

On the record...

Interview with the Deputy Minister of Cooperative Governance and Traditional Affairs, Yunus Carrim

Mazibuko K. Jara, interviews Yunus Carrim,** Deputy Minister of Cooperative Governance and Traditional Affairs, about the Traditional Courts Bill and its implications.*

Mazibuko Jara (MJ): The boundaries to be used for the jurisdiction of the traditional courts envisaged in the Traditional Courts Bill (TCB) are the same as those imposed by the apartheid-era Black Authorities Act of 1951 (BAA); that is because the TCB's default jurisdictional boundaries of traditional courts are the same as those of the BAA. In your view, do the TCB and other laws, such as the Communal Land Rights Act of 2004 (CLARA) and the Traditional Leadership and Governance Framework Act of 2003 (TLGFA), entrench these BAA tribal boundaries and structures?

Yunus Carrim (YC): I can speak about the TLGFA because I was chair of the Portfolio Committee on Local Government when the Bill was processed. When it comes to the TCB, the Justice and Constitutional Development portfolio committee, which I chaired at the time, had little time to deal with the Bill. It was tabled just before the 2009 national elections. But there was too much conflict over the Bill. We proposed to the incoming committee that they should see to it that public hearings were started again, because many civil society stakeholders claimed that the Department of Justice's public hearings were biased. It was said that many of the hearings were held in tribal courts, which did not provide a conducive atmosphere for citizens with different

views. But it was impossible to complete the TCB process, given the imminent end of our five-year term in parliament. That matter is now on the agenda of the Justice Committee chaired by Llewellyn Landers.

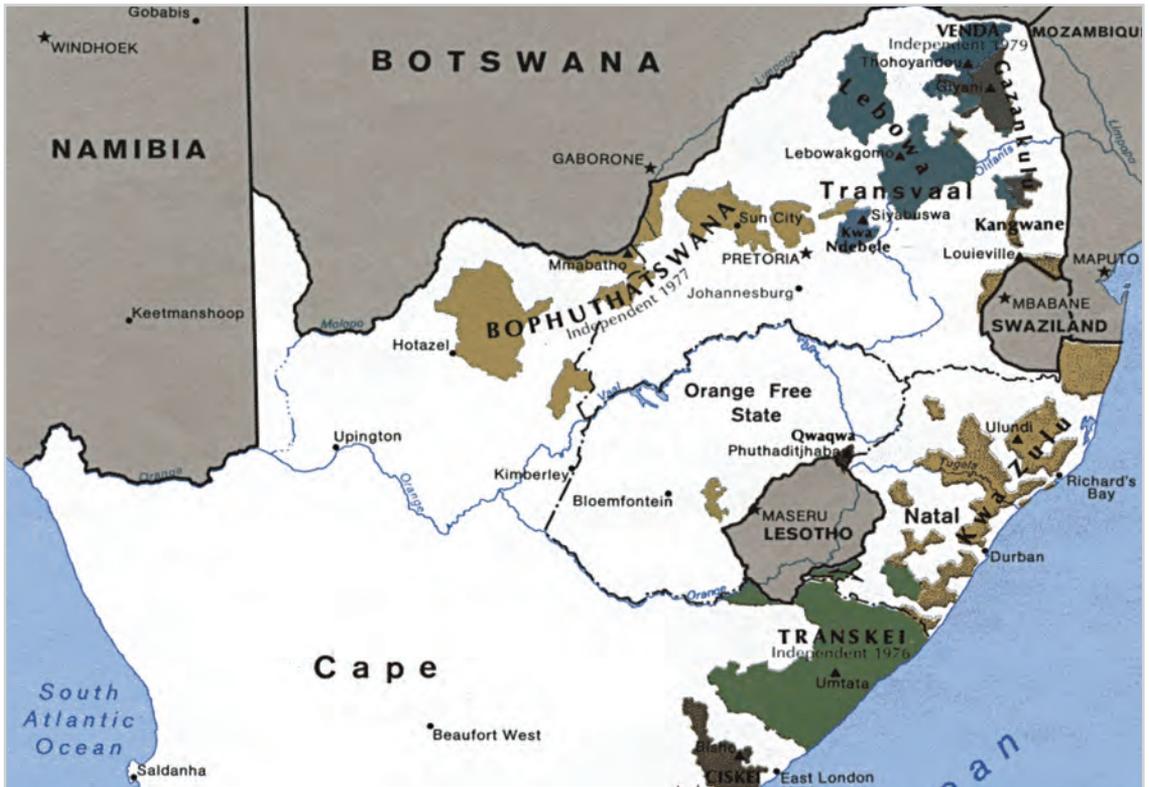
When I chaired the Local Government Committee we did not use the BAA at all as a basis for processing the TLGFA. We looked at what we understood to be happening on the ground. The context of nation-building, and the need to bring traditional leaders into the post-1994 framework were also important considerations. As a portfolio committee, we jettisoned the BAA. We recognised that the traditional leadership institutions will not disappear overnight. We also recognised that the post-1994 situation made traditional leaders feel that there was now a new government that could understand them. Many felt a sense of pride and dignity, which for some included the impulse to restore traditional institutions to what they saw as their rightful place. Some even wanted the restoration almost to return to the pre-colonial era. We had to respond to them. If we had traditional institutions outside of the legislative process, it could have led to problematic and anti-democratic practices in some parts of the country.

One must not look at the TLGFA without looking at the Nhlapho Commission (the Commission on Traditional Leadership Disputes set up by the TLGFA). Many came to the ANC and said, 'we are genuine traditional leaders who were displaced by apartheid because we were not yes-men.' The ANC had to say that you cannot be a traditional

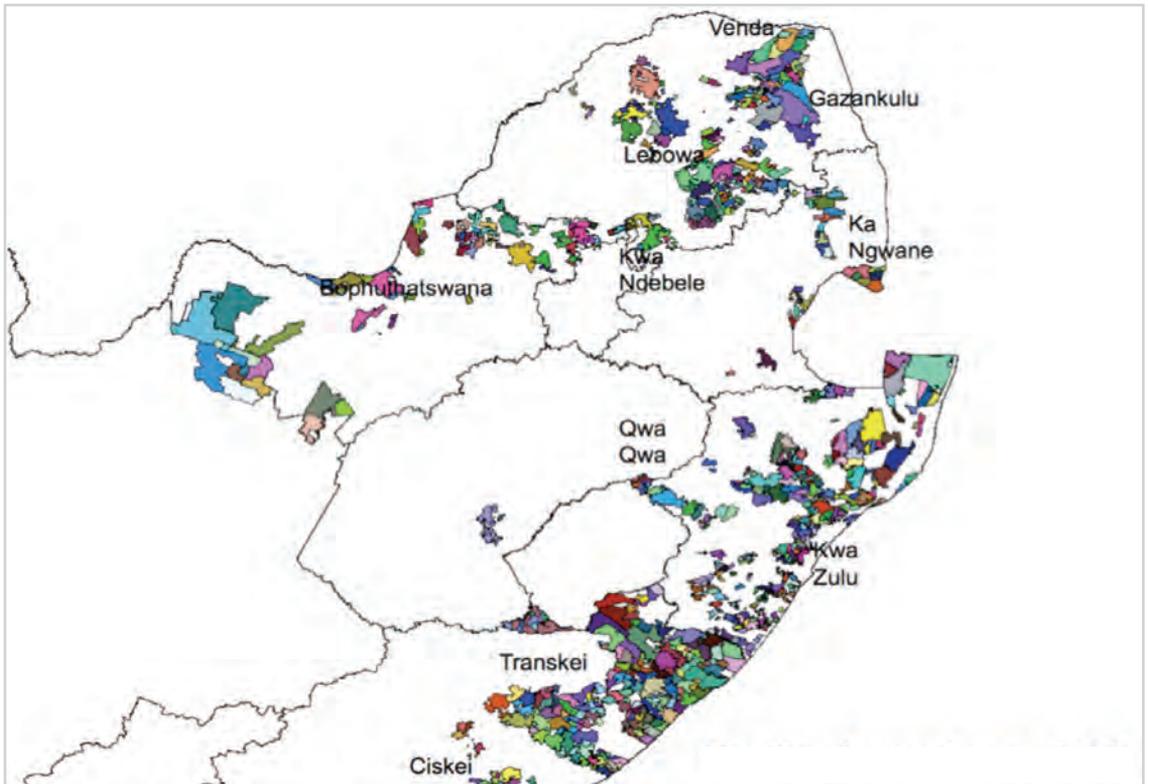
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** Yunus Carrim was chair of the Parliamentary Portfolio Committee on Justice and Constitutional Development when the TCB was introduced to parliament.

Former homelands map, 1986



Traditional Council map, 2010



leader if the apartheid regime appointed you – if you were one by legitimate custom, so be it; but if imposed we cannot recognise you as one. So, the post-1994 era allowed those who are genuine traditional leaders to remain. The BAA did not allow for that, as it had a particular notion of advancing Bantustans, clan and ethnic divisions, and other elements of apartheid rule. The TLGFA now enables traditional leaders to contribute to social cohesion and the development of rural people. I disagree with the view that parliament relied on the BAA in passing the TLGFA.

I cannot recall the specific discussions on tribal boundaries when the TLGFA was passed. However, government can consider a review of traditional boundaries as we are presently preparing an overhaul of legislation relevant to the roles of traditional leaders.

One has to understand that Act (the TLGFA) in the context of the unfolding political process of change we were in at the time. We did not have a revolution in the Marxist sense but a negotiated transfer of power, a 'democratic breakthrough', as the SACP says. We are an emerging democracy. We cannot overnight dismantle all the structures of the order that we overthrew. What we settled for in 1994 meant that we compromised on certain things. For example, we had to ensure a balance between socio-economic rights and the rights of the market to operate. My understanding is that, whatever our views on traditional leadership, the TLGFA was reasonable in the circumstances. It recognises that democracy must prevail, but a democracy shaped in the context of specific structural, cultural and historical circumstances. The TLGFA is a reasonably balanced piece of legislation, taking into account the conditions of the time. It does not entrench traditional leadership institutions in a way that undermines democracy. This challenge of modernity and tradition persists in many forms across the world – for example, even progressive trade unionists in Britain are taken up by the upcoming royal wedding.

Before the TLGFA, I think that what we did is communicate the ANC's positions on traditional

institutions through the Municipal Structures Act (MSA). That meant that at local level it is the elected councillors that have overall responsibility and decision-making power on development. But councillors must work with traditional leaders. The TLGFA must be located in terms of the MSA.

We also recognised that there are large numbers of rural poor who identify with traditional leaders. And the state alone cannot deliver services. In the same way that we need civil society support, traditional leaders can also play a developmental role. Some of them played this role. Through the TLGFA we gave them a more developmental role in an enabling framework that allows each province to work according to local dynamics to shape their own legislation. The TLGFA was not prescriptive legislation. Clearly, what we provided for was a developmental role for traditional leaders, while making it clear that ultimately it is elected public representatives who must take responsibility for service delivery and development. The two need to work together. In the TLGFA we also provided for participation by women in a way that breaks with some discriminatory practices in most of these traditional communities.

The TLGFA was also seen as an interim model until conditions change for a more democratic model. It was not seen as a final answer. Further changes would be on the basis of what is happening on the ground: struggles, contestations and so on. The law reflects the state of those struggles, the conditions on the ground. But of course, the law also has to open space and assist in advancing those struggles.

We were also concerned to enhance the many good and positive aspects of traditional leaders. The ANC itself has a good history with traditional leaders. People like Inkosi Albert Luthuli and Inkosi Zibuse Mlaba in Camperdown are positive examples. It is crude to argue that traditional leaders are inevitably holding back progress. As a deputy minister in this portfolio, I meet often with amakhosi. I am often surprised by the huge potential they have to contribute to development.

Ultimately, it is not just what the law says but also how the law is executed in practice. It is what the MECs and departments understand the law to be. One is aware of the way in which the law can entrench and embed these institutions but these are matters for struggle and local dynamics. As we industrialise and modernise, the chances are that we will be in a better position to accommodate traditional leadership in ways that are more consistent with a progressive democracy. But it is not given that modernisation will do away with traditional systems, views and institutions. Consider, for example, how ethnic and religious differences can emerge in the most modern industrialised societies. What do you say of Muslims born and bred in the UK who turn to Islamic fundamentalism? There are other examples, of course.

Of course we could have done better on the TLGFA. There may be counter-productive features in the TLGFA, including the position of women, the extent of democracy, and urban-rural divisions. But there is now enough space to experiment and improve.

I did not deal with CLARA at all. I was taken aback by CLARA as it surfaced. Some of the civil society people were upset with us as a portfolio committee. They felt that we were accommodating a broad range of views on the TLGFA, but CLARA undermined all of that. I did not know that CLARA was coming out in the way it did. For the TLGFA we allowed for public hearings. We continued to engage with civil society and the traditional leaders till the day we voted on the Bill. We even gave the last version of the Bill to stakeholders for comment, provided they did not raise the same issues on which progress had been made. I did a lot of the negotiating myself. As a result, we struck various balances. The stakeholders and technical experts on all sides were reasonably happy with the way we dealt with the TLGFA. I know certainly that people were not always happy with the final version, but they were reasonably satisfied, even if not altogether happy. When CLARA came up, some of the civil society organisations felt that we were giving them a good TLGFA, yet CLARA was

a problematic law. We were like the 'good guys', while the committee dealing with CLARA were the 'bad guys' – but we were both part of the same 'plan', as it were. But even some senior government and ANC representatives did not seem to know exactly what the provisions of CLARA were. The ANC can at times be erratic, haphazard, vague. But there was not the conspiracy some civil society stakeholders claim.

MJ: The TCB does not enable people to opt out of using traditional courts, as was recommended by the Law Commission. Instead it makes it a criminal offence for anyone living within the jurisdiction of a traditional court to fail to appear once summoned by the senior traditional leader as presiding officer.' Can you explain whether this is consistent with the Constitution? What will the impact of this be on public respect, trust and confidence in traditional leaders, given that your department sees them as partners in the system of cooperative governance, which includes participation by ordinary people? What is your assessment of the scope of the TLGFA provisions for people to opt out from traditional community status? Can a portion of a 'traditional community' have the right to opt out? How?

YC: People have a right to opt out. That's what our committee felt. If a person does not want to abide by the norms and values of the traditional authority, surely that person has a right to opt out? The legal advice we got was that it would be unconstitutional not to give people from traditional authority areas that right. This is a matter that will have to be addressed by the current Justice Committee as it processes the Bill.

MJ: The concept document for the new Department of Traditional Affairs makes mention of oversight and accountability mechanisms for traditional courts. This seems to suggest that the department would play a role in ensuring the accountability it is seeking. How does the department seek to achieve these goals, and is it involving the Department of Justice in this? Is there a correlating budget that would accompany these tasks? How conducive is the environment for accountability by traditional leaders given the

combined impact of the TCB and the TLGFA to fuse judicial, administrative and governance functions in one structure/person/institution?

YC: Legislation dealing with these issues comes from three different departments: the Department of Cooperative Governance and Traditional Affairs, the Department of Rural Development and Land Reform and the Department of Justice and Constitutional Development. There obviously needs to be synergy between us. This needs to be addressed. We can fine-tune this in the overhaul of legislation I have mentioned. The overall principle should be the need for the separation of powers to ensure accountability – how we do it is something we need to apply our minds to. If the TLGFA collapses different roles, we must look at it and arrive at consensus on what to do. I agree with the issues about accountability of traditional leaders. This is the position of the department.

MJ: Critiques of the TCB, TLGFA and CLARA have argued that these laws fail to recognise the diversity and the multi-layered nature of traditional justice, customary law and customary governance systems. What is your view? Do these laws not concentrate power, responsibilities and role in traditional courts and councils that are both dominated by a senior traditional leader? What about the fact that the TLGFA dissolves community authorities?

YC: The TLGFA was an enabling framework act. The intention was to allow for diversity. It is possible that we did not make adequate provisions to recognise this diversity. If that is the case, there is an opportunity to address it now. Right now, government is overhauling relevant legislation: in particular the TLGFA and the National House of Traditional Leadership Act (NHTLA). We hope this will be tabled in parliament in the second half of this year. The department is finalising a discussion document on this. We can consider submissions on community authorities and other customary structures.

MJ: Can the TLGFA (section 20 in particular) be interpreted to mean that the role of traditional

leaders includes governance? Do traditional institutions not constitute a fourth tier of government? What do you make of the Constitutional Court's certification judgment, which specifically rejected the assertion that the roles of traditional leaders included governmental powers?

YC: The Framework Act does not create a fourth tier of government. Traditional leaders are part of our constitutional democracy. What we sought to do was to avoid a situation where traditional leaders would be seen as a fourth tier. The TLGFA provides for a complementary relationship between traditional leaders and elected public representatives. It gives some sort of structure and cohesion to the relationship between traditional leaders and democracy. But it's possible that the way the roles and responsibilities of traditional leaders are applied in practice may, in some cases, serve to create the impression of a fourth tier of government. The Act did not intend this. This is not consistent with the Constitution or values of government or the ANC. If this is the case it needs to be attended to.

MJ: What are the implications of the pending changes to municipal laws regarding the roles of traditional leaders in municipal councils? And the implications for the democratic transformation of local government? Does this not give traditional leaders governmental powers?

YC: What we are talking about are roles, but not an established legislative provision for the same power as public representatives. The views of the current government allow space for a direct developmental role for traditional leaders. But this must be within the framework of democracy. We are not talking about the same powers as public representatives for traditional leaders at this stage, but a greater developmental role. However, an increase in traditional leader powers is a possible outcome, given the review and overhaul of the legislation, and we're not sure what sort of consensus will emerge or what Parliament will decide. The intention is to merge the NHTLA with TLGFA into one overall piece of legislation. Whether they will get more powers is difficult to

say. There is government recognition that traditional leaders can play more of a role – as all actors outside the state can play more of a role.

MJ: The TLGFA was justified by reference to the reform component of tribal authorities through the allocation of a third of seats in new traditional councils to women, and for the election of 40% of its members. The TLGFA stated that such elections would be held by the end of 2004. Yet it is common cause that the elections were botched in KwaZulu-Natal, North West, the Eastern Cape and Mpumalanga, and still have not taken place in Limpopo. Why is it that eight years after the TLGFA was passed in 2003 the election of 40% of the members of traditional councils has not yet taken place in provinces such as Limpopo?

YC: If there were problems, obviously they need to be addressed. Limpopo, I know, posed certain specific problems and the department has been seeking to address them. You must remember that we have to work with the provincial departments on this. Now that we have a separate, dedicated Department of Traditional Affairs within our Ministry, we will be better able to deal with the problems. Some of the problems are understandable, given the complexities of the issues, but others should not have occurred. We have to do more to address them, I agree. The review of the TLGFA and the NHTLA can also address the practical problems in the implementation of the TLGFA.

MJ: What is your message to those rural dwellers concerned about the TLGFA, and the TCB and its impact on rights?

YC: People must take part in the process that will unfold in the next few months. The department will be consulting widely. Parliament will also have public hearings. People are more than welcome to make submissions. We are keen that they do, and we will look at all submissions. We would like to hear more from these organisations. There is an open door to engage with us and, I'm sure, Parliament too.

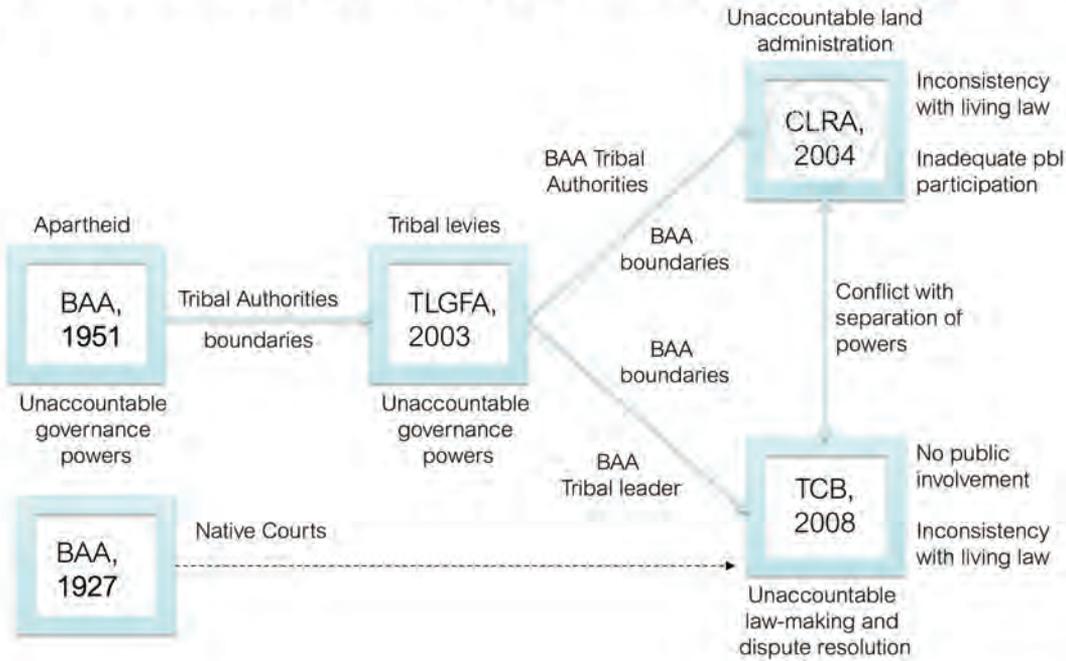
There is scope for reconciling traditional leaders and a progressive democracy. Given the gigantic

challenges around jobs, service delivery, development, HIV/AIDS, the environment and economic growth, and the desperation for progress, I think that we need everybody on board. We need to find a way for traditional leaders to play a role as part and parcel of a progressive democracy. It can be done. Some blindly reject the TLGFA because they do not trust the ANC and government. They do not look fairly at the substance of the TLGFA and the challenges it seeks to address. I think they just don't trust us. If we were trusted more, people might be more willing to see the TLGFA in a more positive light. We must take our measure of responsibility for the lack of trust in us among sections of civil society. If we look at the TLGFA on its own merits and demerits, there will be faults with it, no doubt. But some of those things can be addressed in the process. On some of them we can never agree. From the vantage point of civil society, what they say makes sense. From the vantage point of traditional leaders, the same applies. From government's position, we seek to find consensus on the complementary roles of traditional leaders and elected public representatives as part of a progressive democracy. We cannot exclude traditional leaders. They are part of us. We need to draw them in. We do not need to isolate them. They can play a valuable role in our democracy. There is scope.

NOTE

1. Section 20c of the TCB states that any person who – having received a notice to attend court proceedings, without sufficient cause fails to attend at the time and place specified in the notice, or fails to remain in attendance until the conclusion of the proceedings in question or until excused from further attendance by the presiding officer, is guilty of an offence and liable on conviction to a fine.

BAA => TLGFA => CLRA & TCB



Source: Law, Race and Gender Research Unit, Faculty of Law, University of Cape Town.