear implication in this lack of knowledge that those who are supposed to benefit from the new law – rural women, in this case, who want access to land – do not currently have the knowledge to demand their rights. In relation to the TLGFA, there is little understanding of such provisions as the requirement for one-third of representatives to be women. There is also in some cases a reluctance to participate in discussions of such matters, for various reasons, such as women who do not want to be seen to be challenging the (male) chief or *induna*.

Regarding the dissemination of information about the new laws, clarity is needed in understanding whose primary responsibility it is: the DPLG/DLA, or the HTLs? In practice, it seems that the HTLs are taking the initiative in some cases (eg. Eastern Cape) with regard to the TLGFA. With regard to the CLRA, the DLA is taking the initiative in dissemination; yet in some cases (Eastern Cape) there is no provincial budget and insufficient staff to implement the legislation. Requests were received by the project team (in Limpopo especially) for copies of the legislation, and especially for copies translated into local languages. Moreover, it would seem that an accessibly-worded summary of the complex laws should be made available to roleplayers at local level.

6. Conclusion: Who will benefit from the legislation?

Our understanding is that the intention of the two laws is to benefit the inhabitants of rural areas of South Africa that are still living under traditional law. The TLGFA requires people to define themselves as Traditional Communities in order to be recognised, and it institutionalises the status of their traditional leaders. Yet, a number of questions were raised in the baseline research: how is a traditional community to be defined? Who decides whether or not to seek recognition as a traditional community? What if some section of a community does not wish to be so defined? And while the recognition and institutionalisation of traditional leaders was accepted at least in part as a result of a political compromise and an attempt to accommodate traditional leaders, it is clear that many traditional leaders – in particular those in KwaZulu-Natal – are not satisfied with the current legislation and feel their powers to be undermined. In this situation, it is unlikely that they will see it in their interests to explain and promote the new legislation.

On the other hand, the legislation is meant to democratise traditional institutions, and to allow for greater gender equity in the representation of women on traditional councils and in land administration structures. The critical question for our study is whether the laws will, when implemented, in practise result in a process of democratisation of rural governance. Taking as a baseline the existing system of representation in the six case studies, it will be critical to analyse how these institutions change when the laws are implemented: Is there really greater participation by ordinary citizens? Do women really gain access to real power, such as decision-making about land allocation? Or will there be a conformation to the law in name, but one which involves token representation of women, and essentially retains the status quo?

These questions will form the basis for the next tranche of the fieldwork, which will monitor the implementation of the TLGFA in 2006. The fieldwork is set to take place from late March-May 2006. This research, together with the baseline report, will be compiled into a comprehensive report for publication and dissemination in the second half of 2006.

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