LARC
Land & Accountability
Research Centre

University of Cape Town · iYunivesithi yaseKapa · Universiteit van Kaapstad

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Chairperson and Honourable Members
Select Committee on Cooperative Governance and Traditional Affairs
National Council of Provinces
c/o Mr. Thembile Manele
Per E-mail: tmmanele@parliament.gov.za

Submission on the Traditional and Khoi-San Leadership Bill, 2015

Introduction

The Land and Accountability Research Centre (LARC) – formerly the Rural Women's Action Research Programme at the Centre for Law and Society (CLS) – 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 in the former homeland areas of South Africa. An explicit concern of LARC is power relations, and the impact of national laws and policy in framing the balance of patriarchal and autocratic power within which rural women and men struggle for change at the local level.

In this context, LARC is concerned that the Traditional and Khoi-San Leadership Bill, 2015 [B 23B–2015] (hereafter "the Bill" or "TKLB"), will be detrimental to the full recognition of a "living" customary law, as mandated by the Constitution, and to the democratic rights of citizens in the former homeland areas of South Africa.

The points that LARC would like to raise with the Committee, elaborated in further detail below, can be summarised as follows:

1. The Bill entrenches geographic boundaries derived from colonial and apartheid distortions of customary governance systems.
2. These boundaries lock people into territorial jurisdictions that are used to justify authority by traditional leaders that is unaccountable and lacks consultation.
3. The result is the imposition of tribal identities and the suppression of countervailing forms of representation that runs contrary to the historical narratives articulated by people living in the former homelands.
4. These deep-seated flaws in the Bill's architecture are not sufficiently mitigated by the weak transformative mechanisms provided – particularly in light of the recorded failures of these mechanisms over the past decade.

Faculty of Law
All Africa House, University of Cape Town,
Private Bag X3, Rondebosch 7701, South Africa
Tel: +27 21 650 3288 | **Email:** pbl-larc@uct.ac.za

www.larc.uct.ac.za
www.customcontested.co.za
@LarcUCT

It is therefore **LARC's submission that the Bill is fundamentally inconsistent with the promises made to citizens during the transition to democracy and the rights and values enshrined in the Constitution of South Africa**. For these reasons we call for the Bill to be rejected by Parliament and propose that government uses living customary law, shared identity and consensual legitimacy as the basis for recognising traditional groupings and authorities, rather than the distorted legacy of "tribal" boundaries left behind by the colonial and apartheid governments.

This requires that government not only rethink many of the administrative procedures incorporated into the Bill, but also undertake a process of consultation with traditional groupings and rural constituencies to understand their lived customary law identities. This should inform a new vision for the regulation of traditional governance, based primarily on the interests and lived traditions of customary groupings, rather than sustaining a tainted system to the benefit of a small elite.

Also of significant importance are the recommendations in the report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, which was chaired by former President Kgalema Motlanthe and released in November 2017. The report recommends that the Bill be withdrawn and reviewed, and that it be replaced with separate legislation for the "inclusive" recognition of Khoi and San groups. Parliament is yet to meaningfully engage with the report – this is evident from the ongoing processing of the Bill. **LARC submits that this, and other vital recommendations of the report, be urgently assessed and applied by Parliament**. The High Level Panel report details the kinds of changes that should be made to existing legislation about traditional governance – based on lived experience of how the legislation has been implemented thus far – not the changes proposed in the TKLB.

1. Bill entrenches colonial and apartheid distortions through geographical boundaries

Clause 63 of the Bill describes a process for the transitional recognition of pre-existing community groups, councils and leaders. It is unclear how the clause will be implemented in practice since it confusingly describes the simultaneous recognition of structures existing in law ***prior to*** the commencement of the Traditional Leadership and Governance Framework Act 41 of 2003 ("Framework Act"),[1] and the recognition of structures created ***while*** the Framework Act has been in force. Although the practical implication of this is unclear, what is clear is that the transitional process uses as its building blocks the so-called "tribal" structures that were defined in law by successive undemocratic governments.

The "tribes" that are deemed to have legal status under this Bill, as in the Framework Act, are those that were originally defined by colonial and apartheid government officials in terms of the Native Administration Act 38 of 1927 and that remained in existence throughout the Bantustan period up until the transition to democracy. In terms of the Bill, these "tribes" would now be recognised as

[1] Or in terms of provincial legislation that is not inconsistent with the Framework Act.

Faculty of Law
All Africa House, University of Cape Town,
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Tel: +27 21 650 3288 | Email: pbl-larc@uct.ac.za

www.larc.uct.ac.za
www.customcontested.co.za

traditional communities. Yet, historical narratives have revealed the crude and oppressive nature of the processes of consolidating people into ethnic groups or "tribes" in order to create separate legal realms in the so-called homelands. The concomitant legal recognition of "chiefs" to head "tribes" under the Native Administration Act has also been given new life under the Bill – renamed to senior traditional leaders – despite the tainted history of some chiefs being appointed in order to facilitate an oppressive government's agenda. In 1959, Nelson Mandela wrote:

> Moreover, in South Africa, we all know full well that no Chief can retain his post unless he submits to Verwoerd, and many Chiefs who sought the interest of their people before position and self-advancement have, like President Luthuli, been deposed....Thus, the proposed Bantu Authorities will not be, in any sense of the term, representative or democratic.[2]

Mandela describes a process of manipulation by the apartheid government that resulted in many respected leaders, who enjoyed authority based on their legitimacy and customary affiliation by people, being replaced. The Bill consciously maintains this status quo, and assumes that a commission created by the Framework Act has rectified these past manipulations, rather than starting anew.

In addition to the recognition of "tribes" with "chiefs", the creation of the Bantustans was most directly achieved through the definition of geographical jurisdictions for "tribal authorities" in terms of the Bantu Authorities Act 68 of 1951. Through hundreds of Gazette notices, for every recognised "tribe" and "chief" a "tribal authority" was also established with a specified area of jurisdiction. This process was undertaken in the decades after the Bantu Authorities Act's promulgation and was facilitated by a package of laws that restricted the occupation and ownership of most of the country's land by black South Africans. The creation of tribal authorities sometimes went hand-in-hand with forced removals, as people were forced off their ancestral land and dumped in new areas with people unknown to them under the umbrella of one "tribal authority". Together, these tribal authority jurisdictions formed the boundaries of the homelands and acted as territories of local government within the homeland governance systems.

These same geographical boundaries are reinforced through the Bill's explicit recognition of "tribal authorities" as traditional councils in clause 63(4). Effectively, the same separate legal and geographical realms are recognised for traditional governance institutions as those defined during apartheid. Not only does this betray the Constitutional principle of "one law for one country", it betrays historical struggles against the establishment of tribal authorities in areas like Pondoland. These struggles recognised that tribal authorities were representative of, and instrumental to, an oppressive regime's distortion of customary laws and the nature of traditional governance systems. In 1962, Albert Luthuli noted:

> The modes of government proposed are a caricature. They are neither democratic nor African. The [Promotion of Bantu Self-Government Act] makes our chiefs, quite straightforwardly and simply, into minor puppets and agents of the Big Dictator. They are

[2] Nelson Mandela "Verwoerd's Grim Plot" (May 1959).

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All Africa House, University of Cape Town,
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Tel: +27 21 650 3288 | **Email:** pbl-larc@uct.ac.za

www.larc.uct.ac.za
www.customcontested.co.za

> answerable to him and to him only, never to their people. The whites have made a mockery of the type of rule we knew. Their attempts to substitute dictatorship for what they have efficiently destroyed do not deceive us.[3]

An addition to the B-version of the Bill goes even further to entrench old boundaries. Clause 63(21) places an obligation on Premiers to map, and publish maps, of the area of jurisdiction of a traditional council if that area was previously defined in terms of legislation prior to the commencement of the Bill.[4] This addition may have been an attempt by government to assert that the Bantustan boundaries will be revised under the TKLB. Yet, the mapping process does not explicitly require any consultation with ordinary people and is more likely to further cement the application of the jurisdictional boundaries established by the Bantu Authorities Act rather than drastically undo them. If the Bill is allowed to reproduce this history, past struggles for democracy and the equal recognition of African customary values embodied in the Constitution will have been for nothing.

2. Bill locks people into the authority of traditional leaders with no accountability or consultation mechanisms

The geographical boundaries entrenched by clause 63 of the Bill work in conjunction with provisions providing or allocating traditional leaders certain roles and functions at clauses 15, 19, 20 and 25 to effectively establish territorial jurisdictions for traditional leaders. This creates the dangerous impression that traditional leaders have exclusive authority over people living within the traditional council boundaries, regardless of their cultural affiliations.

The result is that people are locked into precisely the same system of autocratic governance that, under colonialism and apartheid, was established without regard for the rights, choices and customary laws of people.[5] The Bill assumes that if you live within the geographical boundaries of the former homelands today, you should be subject to the rule of a chief and tribal authority – regardless of your personal choices and the history of constituting "tribes" and deposing or appointing "chiefs".

The popular saying 'kgosi ke kgosi ka morafe' or 'inkosi yinkosi ngabantu' shows that traditional leaders are supposed to gain their authority and legitimacy from the people they lead. Yet, the Bill starts with the opposite idea that traditional leaders' authority is based on the existence of a defined territory that was declared and established through government proclamation. The Bill goes so far as to specify at clause 3(4) that in order for a traditional community to gain recognition, it must first have a senior traditional leader. In other words, traditional leaders are put at the centre of a traditional community's customary law identity.[6] The Bill's assumption is thus that traditional leaders create traditional communities, contrary to customary law which states that traditional leaders exist because traditional communities have recognised their legitimate authority.

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[3] Albert Luthuli *Let My People Go* (Collins, 1962) at 200.

[4] Premiers are also able to unilaterally alter traditional council boundaries after they have been defined, following consultation with only the traditional and municipal council concerned – see clause 16(18).

[5] Thuto Thipe "The boundaries of tradition: an examination of the Traditional Leadership and Governance Framework Act" *Harvard Human Rights Journal* (November 2014).

[6] Aninka Claassens "Back to the bad old days" *City Press* (11 October 2015).

This undermines the consensual and reciprocal nature of the relationship between traditional leaders and the people they lead according to customary law. Through clause 63's top-down recognition of a traditional leader's authority based solely on the distorted structures and boundaries created during apartheid, the Bill removes traditional leaders' accountability to ordinary people. Instead, traditional leaders become more accountable to the government that provides them with certificates of recognition and salaries.

Govan Mbeki described how the imposition of the Bantu Authorities system similarly changed the nature of the relationship between traditional leaders and ordinary people:

> Many Chiefs and headmen found that once they had committed themselves to supporting Bantu Authorities, an immense chasm developed between them and the people. Gone was the old give-and-take of tribal consultation, and in its place there was now the autocratic power bestowed on the more ambitious Chiefs, who became arrogant in the knowledge that the government's might was behind them.[7]

Yet, historically customary systems had built-in accountability mechanisms for situations where traditional leaders lost legitimacy or acted contrary to the interests of their people. Simply put, if people no longer wished to be ruled by a corrupt or incompetent leader, they would secede or support succession disputes to justify the leader's removal.[8] Unpopular leaders did not reign for long. When customary governance is no longer based on popular affiliation, but on a boundary defined in law, the power dynamics of the system are altered in a way that favours autocratic and patriarchal rule.[9] This is particularly a problem in cases where the content of customary law is contested between traditional leaders and ordinary people. Where traditional leaders are put in a position where their authority cannot be challenged by ordinary people, there is opportunity for leaders to commit abuses or be involved in corrupt practices in the name of a version of "customary law" that is defined solely by the traditional leader and for the benefit of his personal interests.

One example that enjoyed widespread media coverage was the "customary law" rhetoric used by some to justify criminal acts by AbaThembu King Buyelekhaya Dalindyebo against his so-called "subjects".[10] Yet, it is doubtful that the victims would agree that the violent acts committed against them embody customary values or customary ways of dealing with disputes.[11] Whose version of what is "customary" is to be protected by the law? Is our legal system recognising versions of customary law based on mutual respect and consensus, or versions of customary law based on intolerance and brutality? The undemocratic and unaccountable traditional governance system introduced by the Bill seems to be inviting the latter.

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[7] Govan Mbeki *South Africa: The Peasants' Revolt* (International Defence and Aid Fund, 1984), at 119-120.

[8] Peter Delius "Contested terrain: land rights and chiefly power in historical perspective" in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (UCT Press, 2008) at 214ff.

[9] Aninka Claassens "Power, accountability and apartheid borders: the impact of recent laws on struggles over land rights" in Aninka Claassens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (UCT Press, 2008) at 262ff.

[10] See for example, Thami ka Plaatjie "We jail a king at our peril" *City Press* (3 January 2016), and Phathekile Holomisa "Constitutional Court fails to give leadership on AbaThembu king matter" *Sowetan* (29 December 2015).

[11] Nolundi Luwaya "King Dalindyebo's disregard for customary law is the problem, not his conviction" *Daily Maverick* (15 January 2016); Sindiso Mnisi Weeks "Of a cruel king and the bitter battle for the soul of South Africa's democracy" *Mail & Guardian* (15 October 2015).

LARC submits that the Bill does not provide any independent mechanism through which ordinary community members can complain about the conduct of a traditional authority and demand accountability or a remedy. In terms of the Code of Conduct, only the Houses of Traditional Leaders or councils can action breaches of the Code.[12] The Bill unfairly requires people to trust that the Houses and councils will take honest action that serves their best interests, without any checks and balances in place to ensure that the institutions do not close ranks to protect an errant or abusive traditional leader, House member or council member. In order to ensure accountability, mechanisms for pursuing breaches of the Code of Conduct also need to exist ***outside*** of the institutions in which they can be committed. The content of the Code of Conduct is furthermore limited to conduct committed in the course of being a member of a House of Traditional Leaders or council. The Code fails to deal with accountability and transparency in the relationship between traditional leaders or council members and ordinary people. These are major gaps in legislation which claims to be based on the principle that it is important for traditional institutions to "promote democratic governance and the values of an open and democratic society".[13]

The Bill allows for the broad allocation of roles to traditional leaders at clause 25. The Framework Act similarly allows national or provincial government to give roles to traditional leaders or traditional councils at section 20, in respect of a closed list of subject areas such as land administration, the administration of justice, and agriculture. Since the Framework Act's commencement, this has resulted in at least two unsuccessful attempts to legislate far-reaching powers for traditional institutions. The first was the Communal Land Rights Act 11 of 2004, and the second was the Traditional Courts Bill 15 of 2008/1 of 2012. The Communal Land Rights Act never came into force and was struck down by the Constitutional Court in 2010.[14] The 2008/2012 Traditional Courts Bill was met with fierce opposition during consultations by the provincial legislatures, at national Parliament, and in the media – such that it could not garner a majority of provincial votes to be passed in the National Council of Provinces. Much of the opposition to these two laws decried the ways in which they were based on rigid colonial and apartheid understandings of customary law and traditional leadership.

Based on the massive public outcry to the Traditional Courts Bill, the Department of Justice and Correctional Services made significant amendments and reintroduced a new version of the Traditional Courts Bill to Parliament during January 2017, which now explicitly emphasises the voluntary and consensual nature of customary law.[15] **LARC submits that the same approach be adopted in the Traditional and Khoi-San Leadership Bill and that it must explicitly incorporate provisions which acknowledge and protect the principle of voluntary affiliation**.

Clause 25 of the Traditional and Khoi-San Leadership Bill is similar to section 20 of the Framework Act but substantially broadens the scope of government departments' discretion to provide roles to traditional leaders and councils. A comparison of the two provisions reveals that

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[12] See Schedule 1 to the Bill. The reference to "councils" includes kingship/queenship councils, principal traditional councils, traditional councils, traditional sub-councils, Khoi-San councils and branches.
[13] See *Memorandum on the Objects of the Traditional and Khoi-San Leadership Bill, 2015* at para 1.6.
[14] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).
[15] See Traditional Courts Bill 1 of 2017 at Preamble, clause 2, clause 3(2), 4(2), and 5(2)

the Bill's clause 25 does not provide sufficient guidance on what roles can be given to traditional leaders and councils and what procedures should be used to do so – contrary to the principles of administrative law.[16] Instead, clause 25 states that roles can be given in respect of "any" of government's functions, leaving the nature and extent of these functions completely open to interpretation. Furthermore, in terms of clause 25 it is completely up to the relevant government department to decide the process through which roles can be given to traditional leaders and councils. Clause 25(2)(b) merely stipulates that before a national department makes provision for such roles, it is required to obtain concurrence from the Minister and consult with the National House of Traditional and Khoi-San leaders. Similarly, a provincial department need only obtain concurrence from the MEC responsible for traditional affairs, and consult with provincial and local houses. Although the Bill lays out these procedural steps, it fails to detail what, if any, processes a department must undertake internally and leaves this to the determination of the department concerned.

Not only does this render clause 25 vague and uncertain, it creates the possibility for roles to be given through opaque administrative decisions, such as delegations, as opposed to public law-making processes in the national and provincial legislatures. The Bill does not make mention of any input by members of the public in the process. Since these roles could have a far-reaching impact on the lives of people living in traditional communities, government should at a minimum be obligated to engage with their views before roles are allocated. More than this, the haphazard exercising of discretion by departments at national and provincial level could result in traditional leaders across the country having different roles to each other. This is particularly evident from clause 25(5)(a) of the B-version of the Bill, which indicates a clear expectation that departments will allocate specific roles to individual leaders and councils one by one. Media reports have furthermore highlighted the tensions existing between traditional leaders precisely because of the vastly different treatment they receive from provincial governments in respect of salaries and resources.[17] Inequality within the institution of traditional leadership could thus be worsened considerably.

The Bill is furthermore silent on what the relationship will be between elected local government and traditional leaders, or what traditional leaders' roles will mean in relation to the Constitution's recognition of separate powers for separate branches of government. This is questionable in light of the Constitutional Court's finding in the 1996 *Certification* judgment that the Constitution explicitly does not provide traditional structures with governmental powers and functions.[18] The Court explained as follows:

> We do not feel that the objectors' interpretation… is correct. Had the framers intended to guarantee and require express institutionalisation of governmental powers and functions for traditional leaders, they could easily have included the words "powers and functions" in the first sentence of [Constitutional Principle] XIII.[19]

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[16] Lauren Kohn "The failure of an arranged marriage: the traditional leadership/democracy amalgamation made worse by the draft Traditional Affairs Bill" *Southern African Public Law* 29(2) (2014).

[17] For example, see S'Thembiso Msomi "Xhosa king demands to be treated like (Zulu) royalty" *Sunday Times* (24 May 2015); Monica de Souza "King's budget reeks of favouritism" The Mercury (27 August 2015).

[18] *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) – hereafter "Certification I".

[19] Certification I at para 190.

In Chapter 12 of the Constitution, section 211(1) explicitly states that the “institution, status and role of traditional leadership” is recognised “according to customary law” and “subject to the Constitution”. This means that traditional leadership can only be recognised ***as it exists*** in customary law. Chapter 12 thus supports a version of traditional governance that is democratic, accountable, transparent, and based on principles such as consensus and affiliation that are inherent to customary law. If traditional leaders are to be provided with some public role in the constitutional era, this version of traditional governance is the only one that meets constitutional muster. **LARC submits that if the Bill is instead an attempt to give powers that vest exclusively in the three spheres of government to traditional leaders and councils, then it is a dangerous and unconstitutional proposal.** Not only could it have the effect of creating a fourth tier of government contrary to the Constitution’s framework, it would also be a distortion of the very nature of traditional leadership under customary law.

The Bill’s drafters have attempted to avert criticism that it empowers traditional leaders to take over the functions of the three spheres of governance in the former Bantustan areas by including a qualification in clause 25 that was not present in early draft versions of the Bill. Thus, clause 25(1) states that a role can be given to traditional leaders “[p]rovided that such a role may not include any decision-making power”. Although clause 25 says that a department must monitor the execution of the role and ensure that the execution thereof is consistent with the Constitution, it is unlikely that traditional institutions will be able to perform the “roles” that they have been given by government without making at least some decisions along the way. Moreover, if different traditional authorities are exercising a range of roles with varying terms and conditions across the country, monitoring will become an almost impossible task. By leaving the scope of the roles that could be provided to traditional institutions so vague, clause 25 of the Bill is open to misinterpretation and abuse in practice. The qualification in clause 25(1) could thus in practice be rendered meaningless and do little to prevent ordinary people being disadvantaged by traditional authorities exercising roles against their best interests.

As mentioned above, **LARC submits that the Bill furthermore fails to incorporate a crucial limit on the exercise of power by traditional leaders in the form of community consultation**.[20] When the TKLB was first introduced in the National Assembly, clause 24 allowed traditional and Khoi-San councils[21] to enter into any partnerships or agreements with a third party without any requirement to consult the affected community. After opposition at public hearings and much debate, the Portfolio Committee on Cooperative Governance and Traditional Affairs included a new prerequisite that such partnership or agreement be subject “to a prior consultation with the relevant community represented by such council”.

Yet no reference is made to who the relevant community will be and no minimum standards are set for the consultation. For example, where should it take place, who should be present, what information should be made available and how many consultation meetings should there be? There is also no obligation to obtain the consent of or consult the community again following the ratification of the partnership or agreement by the Premier – the Premier has the last say about

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[20] Phiwe Ndinisa “New Bill leaves communities at mercy of leaders” *Business Report* (30 October 2015); Thabiso Nyapisi “Traditional bill strips people of their rights” *Sowetan* (6 January 2016).

[21] As well as councils at other hierarchical levels.

whether an agreement will be beneficial for a community. In addition, the Bill now requires a Premier to review any partnership or agreement entered into by any of the listed councils within three years of the Bill coming into operation to determine if it meets the requirements in clause 24. Again, no reference is made to any requirement for community participation in this process. There is also an underlying assumption that a traditional council will "represent" a community in all decisions that affect them. Yet, in respect of agreements about communal land, the Interim Protection of Informal Land Rights Act of 1996 (IPILRA) makes it clear that it is the affected landholders themselves who have the right to consent before their rights are deprived. The procedures laid out in IPILRA are more robust than the consultation included in clause 24 of the TKLB and grant greater strength to the rights of ordinary people as customary landowners. These rights cannot be usurped by traditional councils purporting to represent communities in commercial deals.

Clause 24 fails to sufficiently address the fact that customary law is inherently participatory. People must be involved in decision-making within traditional communities and be free to have their say at public meetings. Consultation with public constituencies is also an important aspect of South Africa's participatory democracy and the rights of people to provide input on political processes and decisions that will affect them is well-established in the jurisprudence of the Constitutional Court.[22]

In contrast, throughout the Bill, provisions fail to require traditional leaders to properly consult ordinary people, even in relation to decisions that have far-reaching implications for people's lives. This includes some decisions about which groups or sub-groups of people should be recognised, who should be recognised as traditional leaders and how many members there should be in traditional councils. Often, the Bill does not even provide for ordinary people living in traditional communities to be notified of decisions that have been taken that will affect them. Instead, the Bill highlights consultation with powerful elites such as the Houses of Traditional Leaders, royal families and traditional councils. The Bill therefore goes against the values of public participation in both customary law and the Constitution and privileges the voices of those people or groups who already have an advantage in rural and traditional politics.

Finally, it should be noted that the B-version of the Bill removes the original responsibility of the Auditor-General to audit the financial statements of traditional and Khoi-San councils. Now, a traditional or Khoi-San council can have its statements audited by any registered auditor. The Bill fails even to place an obligation on the Auditor-General to review an audit performed by any other auditor. It simply says that the Auditor-General "may" review any audit.

This is extremely precarious given the lackluster efforts to manage and audit traditional councils' financial documents effectively under the Framework Act. The Auditor-General has reportedly admitted that the financial statements of traditional authorities in the North West have not been audited since 1994.[23] This has had particularly severe consequences for mine-hosting communities in the province. According to a report by the Public Protector published during 2017, the trust

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[22] See, as one example, *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).
[23] Aninka Claassens "South Africa's traditional leadership proposal, the TKLB, is desperate and dangerous" *Daily Maverick* (8 December 2016).

account of the Bapo Ba Mogale is missing R600 million worth of mining revenue. The Bakgatla Ba Kgafela have also lost millions in mining revenue due to the unauthorised dealings of the senior traditional leader and his council, as revealed in evidence at a recent Commission of Inquiry. For these reasons **LARC submits that more robust provisions are required to ensure financial accountability and transparency by traditional leaders and councils to community members and government**. Merely requiring an annual report on finances to the traditional community as per clause 20(3)(b), is not sufficient to ensure proper financial accountability.

3. Bill imposes tribal identities and suppresses countervailing forms of representation

By using the Bantu Authorities system as the default building blocks for the present-day recognition of traditional structures, the Bill adopts many of the categories created under apartheid to define African people. These categories ignore the reality that rural areas are not made up of neat, separate "tribes". In some places people with different histories were forcibly moved into the same area, and labelled a "tribe" during apartheid. These groupings continue to live side-by-side today, with complex and intertwined histories. Even people who have a history as independent landowners are still deemed to fall under the jurisdiction of traditional leaders that were imposed on them during apartheid. Yet, the Bill adopts an understanding of their so-called "tribal" identities that ignores the fact that many "tribes" and "tribal authorities" were created through forced removals, land dispossession, and the imposition of pliable leaders. It is doubtful whether many existing customary groupings in South Africa would meet the demanding criteria for recognising new traditional communities included at clause 3(4) of the Bill because the provision fails to understand this history. For example, groupings who were subjected to decades of government manipulation during the processes of Bantustan consolidation are unlikely to be able to demonstrate "a proven history of existence" that is "distinct and separate". The same is true in respect of the recognition criteria for Khoi-San communities: the criteria at clause 5(1) are ahistorical and likely to severely limit the number of Khoi-San communities who qualify for recognition. Meanwhile other traditional communities received automatic recognition if they were previously recognised as "tribes".

Due to the history described above, many people in the former Bantustan areas of South Africa dispute official "tribal" boundaries, or disassociate from the traditional community or leader who is their "official" representative. Yet, the Bill does not allow people to "opt-out" of the traditional community or the traditional leader that they have been placed under by default, and there is no means through which to reconstitute identities and groups by choice, as part of an "opt-in" system of consensual affiliation. Clauses 3 and 4 of the Bill fail to facilitate processes of secession by sub-groups within a recognised traditional community, who cease to recognise the legitimacy of an official overarching authority in terms of customary law. Instead, in order to apply for changes to community recognition sub-groupings are forced to interact with government via overarching traditional councils and leaders – even where these are precisely the institutions being challenged.

In this respect, the Bill treats the recognition of Khoi-San groupings and authorities fundamentally differently. The Bill sets up an "opt-in" system of consensual affiliation for Khoi-San communities whereby a Khoi-San leader's authority only extends to people who have specifically taken steps to affiliate with a particular Khoi-San identity and leader. In terms of the Bill, a person is not

automatically Khoi-San because they live in a particular area. This provides a simple potential template for the recognition of all traditional groupings, which, importantly, does not rely on the boundaries of the former Bantustans as a default position.

In essence, the Bill distinguishes between jurisdiction over land for traditional authorities in the former Bantustans, and jurisdiction over people for Khoi-San authorities. For the former Bantustans, the Bill puts in place a hierarchy of traditional communities that occupy a geographical area over which traditional councils have jurisdiction and that are headed by traditional leaders. In other words, leaders and councils in the former Bantustans will have authority that is connected to a particular piece of land and whoever lives on it. This is a replica of the "tribal" boundaries system entrenched through the Bantu Authorities Act. On the other hand, Khoi-San leaders and councils do not have authority that is connected to a particular piece of land – instead, their jurisdiction extends only over people who elect to be part of the Khoi-San community. Khoi-San leaders and councils will have administrative seats based in one central location, not expanded areas of authority that go beyond an office. In the former Bantustans, traditional leaders and councils have authority not only at the traditional council office; the authority extends to all those living on the land included within the geographical jurisdictional boundaries derived from apartheid.

In communications about the Bill, government and Parliament has repeatedly stated that the Bill is necessary in order to provide official recognition to Khoi-San customary institutions that have hitherto been neglected in the legal and political realm. Yet, the provisions of the Bill make it clear that, in respect of jurisdiction, government is not giving Khoi-San leadership structures the *same* recognition as traditional institutions in the former Bantustans. This is especially relevant in light of recent debates about land reform and government's previous promises to Khoi-San groups that changes in the law will allow them to claim back land that was historically taken away from them.

As stated earlier, the Bill establishes a system of affiliation for Khoi-San communities that relies on self-identification to define membership. To practically implement this, the Bill requires that Khoi-San people put their names, identity numbers and a certified copy of their valid identification document, physical addresses confirmed by documentary evidence, signatures and contact details on a list when applying for recognition as a community. The rigid bureaucratic procedure set out in the Bill is problematic, yet government has set the precedent that it is possible to base customary community identity on affiliation rather than on territory. It is arguable that a similar system could be put into place for traditional communities in the former Bantustans. This would do away with the imposed apartheid and colonial tribal boundaries that currently form the basis for traditional governance under the Framework Act and the Bill. Moreover the basic structure for an affiliation-based system is already contained in the recognition provisions for new traditional communities and councils contained in sections 2 and 3 of the Framework Act, which are then unfortunately undercut by the transitional mechanisms in s 28 of the Act. **LARC thus submits that an affiliation-based system should apply to all customary communities in South Africa, including Khoi-San and other traditional communities**.

If, like the Framework Act, the Bill retains the Bantustan boundaries system and prevents people from opting out of identities and institutions which they reject, the Bill will be affirming many of the oppressive practices that the Framework Act has elicited. One example is the practice of charging people within a traditional council area with compulsory fees called "tribal levies".[24] Where people fail (or refuse) to pay these levies to a traditional council, they are denied approval for burial ceremonies or proof of address letters that are essential for opening a bank account, obtaining a cellphone or applying for other civic services. Institutions will often only accept these letters if they have been stamped by a traditional council. As a result, if people live within a traditional council's jurisdiction they must be up to date on their "tribal levies" in order to access basic services. The TKLB is silent on the collection of "tribal levies" by the traditional council and only refers to "voluntary contributions".[25] A similar absence of prohibitive language in provincial traditional leadership legislation promulgated under the Framework Act, has in some provinces failed to prevent the collection of "tribal levies" in practice.

The "tribal" boundaries entrenched by the Framework Act have also in practice resulted in the suppression of countervailing forms of customary representation. In the North West, for example, two cases concerning the standing of parallel forms of authority within the Bakgatla ba Kgafela traditional community have reached the Constitutional Court. In the first case, the traditional leader and traditional council attempted to ban community meetings called by any other customary structures, claiming exclusive authority to determine when issues affecting the community can be discussed in public meetings by ordinary people.[26] In this way, leadership at the "top" of the traditional hierarchy could quell dissent at village level and prevent talks about secession following widespread dissatisfaction among ordinary people about corruption and maladministration by the senior traditional leader and his councillors.[27] In the second case, the same senior traditional leader obstructed a Communal Property Association chosen by the community from holding and managing land won through restitution.[28] In both cases, the Constitutional Court found in favour of the co-existing forms of representation that had gained legitimacy and been recognised by the customary community – not the traditional leader or council. The rights of people living within the former Bantustans to call meetings and manage land independent of a traditional authority were upheld.

Yet, other pending cases demonstrate that traditional authorities are still able to obtain interdicts against, and contest the standing of, community groups or activists that challenge the legitimacy of

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[24] 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).

[25] Clause 23

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

[27] Evidence of the extent of this maladministration has come to light through processes of the Commission of Inquiry into Traditional Claims and Disputes within the North West Province. See the Commission's terms of reference in Premier: North West Province "Commission of Inquiry into the traditional leadership disputes in respect of the Bakgatla ba Kgafela community dispute, Batlhako ba Leema and Bapo I and II community disputes respectively" Proclamation 19 *Provincial Gazette Extraordinary* 7657 (15 June 2016).

[28] *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* (CCT231/14) [2015] ZACC 25; 2015 (6) SA 32 (CC) (20 August 2015).

traditional leaders or their unaccountable conduct. In some areas, this has resulted in brutal violence.[29]

4. Bill's problems not mitigated by weak and failed transformative mechanisms

During the Framework Act's drafting, Parliament justified retaining traditional institutions appointed and established in terms of apartheid legislation on the basis that provisions of the law would force these institutions to transform. The Framework Act thus includes two primary mechanisms to mitigate the damage of entrenching old apartheid and colonial traditional leadership structures. The first mechanism required that traditional councils include 40% elected members and one third women members by a certain deadline. The second mechanism established was the Commission on Traditional Leadership Disputes and Claims (popularly known as the "Nhlapo Commission", named for its first Chairperson). The Framework Act mandated this Commission with investigating and assessing claims that in some areas illegitimate persons were holding official traditional leadership positions, or that legitimate positions had previously been undermined by the colonial and apartheid governments.

Yet, both of these mechanisms have failed to achieve broad democratic transformation of traditional leadership structures. Most provinces have failed to hold proper traditional council elections, while in Limpopo there have been no elections at all.[30] Provinces have failed to meet the deadlines set for transformation in the Framework Act[31] and many traditional councils still do not include one third women members. Where women ***are*** members on traditional councils, they are vulnerable to abuse by other councilors.[32]

These failures have been acknowledged by the Department of Cooperative Governance and Traditional Affairs and resulted in the Traditional Leadership and Governance Framework Amendment Bill [B 8B—2017] ("Amendment Bill") being introduced to the National Assembly in March 2017. The Memorandum attached to the Amendment Bill explicitly states:

> "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-
>
> (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;

[29] Zoë Mahopo "Vigilantes pickaxe pensioner" *Sowetan* (13 June 2015); Tariro Washinyira "We will die for our land, say angry Xolobeni villagers as dune mining looms" *Mail & Guardian* (12 February 2016).

[30] Law, Race and Gender Research Unit *Law, Custom and Rights* newsletter (August/September 2011), available at http://www.cls.uct.ac.za/usr/lrg/downloads/LRG_News_AUG_SEPT2011.pdf. See also Land and Accountability Research Centre "Submission to National Council of Provinces on the Traditional Leadership and Governance Framework Amendment Bill, 2017" (10 November 2017), available at http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/LARC%20Submission%20to%20NCOP%20on%20TLGFAB_20171110.pdf .

[31] Monica de Souza "Justice and legitimacy hindered by uncertainty? The legal status of traditional councils in North West Province" *South African Crime Quarterly* Vol 49 (September 2014).

[32] Pearlie Joubert "Women's minister whacks chiefs bill" *City Press* (22 September 2012).

Faculty of Law
All Africa House, University of Cape Town,
Private Bag X3, Rondebosch 7701, South Africa
Tel: +27 21 650 3288 | **Email:** pbl-larc@uct.ac.za

www.larc.uct.ac.za
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(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."

The Amendment Bill thus seeks to offer a new opportunity within which tribal authorities must transition to traditional councils. One of the stated purposes of the Amendment Bill is to align the terms of office of reconstituted tribal authorities with the term of office of the National House of Traditional Leaders. The term of the National House expired in August 2017. Based on this looming expiration date, and the major failure by tribal authorities to transform, the Amendment Bill was being framed by the Department as a "stopgap measure" to bring about this alignment while the TKLB was still being processed by Parliament.

While the National House was reconstituted after August last year, the Amendment Bill is still being dealt with by the National Council of Provinces, as is the TKLB. The need to realign the terms of these institutions is therefore seemingly not the main rationale for the Amendment Bill, or the reason for initially treating it with urgency. Furthermore, since the TKLB and Amendment Bill seek to achieve similar changes regarding the reconstitution of tribal authorities and traditional councils, **LARC submits that it is irrational and financially wasteful that both Bills are being processed simultaneously**.

Against a background of acknowledged failures, the TKLB retains the Framework Act's transformation mechanisms to mitigate clause 63's "transitional" re-entrenchment of colonial and apartheid traditional institutions. A new mechanism for reviewing the status of all existing headmen within three years after the TKLB becomes law is also created. However, the TKLB goes further to remove the protection in the Framework Act that resulted in old tribal authorities having a vulnerable legal status when they failed to meet the election and gender composition requirements for new traditional councils.[33] The Memorandum to the Amendment Bill also acknowledges this vulnerable legal status: "As a result of the above-mentioned challenges, 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."

While the legal status of untransformed tribal authorities is presently unclear, both the TKLB and Amendment Bill fail to set out concrete consequences for non-compliance with the new extension period, nor do they set out the consequences and legal status of decisions and deals that have been entered into by improperly constituted tribal authorities. Although the TKLB states that compliance with the composition requirements for traditional councils is mandatory, and that it must be carried out within two years, there is no real consequence for traditional councils who fail to meet the requirements in time. The Bill merely states that the Minister of Traditional Affairs, after consulting with the relevant Premier, can intervene to "ensure" that traditional councils are

[33] Centre for Law and Society "Questioning the legal status of traditional councils in South Africa" (August 2013).

Faculty of Law
All Africa House, University of Cape Town,
Private Bag X3, Rondebosch 7701, South Africa
Tel: +27 21 650 3288 | Email: pbl-larc@uct.ac.za

www.larc.uct.ac.za
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reconstituted according to the legislative requirements.[34] This is hardly sufficient considering the lack of transformation of traditional institutions to date. It should further be noted that the timeframes for compliance laid out in the TKLB and the Amendment Bill are contradictory. While the TKLB grants tribal authorities two years within which to effect proper transformation, the Amendment Bill only allows for a one-year time period. This contradiction has not been explained or corrected.

The second transformative mechanism included in Framework Act, and in the TKLB as initially introduced, was the Commission on Traditional Leadership Disputes and Claims. This Commission was unable to deal with the enormous volume of claims brought before it after the Framework Act first came into force, and provincial committees have since been set up to distribute the load. Meanwhile, many of those cases that ***have*** been dealt with by the Commission or its provincial committees are being challenged in court. For example, in June 2013 the Constitutional Court declared that the President's dethronement of AmaMpondo King Justice Mpondombini Sigcau, based on a decision by the Commission, had no legal effect. Litigation is still ongoing to determine the implications of this judgment.[35] There has also been a concerning lack of transparency around provincial committee reports and recommendations after their investigations have been concluded – in North West province claimants have resorted to litigation in order to uncover the outcomes of their claims. At the end of 2015, this litigation forced North West Premier Supra Mahumapelo to publicly announce the North West committee's findings in respect of the incumbent to the Bakgatla ba Kgafela senior traditional leadership position.[36] The committee found that the current incumbent should be deposed with immediate effect since he was appointed through the interference of the former Bophuthatswana government and contrary to Bakgatla ba Kgafela customary law.[37] Yet, because the Commission has only the power to make recommendations (following a 2009 amendment of the Framework Act), it was within the Premier's discretion to implement the Commission's findings or reject them[38] and he has subsequently set up his own Commission of Inquiry. This raises doubt about the extent to which re-entrenched apartheid structures have actually been, and can be, transformed by a mechanism such as the Commission.

Moreover, provisions regarding the Commission were removed from the first version of the Bill during the National Assembly's deliberations. The Department explained to the Portfolio Committee of Cooperative Governance and Traditional Affairs that the Commission's work was almost complete. The B-version of the Bill thus no longer includes a mechanism for resolving historical disputes about legitimacy and succession, it only provides for "new" disputes to be resolved. Yet, many of these disputes remain visible and ongoing – not only through legal challenges or unresolved litigation, but also within local community politics. The Commission's

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[34] See Clause 63(4) of the Bill.
[35] *Sigcau and Another v Minister of Co-operative Governance and Traditional Affairs and Others* CCT167/17 (heard in the Constitutional Court on 20 February 2018; judgment pending).
[36] Bafokeng Land Buyers' Association "Merafe Ramono, the new chief of Bakgatla-ba-Kgafela" (12 January 2015, press statement).
[37] Commission on Traditional Leadership Disputes and Claims: North West Provincial Committee *Report and recommendations on the traditional leadership dispute of Bakgatla Baga Kgafela by Mr Merafe Ramono against Kgosi Nyalala Pilane for Senior Traditional Leadership position* (2014).
[38] Monica de Souza Louw "Will North West premier depose tainted tribal leader?" *GroundUp* (25 January 2016).

work thus seems far from complete,[39] and it is questionable whether its intended purpose has actually been achieved.

LARC submits therefore that it is unlikely that the preservation of colonial and apartheid structures and jurisdictions will be sufficiently mitigated by any transformative mechanisms in the TKLB.

Conclusion

As outlined above, it is **LARC's submission that the Traditional and Khoi-San Leadership Bill of 2015 should be rejected outright** on the basis that it re-entrenches the "tribal" boundaries and structures that underpinned the creation of the Bantustans under apartheid. Any democratic recognition of authority for traditional institutions cannot be based on these boundaries, but must instead be based on a system of customary affiliation. Traditional communities should be defined in terms of self-identification, not according to apartheid "tribal" classification. This means that the basic schema of the Bill is flawed, and requires an overhaul based on the lived experiences and histories of customary groupings. In the Bill's treatment of Khoi-San institutions, a precedent has been set for the recognition of customary identity through affiliation rather than territory. This could provide the starting point for an alternative approach to the regulation of traditional institutions in the former Bantustan areas of South Africa. In this respect, LARC again highlights the significant and helpful recommendations made in the High Level Panel report.

While the TKLB claims to provide Khoi and San communities with long overdue recognition, the Bill's emphasis is more on the recognition, powers and benefits of authority structures. It is **LARC's submission that, instead, the Bill should emphasise consensual customary law, accountability, cultural identities and the needs of customary communities**.

Submission prepared by: Monica de Souza Louw and Ayesha Motala

[39] Recent comments by the Portfolio Committee on Cooperative Governance and Traditional Affairs seem to support this observation. The Committee expressed disappointment that the latest budget allocations to the Department of Cooperative Governance and Traditional Affairs decreased the funding for dispute resolution as it was "inconsistent with the Department's objective of reducing the number of traditional leadership disputes and claims over the medium term". See "Report of the Portfolio Committee on Cooperative Governance and Traditional Affairs on the Annual Performance Plan and Budget Vote 4 of the Department of Cooperative Governance and Traditional Affairs, dated 8 May 2018" (Committee report tabled in the National Assembly on 9 May 2018).

Faculty of Law
All Africa House, University of Cape Town,
Private Bag X3, Rondebosch 7701, South Africa
Tel: +27 21 650 3288 | **Email:** pbl-larc@uct.ac.za

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