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Chairperson and Honourable Members

Portfolio Committee: Co-operative Governance and Traditional Affairs

Parliament of South Africa

c/o Ms Shereen Cassiem

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Submission on the Traditional Leadership and Governance Framework Amendment Bill, 2017

Introduction

The Land and Accountability Research Centre (LARC) – formerly the Rural Women’s Action Research Programme at the Centre for Law and Society – 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 power within which rural women and men struggle for change at the local level. LARC’s objective is to intercept laws that threaten rural democracy and propose alternative laws and policies that promote rural democracy and are consistent with living law.

LARC is concerned with the proposed provisions put forth in the Traditional Leadership and Governance Framework Amendment Bill [B 8–2017] (hereafter “the Bill”). 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 these proposed amendments fail to provide any solutions or clarity regarding the status of traditional councils. 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 Department of Cooperative Governance’s own admission, are operating in a state of illegality. By continuing to pretend that traditional councils continue to be viable in their current configuration, the Bill enables the continued entrenchment of untransformed colonial and apartheid structures in the form of tribal authorities.

For these reasons LARC rejects the Bill in its entirety, and would welcome an opportunity to share its views with the Committee in a verbal presentation.

Background

LARC's position is informed by the background to the Bill's current proposals. The points that LARC would like to raise with the Committee, elaborated in further detail below, can be summarised as follows:

1. The TLGFA provided for the continuation of tribal authorities as traditional councils, thereby re-entrenching structures established in terms of the Black Authorities Act 68 of 1951;
2. 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;
3. The transformative mechanisms envisaged in the TLGFA have for thirteen years failed to democratise tribal authorities and traditional councils.

Section 28 of the TLGFA provides 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 tribal authority would be deemed to be a traditional council, provided that the tribal authority complied with the requirements of section 3(2) within a particular period. In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*,¹ 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 (the Traditional Leadership Act)”.

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.² 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 1927.³ Tribal authorities were fiercely contested by many ordinary people and political activists, who recognised their role in the oppressive apartheid state machinery.⁴

¹ (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010), at para 24.

² 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_DE_C_2010_-_FINAL%2C_AMENDED.pdf, at pages 101 and 107. Hereafter “LRG submission”.

³ Land and Accountability Research Centre “Submission on the Traditional and Khoi-San Leadership Bill, 2015” (2 February 2016) at page 2.

⁴ Quotes by Nelson Mandela, Govan Mbeki and Albert Luthuli to illustrate this history have previously been put before this Committee in LARC's submission on the Traditional and Khoi-San Leadership Bill of 2015, available at

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.⁵ By specifying the extent of traditional authorities’ powers through fixed geographic boundaries, the TLGFA furthermore locks people living within those boundaries to that authority. Yet, 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 lived customary law, the authority of traditional councils is based on a top-down declaration of powers through statute, akin to the model used during apartheid.⁶ This model then goes further to provide potentially extensive powers over land administration and the administration of justice, for example, 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.⁷

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 have to be women, 40% of the members have to be democratically elected, and the total number of members had to be calculated according to a particular formula.⁸

As acknowledged in the Memorandum to the Bill there have been major failures in respect of provincial attempts to reconstitute tribal authorities within the specified timeframes.⁹ Thus, the Memorandum 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;
- (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.”¹⁰

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

http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission%20on%20TKLB_LARC_20160202.pdf .

⁵ See LRG submission at page 104.

⁶ 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”.

⁷ Ibid at page 13.

⁸ 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.

⁹ 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”.

¹⁰ Paragraph 1.7 of the Memorandum to the Bill.

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.

Research has shown that even where elections did take place, they had serious weaknesses and did not comply with provincial regulations, with elections taking place below acceptable standards.¹¹ During Eastern Cape elections in 2010, many traditional leaders objected to having to include elected members.¹² 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.¹³ 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.¹⁴ This created the impression that elections were monitored and run by the IEC.¹⁵ Nonetheless, less than 2% of the voting age population in KwaZulu-Natal voted in the traditional council elections.¹⁶ In the North West, elections were supervised by the Provincial House of Traditional Leaders,¹⁷ with many people unaware that elections had taken place in their areas.¹⁸ As of June 2011, only three of the fifty-six traditional communities had embarked on the election process, with only two of the three conducting elections.¹⁹ Election procedures were repeatedly postponed and Gazette notices attempting to recognise traditional councils were out of time.²⁰ In Limpopo, no traditional council election has ever taken place.²¹

These failures have resulted in legal uncertainty around the status of tribal authorities and traditional councils.²² 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".²³ 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.²⁴ These structures are not valid "traditional councils" in terms of the TLGFA and also cannot operate lawfully as "tribal

¹¹ See LRG submission at page 111.

¹² See Claassens at page 7.

¹³ See LRG submission at page 112.

¹⁴ Ibid.

¹⁵ See Claassens at page 7.

¹⁶ Jean Redpath "Past KwaZulu Natal traditional council elections flawed" in Law, Race and Gender Research Unit Newsletter *Law, Custom and Rights* (August/September 2011).

¹⁷ See LRG submission at page 112.

¹⁸ See Claassens at page 7.

¹⁹ 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.

²⁰ 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).

²¹ Aninka Claassens "Traditional leadership bill a sly attempt to bypass constitutional rights to land" *Business Day* (1 December 2016).

²² 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".

²³ Paragraph 1.8 of the Memorandum to the Bill.

²⁴ 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".

authorities” since the Black Authorities Act of 1951 has since been repealed.²⁵ 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.²⁶ 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.²⁷ The NHTL’s term of office expires 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 require an Amendment to the TLGFA to be put in place before August 2017.²⁸ Based on this rationale, the Department of Traditional Affairs has referred to the present Bill’s proposals as relating to “implementation challenges”²⁹ and that these are merely technical and operational in nature.³⁰

Yet, this reasoning 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.

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. Government has also been aware of these failures previously during the thirteen years since the TLGFA first came into force. Despite this, national government has provided no more concrete a solution to enforce the transformation of tribal authorities than the granting of a further one year time extension. 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 consequences of again failing to meet the reconstitution requirements. It merely states that the Minister has the *discretionary* power to take “necessary steps” (it is unclear what these entail) to ensure that tribal authorities and traditional councils are reconstituted if the one year deadline is not met.³¹ Given the transformation failures documented thus far, it is surprising that this enforcement mechanism is so weak. Without any real incentive to meet the requirements, it is doubtful that the timeframe envisaged in the Bill will be met when 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.³² The Bill is also an attempt to provide a veneer of legality to structures that have until

²⁵ The Bantu Authorities Act was repealed through the various provincial iterations of the TLGFA and the Black Authorities Act Repeal Act 13 of 2010.

²⁶ Marelise van der Merwe, “Traditional and Khoi-San Leadership Bill: Rules of Engagement” *Daily Maverick* (16 May 2017). Hereafter “Van der Merwe”.

²⁷ Paragraph 1.8 read with paragraph 1.9 of the Memorandum to the Bill.

²⁸ Paragraph 1.12, Memorandum to the Bill.

²⁹ Paragraph 5.1, Memorandum to the Bill.

³⁰ 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).

³¹ Clause 2(c) of the Bill.

³² See Van der Merwe.

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.³³ Despite their unlawful status, 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.³⁴

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".³⁵ 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."³⁶ The circular reveals that councils were 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.

Traditional authorities are also negotiating deals with mining companies without consulting communities.³⁷ 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".³⁸ 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 institutions with no corresponding duty to consult or obtain the consent of persons living within their jurisdiction.

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".³⁹ Community members have also been threatened by supporters of the chief and members of the traditional council, and are prevented from communicating about the community's financial affairs.⁴⁰ Madibeng FM community radio station, which was reporting on the management of the community and its funds, has been a victim of such tactics.⁴¹

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 who was authorised by the traditional council to negotiate the deal.⁴² Yet, it is

³³ Aninka Claassens "South Africa's traditional leadership proposal, the TKLB, is desperate and dangerous" *Daily Maverick* (8 December 2016).

³⁴ See Van der Merwe.

³⁵ See De Souza at page 48.

³⁶ Ibid.

³⁷ Joanna Pickering "Black people on communal land at mercy of mining firms" *Business Report* (20 July 2016).

³⁸ 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".

³⁹ Sobantu Mzwakali "Public Protector Mkhwebane promises report on Bapo's lost millions by the end of April" *Custom Contested* (28 March 2017).

⁴⁰ Brendan Boyle "Bapo chief and Marikana missing millions" *City Press* (25 July 2016).

⁴¹ Ibid.

⁴² Thabiso Nyapisi "Community kept in the dark over Amplats mining deal" *Sowetan* (3 May 2016).

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.⁴³

Yet, if these traditional authority structures are invalid in law, any decisions taken and contracts entered into at the time are also invalid in law. So how will the proposed Bill impact the status of these past transactions? Is the Bill attempting to retrospectively validate these transactions? Moreover, how will the proposed Bill impact the status of future transactions by these structures if they still fail to transform within the extended one year timeframe? These crucial questions remain unanswered by the proposed Bill.

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. In this sense the Bill undermines the very purpose that it is supposed to be serving.

Conclusion

As outlined above, LARC submits that the Traditional Leadership and Governance Framework Amendment Bill, 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 what the implications will be for these transactions.

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 and welcomes an opportunity to share its views with the Committee in a verbal presentation.

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,⁴⁴ and deserves careful reconsideration thirteen years after the TLGFA has been in force.

⁴³ Ibid.

⁴⁴ See Thipe.