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Chairperson and Honourable Members

Select Committee: Co-operative Governance and Traditional Affairs

National Council of Provinces

Parliament of South Africa

c/o Mr Moses Manele (Secretary)

Per e-mail: tmmanele@parliament.gov.za

Submission to National Council of Provinces on the Traditional Leadership and Governance Framework Amendment Bill, 2017

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Introduction

The Land and Accountability Research Centre (LARC) is based in the University of Cape Town's Faculty of Law. LARC forms part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights and living customary law in the former homeland areas of South Africa. LARC is particularly interested by the ways in which laws and policies frame power relations within these areas and threaten ongoing initiatives for democratic change and accountability at the local level.

In light of this, LARC is concerned with the proposed provisions put forth in the Traditional Leadership and Governance Framework Amendment Bill [B 8–2017] (hereafter "the Bill"). LARC previously raised these concerns in a written and verbal submission to the National Assembly's Portfolio Committee on Cooperative Governance and Traditional Affairs, which has also been shared with this Select Committee.[1] The drafting amendments made by the Portfolio Committee have failed to address the fundamental points raised by LARC in its first submission. Instead, the amendments only address concerns raised by the National House of Traditional Leaders and the Department of Traditional Affairs. LARC would thus like to reiterate and expand on its points in respect of the Bill version that is now before this Committee [B 8B–2017]. In addition to this written submission, LARC would welcome an opportunity to explain our concerns to the Select Committee in a verbal presentation.

Summary of concerns

In particular, LARC's concern is the misleading nature of the Bill's proposal to extend the timeframes for traditional councils to transition from tribal authorities, as per the transitional provisions of the Traditional Leadership and Governance Framework Act 41 of 2003 (hereafter "the TLGFA"). LARC maintains that the Bill's proposals fail to provide any solutions or clarity regarding the status of traditional councils, or the various actions they have consistently purported to take. Instead, the Bill attempts to provide a veneer of legality to institutions which have irredeemably failed to meet any of the requirements set out for them in the TLGFA and which, by the admission of the Department of Cooperative Governance and Traditional Affairs itself, are operating in a state of illegality. This will encourage ongoing abuses by traditional councils, who in many cases rely on their official statutory status to justify and bolster their assertions of authority – even where they have no legitimacy in the eyes of people or under customary law.

By pretending that traditional councils remain viable in their current configuration, the Bill enables the continued entrenchment of untransformed colonial and apartheid structures in the form of tribal authorities. This is a fundamental betrayal of the promises made in the transition to democracy and undermines the Constitutional mandate to give due recognition to customary law.

For these reasons LARC rejects the Bill in its entirety.

[1] Land and Accountability Research Centre "Submission on the Traditional Leadership and Governance Framework Amendment Bill, 2017" (5 June 2017), available at http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission_TLGFA%20Amendment_LARC_20170605%20Final.pdf . See also Ayesha Motala and Thiyane Duda "A veneer of legality to disguise total system failure of traditional councils" *Daily Maverick* (25 June 2017).

Background – TLGFA undermines Constitution and customary law

As a starting point, it is important to acknowledge the Constitution's mandate to provide due recognition to customary law. In order to rectify the past distortion and suppression of customary law within South Africa's legal system, the Constitution recognises customary law as a system of law that is equal in status to the common law. Various provisions in the Constitution pertain to customary law and have been given further meaning in jurisprudence by the Constitutional Court. Sections 30 and 31 recognise the right to participate in the cultural life of one's choosing; s 39(3) protects the rights and freedoms conferred by customary law; s 25(6) requires tenure security for customary property rights; and s 211(3) enjoins courts to apply customary law when applicable. Even Chapter 12 of the Constitution, often cited by traditional institutions as a source of boundless authority, explicitly recognises traditional leaders only "according to customary law" in s 211(1).

Despite the Constitution's explicit promotion of customary law, legislative efforts since 1999 have focused on bolstering traditional leadership institutions, not on promoting customary law and customary forms of governance and accountability. This fostered a colonially-derived notion that traditional leaders are accountable to government, rather than to communities. Moreover, it rendered traditional leadership synonymous with "customary law", and quashed the notion that traditional leaders can only be recognised according to customary law.

An examination of the various policy documents that preceded the enactment of the TLGFA reveals a fundamental shift in government's approach to traditional governance in South Africa.[2] In the 2000 Draft Discussion Document Towards a White Paper on Traditional Leadership and Institutions, the approach was informed by the following observation:

> "Essentially, these [apartheid] laws established a system of local government that placed the traditional leaders at the centre of the bureaucratic system of traditional authorities. Chieftainship came to be reduced to a very different institution. As one commentator noted: 'It was a public office created by statute. **That is the reversal of the position of the chief in traditional society in which the role of the chief was to represent his people according to the dictates of customary practice.** This reversal, effected by the (Bantu Authorities) Act, has plainly made the appointment, suspension and deposition of chiefs subject to political manipulation'."[3]

In the 2002 Draft White Paper on Traditional Leadership and Institutions, there seemed to be a split in opinion as to whether traditional leaders should be accountable to their communities or to government.[4] By the time of the Final White Paper and the promulgated version of the TLGFA in 2003, it was established that traditional leaders would be directly accountable only to government, and no mechanisms were provided through which ordinary people could enforce indigenous forms of accountability.[5]

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[2] Wilmien Wicomb "Whose custom is it anyway? The rise of traditional leaders and the fall of living customary law in twenty years of South Africa's democracy" (Draft Paper presented at Twenty Years of South African Constitutionalism Conference at New York Law School; November 2014), available at http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/wicomb1.pdf . Hereafter "Wicomb". See also Thuto Thipe "The Boundaries of Tradition: An Examination of the Traditional Leadership and Governance Framework Act" *Harvard Human Rights Journal* (4 November 2014); hereafter "Thipe".

[3] Emphasis added. Department of Provincial and Local Government, "A Draft Discussion Document Towards a White Paper on Traditional Leadership and Institutions" (20 April 2000), at page 19 – 20.

[4] See Wicomb at part 4.

[5] Ibid. See also Thipe.

Not only did the TLGFA reverse the ways in which customary governance systems have ensured accountability in the past, it also retained the controversial apartheid geography that culminated in the creation of the Bantustans without any transformation. The TLGFA's retention of apartheid geography has been effected in the following ways:

1. The TLGFA provided for the continuation of tribal authorities as traditional councils, thereby re-entrenching structures and jurisdictions established in terms of the Bantu (Black) Authorities Act 68 of 1951;
2. Bantu Authorities were established by notice in the Government Gazette over a 30 year period. Each notice delineates the boundaries of the 'tribe' by reference to rivers, beacons and other land marks, and names the Authority and traditional leader. The TLGFA entrenches the boundaries described in those Government Gazette notices issued in terms of the Bantu Authorities Act as the boundaries of traditional communities (previously named 'tribes').
3. The continuation of these structures was enacted into post-apartheid law on condition that the structures undergo a process of transformation to align with Constitutional values;
4. The transformative mechanisms envisaged in the TLGFA have for thirteen years failed to democratise tribal authorities and traditional councils.

Section 28 of the TLGFA contains transitional mechanisms that enable the continuation of certain structures that existed in law prior to the TLGFA's commencement. Section 28(4) specifically stipulated that a previous "tribal authority" would under the TLGFA be deemed to be a traditional council, provided that the tribal authority complied with stipulated requirements within a particular period. In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*,[6] the Constitutional Court thus noted that:

> "The Black Authorities Act gave the State President the authority to establish 'with due regard to native law and custom' tribal authorities for African 'tribes' as the basic unit of administration in the areas to which the provisions of [the Communal Land Rights Act of 2004] apply. … It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act, 2003…."

As alluded to by the Court, tribal authorities were those administrative structures created by the apartheid government under the Bantu Authorities Act 68 of 1951 (later known as the Black Authorities Act) in order to consolidate various ethnic groups into overcrowded parcels of land which were later to become the homelands.[7] The apartheid government's aim was to establish a "tribal authority", with a specified geographic area of jurisdiction for each "tribe" and "chief" recognised in terms of the Native Administration Act 38 of 1927.[8] Tribal authorities were fiercely

[6] (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010), at para 24.
[7] Law, Race and Gender Research Unit "Initial Submissions on the Black Authorities Repeal Bill (B9-2010)" (11 June 2010), in *Custom, citizenship and rights: community voices on the repeal of the Black Authorities Act* (July 2010), available at http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/LRG_BOOK_COMBINED%2C_DEC_2010_-_FINAL%2C_AMENDED.pdf , at pages 101 and 107. Hereafter "LRG submission".
[8] Land and Accountability Research Centre "Submission on the Traditional and Khoi-San Leadership Bill, 2015" (2 February 2016) at page 2, available at http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission%20on%20TKLB_LARC_20160202.pdf. Hereafter "TKLB submission".

contested by many ordinary people and political activists, who recognised their role in the oppressive apartheid state machinery.[9]

By retaining these structures as the foundation for traditional councils, the TLGFA preserved both the obsolete boundaries of the former homelands and the undemocratic power relations that existed between traditional leaders and their "subjects" under the indirect rule policies of the colonial and apartheid governments.[10] By specifying the extent of traditional authorities' powers through fixed geographic boundaries, the TLGFA furthermore locks people living within those boundaries to that authority – a denial of the Constitutional right to choose one's cultural affiliation.

Yet, and as stated above, these authorities are supposed to operate in terms of customary law – a consensual system based on the voluntary affiliation of persons to a particular group identity and system of governance. Thus, rather than authority based on customary law legitimacy, the authority of traditional councils is based on a top-down declaration of powers through statute, akin to the model used during apartheid.[11] This model goes further to provide potentially extensive powers, including over land administration and dispute resolution, to traditional leaders and traditional councils in terms of section 20 of the TLGFA. By reinforcing this autocratic version of customary law inherited from colonialism and apartheid, the TLGFA undermines the vibrant and progressive nature of customary law and rights protected in the Constitution.[12]

Given the history of tribal authorities, it was crucial that the TLGFA incorporate mechanisms through which the tainted tribal authorities could gain Constitutional and popular legitimacy. For this reason, section 3(2) of the TLGFA included certain composition requirements for traditional councils, which tribal authorities had to meet within a specified timeframe in order to transform or transition in status. In terms of this provision, at least a third of the members of any traditional council must be women, 40% of the members must be democratically elected, and the total number of members had to be calculated according to a particular formula.[13] Another transformative mechanism included in the TLGFA was a Commission on Traditional Leadership Disputes and Claims, which was tasked with resolving disputes emanating from the past manipulation of structures, jurisdictions and authorities by the colonial and apartheid governments. Although it will not be discussed in detail here, LARC has documented the ways in which the Commission has failed in its task to ensure legitimacy and accountability, and presented some of these in our submission on the pending Traditional and Khoi-San Leadership Bill.[14]

As acknowledged in the Memorandum to the Bill there have also been major failures in respect of provincial attempts to reconstitute tribal authorities according to the requirements and within the specified timeframes.[15] The Memorandum explains:

> "... although there are instances where provinces attempted to reconstitute the tribal authorities, various challenges have been identified in respect of such reconstitution. In some instances—

[9] Quotes by Nelson Mandela, Govan Mbeki and Albert Luthuli to illustrate this history have previously been put before the National Assembly in LARC's 2016 TKLB submission.
[10] See LRG submission at page 104.
[11] Aninka Claassens "Analysis of recent laws and the legacy of the Bantu Authorities Act" in *Custom, citizenship and rights: community voices on the repeal of the Black Authorities Act* (July 2010) at page 9. Hereafter "Claassens".
[12] Ibid at page 13.
[13] Section 3(2)(b) read with section 3(2)(c) of the Act. Prior to the TLGFA's amendment in 2009, the total number of traditional council members could not exceed thirty members.
[14] TKLB submission at pages 9 – 10.
[15] Paragraph 1.4, 1.5, 1.6 and 1.7 of the "Memorandum on the objects of the Traditional Leadership and Governance Framework Amendment Bill, 2017" annexed to the Bill. Hereafter "Memorandum to the Bill".

(a) tribal authorities were not reconstituted at all;
(b) the reconstitution took place after the expiry of the timeframe within which it had to be done;
(c) no formula was issued;
(d) where a formula was issued, it was not aligned with the Minister's guidelines; and
(e) certain requirements of the relevant provincial legislation were not met."[16]

The Department responsible for Traditional Affairs is therefore aware of the stagnation that has taken place in the implementation of traditional council transformation. Indeed, in 2009 the Traditional Leadership and Governance Framework Amendment Act already attempted to extend the timeframes within which credible traditional council elections could be conducted in all relevant provinces. The Act initially gave tribal authorities one year within which to reconstitute. This was not met. Subsequently, the 2009 amendment extended that timeframe to seven years, effective from the date of the TLGFA's commencement. That extended timeframe lapsed in September 2011. Even with this time extension, traditional councils failed to transform.

In 2015, the Minister of Cooperative Governance and Traditional Affairs provided a written reply to a Parliamentary Question about traditional councils' compliance with transformation requirements in terms of the TLGFA.[17] The Minister attached tables revealing the extent of the failures for all relevant provinces except the Eastern Cape, which had not provided the requested information. Both Mpumalanga and Limpopo were listed as having no compliant traditional councils at the time, while only one third of councils listed for North West were compliant.[18] Limpopo cited that it was "in the process of seeking funds" to reconstitute the 185 traditional councils listed for that province.[19]

Research has shown that even where elections did take place, they were below acceptable standards.[20] During Eastern Cape elections in 2010, many traditional leaders objected to having to include elected members on councils.[21] In King William's Town, villages rejected elections and sent objection letters to the MEC. Other organisations also objected, but the MEC's office did not respond to their concerns. After then meeting with the MEC, they were informed that the elections would still proceed, even though the MEC admitted that the election process had not been properly conducted.[22] In KwaZulu-Natal, formal electoral ballot boxes were used despite there being insufficient funds to hire the IEC to monitor and support traditional council elections.[23] This created the impression that elections were monitored and run by the IEC.[24] Nonetheless, less than 2% of the voting age population in KwaZulu-Natal voted in the traditional council elections.[25] In the North West, elections were supervised by the Provincial House of Traditional Leaders,[26] with many people

[16] Paragraph 1.7 of the Memorandum to the Bill.
[17] Written Reply by Minister of Cooperative Governance and Traditional Affairs to Question No 3378 in the National Assembly (Reply received October 2015), available at https://pmg.org.za/committee-question/1423/ . Hereafter "Written Reply October 2015".
[18] Ibid. In a 2017 Provincial Gazette notice the North West Premier acknowledges further failures in respect of a number of traditional councils in the province, including traditional councils with ongoing boundary disputes and disrupted election processes – Premier of the North West Province, Notice in terms of the North West Traditional Leadership and Governance Act, Act No. 2 of 2005, *Provincial Gazette* 7749, Notice No 51 (28 March 2017).
[19] See data tables for Limpopo in Written Reply October 2015.
[20] See LRG submission at page 111.
[21] See Claassens at page 7.
[22] See LRG submission at page 112.
[23] Ibid.
[24] See Claassens at page 7.
[25] Jean Redpath "Past KwaZulu Natal traditional council elections flawed" in Law, Race and Gender Research Unit Newsletter *Law, Custom and Rights* (August/September 2011).
[26] See LRG submission at page 112.

unaware that elections had taken place in their areas.[27] As of June 2011, only three of the fifty-six traditional communities in North West had embarked on the election process, with only two of the three conducting elections.[28] Election procedures were repeatedly postponed and Gazette notices attempting to recognise traditional councils were out of time.[29] In Limpopo, no traditional council election has ever taken place.[30]

These failures have resulted in legal uncertainty around the status of tribal authorities and traditional councils.[31] As stated in the Memorandum to the Bill, "there is legal uncertainty with regards to the status of those tribal authorities that were not reconstituted as well as those who were reconstituted but did not meet all the statutory requirements".[32] Since the requirements in section 3(2) were necessary in order for tribal authorities to be deemed valid traditional councils, where the requirements have not been met tribal authorities are currently operating outside of any law.[33] These structures are not valid "traditional councils" in terms of the TLGFA and also cannot operate lawfully as "tribal authorities" since the Black Authorities Act of 1951 has since been repealed.[34] So where is the existing legal authority for their continued operation?

Consequences of the Amendment Bill's proposals

The Amendment Bill is being framed as a "stopgap measure" to address the failure to adhere to the TLGFA's timeframes for tribal authority transformation while the promulgation of the Traditional and Khoi-San Leadership Bill [B 23–2015] is awaited.[35] The Bill is allegedly also addressing the prevailing non-alignment of the terms of office of traditional councils with the National House of Traditional Leaders (NHTL) as required by the TLGFA since its 2009 Amendment.[36] The NHTL's term of office expired in August 2017. While the Traditional and Khoi-San Leadership Bill will repeal the TLGFA and puts in place another "transition" for tribal authorities, delays in its promulgation supposedly required an Amendment to the TLGFA to be put in place before August 2017.[37] Based on this rationale, the Department of Traditional Affairs has referred to the present Bill's proposals as relating to "implementation challenges"[38] and that these are merely technical and operational in nature.[39]

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[27] See Claassens at page 7.
[28] Lisa Heeman "Confusion marks traditional council elections in North West" in Law, Race and Gender Research Unit Newsletter *Law, Custom and Rights* (August/September 2011) at page 5.
[29] Monica de Souza "Justice and legitimacy hindered by uncertainty – the legal status of traditional councils in North West Province" *SA Crime Quarterly* No. 49 (September 2014).
[30] Aninka Claassens "Traditional leadership bill a sly attempt to bypass constitutional rights to land" *Business Day* (1 December 2016).
[31] Monica de Souza *"Justice and legitimacy hindered by uncertainty – the legal status of traditional councils in North West Province"* SA Crime Quarterly No. 49 (September 2014) at page 42. Hereafter "De Souza".
[32] Paragraph 1.8 of the Memorandum to the Bill.
[33] Paragraph 1.3 of the Memorandum to the Bill states explicitly that "tribal authorities had to be reconstituted… and only once that has been done, would they be deemed to be traditional councils".
[34] The Bantu Authorities Act was repealed through the various provincial iterations of the TLGFA and the Black Authorities Act Repeal Act 13 of 2010.
[35] Marelise van der Merwe, "Traditional and Khoi-San Leadership Bill: Rules of Engagement" *Daily Maverick* (16 May 2017). Hereafter "Van der Merwe".
[36] Paragraph 1.8 read with paragraph 1.9 of the Memorandum to the Bill.
[37] Paragraph 1.12, Memorandum to the Bill.
[38] Paragraph 5.1, Memorandum to the Bill.
[39] Stated by Mr. Abram Sithole, Deputy Director-General: Research Policy and Legislation, at a briefing by the Department of Traditional Affairs at a meeting of the Portfolio Committee on Co-operative Governance and Traditional Affairs (9 May 2017).

Yet, the stated reasoning for the Bill masks the true nature of the proposals contained in the Amendment Bill that are not merely technical in nature and that could have far reaching consequences for persons living within the boundaries of traditional councils in future. The Bill's underlying purposes have become even more apparent since the expiry of the August 2017 deadline for the end of the NHTL's term. If August 2017 presented an absolute deadline for traditional council reconstitution, it is unclear how the stated rationale for this Bill can still now be maintained by government. Moreover, since the TKLB has now been referred to the National Council of Provinces after the National Assembly passed it on 7 November 2017, the NCOP is now processing two Bills that effect precisely the same outcome in the law. Not only is this somewhat of an absurdity, it poses a threat of fruitless and wasteful expenditure by Parliament.

Government has admitted that their endeavours to transform traditional councils at a provincial level have failed and that, at present, structures operating as traditional councils or tribal authorities are actually unlawful. Despite this, the Amendment Bill provides no more concrete a solution to enforce the transformation of tribal authorities than the granting of a further one year time extension at s 3.[40] Nothing in the proposed Amendment Bill suggests how this next one year period will be different to the past thirteen years or to the time extension granted before in 2009.

The proposed Bill is silent on the legal consequences of again failing to meet the reconstitution requirements. This is a departure from the previous TLGFA provisions, which resulted in the invalidity of traditional councils for non-compliance, as stated earlier. This provided an important mitigation for the TLGFA's retention of apartheid structures and jurisdictions. In other words, where structures did not transform in line with democracy, they would no longer enjoy legal recognition. In contrast, the Amendment Bill merely states that the Minister has the *discretionary* power to take "necessary steps" (it is unclear what these entail) within a further one year period to ensure that tribal authorities and traditional councils are reconstituted if the first one year deadline is not met.[41] There is no specified consequence if the Minister chooses not to exercise his discretion or, despite effort, still fails to "ensure" transformation in the additional year.

Given the transformation failures documented thus far, it is surprising that this enforcement mechanism is so weak. With the Bill's current provisions, traditional councils could remain in a perpetual state of failed reconstitution. If the Bill was explicit about the impact of non-compliance on traditional councils' legal status – in other words that they cannot undertake legal actions or decisions until they comply – some of the danger would be mitigated. The Bill's silence on these legal status consequences means that there is no real incentive for traditional councils ever to meet the requirements. It is therefore doubtful that the one year timeframe envisaged in the Bill will be met after government has failed to do so for the last decade.

Yet the impact of the Bill will be deeper than merely buying tribal authorities and traditional councils more time.[42] The Bill is also an attempt to provide a veneer of legality to structures that have until now been operating outside of the law. Not only have traditional authorities failed to meet the TLGFA's composition requirements, they have also failed to meet other accountability mechanisms provided in the TLGFA. For example, the Auditor-General has admitted that the financial statements of traditional authorities in North West have not been audited since 1994, although this is required by section 4(2)(b) of the TLGFA.[43] Despite their unlawful status,

[40] Note that queenship and kingship councils are granted a longer two year period within which to constitute at s 1 of the Amendment Bill.
[41] Clause 2(c) of the Bill.
[42] See Van der Merwe.
[43] Aninka Claassens "South Africa's traditional leadership proposal, the TKLB, is desperate and dangerous" *Daily Maverick* (8 December 2016). See also the following for notes about the lack of auditing of traditional councils:

untransformed traditional authorities have since the TLGFA's commencement been taking decisions and performing commercial transactions that purport to represent the "traditional communities" recognised within their geographic boundaries.[44]

During 2011, a circular by the North West Department of Local Government and Traditional Affairs warned chairpersons of traditional councils not to enter into contracts until the councils were "duly reconstituted".[45] The circular noted: "The danger about contracts/deals concluded post 24 September 2010 is that they might be of no force and affect, therefore invalid. The basis therefor being that such traditional councils lacked legal standing at the time the said contracts/deals were concluded."[46] The circular reveals that councils were at the time entering into agreements despite their ambiguous legal standing to do so. They have also continued to do so despite the North West government's earlier warning. Indeed, it also seems that the North West government is no longer requiring traditional authorities to proceed with caution when transacting. Recent correspondence by the North West Department of Culture and Traditional Affairs to the Bapo Ba Mogale Traditional Council, dated 20 October 2017, states explicitly:

> "The term of office for Traditional Councils reconstituted in 2014 has ended. However the current Councils will continue to function until such time elections are held."

The correspondence suggests that the transformation and proper reconstitution of traditional councils is irrelevant to the North West government. Rather, the priority is that traditional councils continue to exercise their functions. What are these functions? The TLGFA does not provide traditional councils with any substantial powers or functions other than weak advisory and administrative roles listed at s 4. Yet traditional authorities have in practice assumed a myriad of roles outside of the realm of the law. Thus, not only are councils unlawful in status, they are also exercising *ultra vires* powers and functions.

Examples of traditional councils operating beyond legal terms

Traditional authorities are negotiating deals with mining companies, for example, and do so without consulting communities.[47] Thuto Thipe writes: "in cases around the country, 'traditional communities' have challenged decisions where traditional leaders were engaged with as representatives of the community, and they assert that decisions regarding mining on their land were taken without adequate consultation or even against their will".[48] Where communal land deprivations are concerned, this undermines communities' rights to consent before development takes place on their land under the Interim Protection of Informal Land Rights Act of 1996

Witness Statement of Mr Geo Paul in the Commission of Inquiry into the Traditional Leadership Disputes in Respect of the Bakgatla Ba Kgafela Community (Rustenburg, 5 July 2017), at page 14 of Annexure A; Public Protector "Report on an Investigation into alleged improper prejudice suffered by Bapo Ba Mogale community as a result of maladministration by the former Bapo Ba Mogale Administration" (Report No 5 of 2017/2018; 19 June 2017), available at http://www.pprotect.org/sites/default/files/legislation_report/SKMBT_C55417061916570.pdf (Hereafter "Public Protector Report"); Written Reply by Minister of Cooperative Governance and Traditional Affairs to Question No 1595 in the National Assembly (Reply received August 2013), available at https://pmg.org.za/question_reply/441/; Written Reply by Minister of Cooperative Governance and Traditional Affairs to Question No 2695 in the National Assembly (Reply received November 2014), available at https://pmg.org.za/question_reply/486/.

[44] See Van der Merwe.

[45] See De Souza at page 48.

[46] Ibid.

[47] Joanna Pickering "Black people on communal land at mercy of mining firms" *Business Report* (20 July 2016).

[48] See Thipe.

(IPILRA). Moreover, it is actually only the Minister of Rural Development and Land Reform who has the prerogative to enter into surface leases, as the nominal owner of the communal land that falls within the geographical jurisdictions of traditional communities in the former homelands. The Minister is bound by IPILRA to obtain the consent of the holders of informal rights whose land would be affected by mining activities, but appears to have ceded his authority and duty to consult to traditional leaders despite not having the legal authority to do so. Ironically, clause 24 of the Traditional and Khoi-San Leadership Bill of 2015 now proposes to cement this reality into law by giving traditional councils the power to conclude contracts with any institution with only an ambiguous corresponding duty to consult "relevant" communities.

Mining deals entered into by traditional councils can have devastating effects. A prime example is that of the Bapo Ba Mogale community located at the Marikana mine in North West. An investigation by the Public Protector into the alleged looting of the community's resources points to misspending by the traditional leader and traditional council which has depleted the community's finances held in the so-called "D-account" of the North West provincial government.[49] The Public Protector's final report was published on 19 June 2017. It concludes that the Bapo Ba Mogale Administration and North West provincial government failed to manage the finances of the Bapo, their conduct amounted to maladministration, and community members suffered prejudice as a result.[50] The Public Protector instructed the North West Premier to initiate an investigation of irregular payments made by the Bapo traditional council totalling about R243 million.[51] The Public Protector has also asked for an investigation into a separate corporate entity established "on behalf of" community members to receive dividends from a royalty-to-share conversion deal with Lonmin Plc.[52] Since its establishment, all income due to the Bapo Administration is received into this entity, bypassing management and oversight even by the provincial government.[53] The report notes:

> "Traditional Councils are expected to perform their functions in good faith, diligently, efficiently, honestly and in a transparent manner. The performance of the functions were not adhered to in terms of [the TLGFA's Code of Conduct]. … The Department failed to safeguard the funds held in the Bapo ba Mogale D-Account and for that reason, certain amounts cannot be accounted for as [sic] and in some instances there is over expenditure as well as fruitless and wasteful expenditure contrary to the applicable legislative prescripts."[54]

Later, the report also states:

> "As a result of the failure by the Department to properly manage the D-Account millions of rand cannot be accounted for. … the conduct of the Department deprived, the community of the financial resources which would have been used for the community's benefit with regards to additional decent housing, proper health care facilities, food, water and social security, employment opportunities, more bursaries to deserving students, infrastructure, employment projects; poverty alleviation…."[55]

Critical community members have also been threatened by supporters of the traditional leader and members of the traditional council, and are prevented from communicating about the community's

[49] Sobantu Mzwakali "Public Protector Mkhwebane promises report on Bapo's lost millions by the end of April" *Custom Contested* (28 March 2017).
[50] Public Protector Report at part 6 "Findings".
[51] Ibid at 7.1.1.
[52] Ibid at 7.1.1.2.d.
[53] Ibid at para 5.1.31.6.
[54] Ibid at 6.1.5 and 6.1.16.
[55] Ibid at 6.2.2 – 6.2.3.

financial affairs.[56] Madibeng FM community radio station, which was reporting on the management of the community and its funds, has been a victim of such tactics.[57]

Another example is the Mapela community in Limpopo. A settlement agreement in the amount of R175 million was signed behind closed doors and without any consultation with the community, by the traditional leader.[58] Yet, it is unclear who will benefit from the deal and residents have thus far not received meaningful compensation from Anglo American Platinum for mining on their land.[59] Residents have recently threatened to shut down the local Mogalakwena mine if they do not receive the benefits due to them, in a context where more and more mine-hosting communities are resorting to protests against the mines.[60] Mining houses in the platinum belt have started to realise that traditional councils do not necessarily carry legitimate authority within traditional communities, and some have changed their negotiation strategies as a result.[61] A March 2017 report from the business sector similarly highlighted how uncertainties around traditional council status have created problems for industry more broadly.[62] The report states:

> "Business' key concern is around the legitimacy of the Traditional Council that they can engage with from a commercial perspective. It is felt that there is a lack of clarity around whether the current traditional councils actually comply with the pre-requisites stipulated by Government and hence this is a very risky area for industry as they are unclear who they can officially engage with as representing the community. … In reality this clarity does not seem to be forthcoming and it seems likely that a number of traditional councils have not been able to comply with the requirements set down by the legislation. The ability of legislation to realise its objective is closely related to the ability of government to enforce this. The enforcement of the legislation appears to be weak, which provides industry with a serious challenge and there do not appear to be any clear, quick fix solutions."[63]

In addition to concluding agreements in relation to mining, traditional councils assert general land administration powers as if they are the landowners or local government. In so doing, they deny the land rights and histories of families and other groups living within their geographic jurisdictions which, as explained earlier, were superimposed during apartheid. It has become apparent that there is an intention to write these unlawfully-assumed powers into official legislation, with the recent publication of a Draft Communal Land Tenure Bill (CLTB) by the Department of Rural Development and Land Reform.[64] The CLTB enables traditional councils to have land administration powers in communal areas provided they have complied with the reconstitution requirements in the TLGFA.[65] The two bills are thus explicitly linked, with the TLGFA Amendment Bill paving the way for the CLTB.

Traditional authorities continue to interdict community meetings, especially when called by critical voices within the community, despite a Constitutional Court judgment declaring this practice

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[56] Brendan Boyle "Bapo chief and Marikana missing millions" *City Press* (25 July 2016).
[57] Ibid.
[58] Thabiso Nyapisi "Community kept in the dark over Amplats mining deal" *Sowetan* (3 May 2016).
[59] Ibid.
[60] Ed Stoddard "Protests test tribal authority on South Africa's Platinum belt" *Reuters* (8 October 2017).
[61] Ibid.
[62] Business Leadership South Africa in conjunction with Business Unity South Africa "A Review of regulatory challenges & policy uncertainty impeding investment & employment in South Africa" (Final Report; 16 March 2017).
[63] Ibid at pages 44 – 45.
[64] Minister of Rural Development and Land Reform, Publication of Draft Communal Land Tenure Bill, 2017 for comments, *Government Gazette* 40965, Notice No 510 (7 July 2017), available at file:///C:/Users/01417880/Downloads/CommunalLandTenureBillPublicationComment-2017.pdf.
[65] See clause 28(4)(a) of the Draft Communal Land Tenure Bill, 2017.

unlawful and contrary to basic rights such as freedom of association and expression.[66] They deny the legal standing of any other community structures, claiming that as the statutorily-recognised "representatives" of traditional communities, no-one else is permitted to represent community views. Although there have never been traditional council elections in Limpopo, traditional authorities in that province continue to charge impoverished community members so-called "tribal levies", which are sometimes enforced through the withholding of proof of address letters.[67]

This is precisely the type of conduct by traditional authorities that the proposed Amendment Bill tries to justify with a blanket veneer of legality, while failing to address the fundamental problems that have been posed by the current traditional council system to date. If traditional authority structures have been invalid in law for failing to reconstitute, any actions, decisions taken and contracts entered into by them are also invalid in law. Yet, the proposed Bill does not explain how the status of all past traditional authority transactions and conduct will be affected. Is the Bill attempting to retrospectively validate these actions and decisions? Moreover, how will the proposed Bill impact the status of future actions and decisions by these structures if they still fail to transform within the extended one year timeframe? Will traditional authorities be legally permitted to function while they remain unconstituted? These crucial questions remain unanswered by the proposed Bill, and open spaces for continued abusive practices.

For these reasons, it is LARC's submission that while the Bill is framed as a solution to failures and delays in the proper transformation of traditional councils, in reality it provides no answers to the practical and legal problems that have arisen as a result of those failures and delays to date. In this sense the Bill undermines the very purpose that it is supposed to be serving. Rather than using an opportunity to correct the failures of the TLGFA system thus far, the Bill proposes to cover up those failures and imbue them with renewed power. It is by no means merely "technical".

Law is supposed to protect the vulnerable and mitigate against abuses in worst case scenarios. Many traditional institutions in the country are accountable and legitimate, but that is the best case scenario. The TLGFA has over the last thirteen years elicited abuse precisely because it has not prepared for a worst case scenario by failing to balance the powers of traditional councils and other institutions with indigenous accountability mechanisms. It also went further to lock people into the authority of potentially unaccountable institutions by retaining the boundaries, jurisdictions and identities imposed during colonialism and apartheid instead of an indigenous affiliation-based system. The fundamental question is why traditional councils and other institutions would need this level of legal protection and insulation from censure if they were legitimate and accountable.

Notes about legislative process thus far

LARC would like to note certain aspects of the legislative process thus far, particularly in relation to the opportunities provided for public participation on the Bill. As has been discussed extensively above, the content of the proposed Bill is not merely technical. It is likely to have significant repercussions for all those people who find themselves living within the boundaries of former tribal authorities. Given the substantive nature of the proposed amendments, it is imperative that the

[66] *Pilane and Another v Pilane and Another* (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (28 February 2013).

[67] See pending challenge in the Limpopo High Court in *Mohlaba and Others v Minister of Cooperative Governance and Traditional Affairs and Others*, Case No: 2885/2016. For more on this practice, see Aninka Claassens "The resurgence of tribal taxes in the context of recent traditional leadership laws in South Africa" *South African Journal on Human Rights* 27(3) (2011).

views of the public – in particular those people living within the former homeland areas of the country who will be directly affected – are heard on the Bill. This is also an essential component of the NCOP's Constitutional mandate, as enshrined in s 72 of the Constitution and upheld in a number of Constitutional Court judgments.

In the National Assembly, the Portfolio Committee on Cooperative Governance provided a two-week period for the submission of written comments,[68] during which only a few submissions were received. Only two stakeholders managed to present at a "public hearing" held at Parliament on 13 June 2017 – namely, LARC and the National House of Traditional Leaders. It is unclear to what extent these processes were advertised in traditional council areas.

We note also that after the Bill was introduced to the NCOP, this Select Committee published an initial call for comments with only one day's notice before the deadline.[69] Although this deadline was initially maintained, it was later amended to 27 October, then 3 November, and finally 10 November 2017 variably through newspaper publication and Parliament's online platforms.[70]

We note further that there appears to be confusion regarding the timelines for negotiating and final mandates between the Select Committee and Provincial Legislatures, and that some Provincial Legislature programmes appear unable to reasonably accommodate the short timeframes set by the NCOP.

Finally we note that, with the TKLB's introduction in the NCOP, this Select Committee will be processing the Amendment Bill and the TKLB simultaneously and has considered hosting public hearings on both Bills jointly. It is important to understand that both Bills propose changes to precisely the same provisions in the law, namely s 28, s 3A and 3B of the TLGFA. While the Amendment Bill seeks to make changes within the text of the TLGFA, the TKLB seeks to repeal the TLGFA in its entirety but retains much of its basic content in new forms. Section 28 ("Transitional Arrangements") of the TLGFA is, for example, replaced and embodied in clause 63 of the TKLB (version B 23B–2015 introduced to the NCOP), with some changes and additions. As it is currently worded, the TKLB's clauses already incorporate the amendments proposed to ss 28, 3A and 3B in the Amendment Bill, albeit in different forms. It makes little sense to go through the trouble and expense of amending the TLGFA, only to simultaneously repeal and replace it with another Bill that introduces the same changes. As stated previously, any urgency around the reconstitution of traditional councils has long since lapsed.

LARC thanks the Committee for providing this opportunity to share its views on the proposed Bill and urges the Committee to allow for extensive public input on this Bill by facilitating opportunities for ordinary people to also express their views on the Bill. The primary subject matter of this Bill was a highly debated and contentious issue at the time of the drafting of the TLGFA,[71] and deserves careful reconsideration thirteen years after the TLGFA has been in force.

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[68] The call for submissions was published on 21 May, with comments due by 4 June 2017. See Parliament of South Africa "PC on Cogta calls for written submissions on Traditional Leadership and Governance Framework Bill" (Press Release; 21 May 2017), available at https://www.parliament.gov.za/press-releases/pc-cogta-calls-written-submissions-traditional-leadership-and-governance-framework-bill .

[69] The call for submissions was made in the Sunday Times on 15 October, with comments due by 16 October 2017.

[70] These changes were tracked in a series of articles on the Custom Contested website at www.customcontested.co.za.

[71] See Thipe.

Conclusion

As outlined above, LARC submits that the Traditional Leadership and Governance Framework Amendment Bill of 2017 fails to adequately address the lack of transformation of traditional structures inherited from colonialism and apartheid. The repeated extension of timeframes for tribal authorities and traditional councils to reconstitute has proven to be ineffective, and there is nothing to suggest that a further one year period will achieve different results. All the while, substantial transactions are being negotiated by traditional structures that do not have any legal status, and the Bill fails to address the legal, commercial and fiduciary implications arising from agreements entered into with invalid traditional councils acting beyond their legal mandate. Instead of addressing this problem, it actually enables more such agreements to be signed.

LARC furthermore submits that the Bill fails to provide any real solutions to the legal and practical problems identified regarding traditional council transformation in the Bill's Memorandum. Whatever its stated rationale for this Bill, government cannot escape the fact that the traditional council transformation project has failed and that most, if not all, of these structures have no valid legal status. This Bill cannot undo that reality or create a new opportunity to legitimise these structures inherited from apartheid or their actions over the past thirteen years. Insofar as the proposed Bill is an attempt to do so, LARC rejects it in its entirety.

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