

**SUBMISSIONS TO THE CALL FOR COMMENTS: TRADITIONAL AND KHOI-SAN
LEADERSHIP BILL, 2024**

**ALLIANCE FOR RURAL DEMOCRACY, REPRESENTED BY THE LEGAL RESOURCES
CENTRE**

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ABOUT THE LEGAL RESOURCES CENTRE

1. The Legal Resources Centre (LRC) is a Non-Profit Company (NPC) that was founded in 1979. Since its inception, the LRC has had a vision for a democratic and transparent society where disadvantaged communities have access to justice. The LRC has used the law as an instrument for justice, equality, land reform and the protection of customary rights, to propel the vision of a democratic society and restore dignity to disadvantaged communities. In this current context, the LRC is making these

submissions on behalf of the Alliance for Rural Democracy (ARD). The LRC was the legal representative of National Coordinator for the ARD in the constitutional challenge against the Traditional and Khoi-San Leadership Act (TKLA). As such, we remain committed to supporting the ARD in ensuring that the rights of traditional and rural communities are protected and respected by the law.

ABOUT THE ALLIANCE FOR RURAL DEMOCRACY (ARD)

2. The ARD is a cross section of grassroots and civil society partners with a geographic footprint in Limpopo, North West, Eastern Cape, KwaZulu-Natal and Mpumalanga. Our core work is focused on restorative land justice (including land reform), mining and extractives and rural governance.
3. The ARD works to challenge undemocratic practices and discriminatory laws through on the ground campaigns, test law reform through cases brought before the courts and capacity building initiatives for rural communities and activists; participatory research; and other policy work. They embrace the spirit within which the Constitution protects customary rights, laws and practices. They believe that customary rights, laws and practices have no boundaries or jurisdiction and that they not only apply to rural areas in the way that is now intended through the regressive law-making of the present. In line with their mission statement, they were the applicants that challenged the TKLA. They were successful in challenging the Act because the communities that would be affected by this Act, were not consulted or adequately consulted when it was a Bill. It is within this context that the ARD finds it imperative that they make comments on this current Bill.
4. These comments will be structured as follows:



- 4.1. Firstly, the comments will express the ARD's deep disappointment with the current Bill, as Parliament has once again failed to consider the concerns raised regarding the 2015 Bill. Despite previous input, the Bill in its current form fails to reflect the realities on the ground, missing a critical opportunity for meaningful reform.
- 4.2. Secondly, the submission will then highlight specific clauses of the Traditional and Khoi-San Leadership Bill (TKLB), that are particularly concerning, outlining their shortcomings and potential implications.

A BILL THAT FAILS TO REFLECT PUBLIC INPUT AND THE REALITIES ON THE GROUND

5. In previous submissions activists and Alliance partners have shared concerns on how the Traditional and Khoi-San Leadership Bill [B23-2015] framed and understood living customary law in rural areas. As a key concern, the boundaries and demarcations of traditional councils are a legacy of apartheid, and the ARD was at pains to express that this is an imposed identity. Furthermore, the participatory nature of decision-making was not well articulated in the TKLB as it gave overriding powers to traditional authorities regarding land-based deals and investments. Finally, the crux of the submissions made by the ARD were that the customary landowners need to have a say in how land and natural resources are governed and the proceeds thereof. The TKLB sought to entrench inequalities as it viewed traditional communities as subordinate to traditional leaders which goes against the long-held understanding that '*Kgosi ke Kgosi ka batho*'. By assigning unfettered powers to traditional authorities the ARD and others argued that the TKLB was a 'Bantustan Bill' that sought to cement the

powers of undemocratic, unaccountable traditional leaders and weaken the rights of customary landowners which was commonplace under Apartheid.

6. In May 2023, the Constitutional Court handed down a judgment that declared the TKLA unconstitutional and suspended its declaration for invalidity for 24 months. On 29 November 2024, a new draft Bill was published for the public to comment. Upon reading the contents of the Bill, it was disappointing to take note that no substantial changes had been made from the previous Bill released in September 2015. With the TKLB [23-2015], numerous submissions had been made by the ARD and other organisations to bring issues to the attention of the legislature to ensure that the act would reflect the needs and the wants of the people it is intended to govern. Unfortunately, the Bill in its current form does not reflect the voices of the people on the ground, thereby undermining participatory democracy.
7. Participatory democracy is a cornerstone of South Africa's Constitutional order, ensuring that citizens play an active role in governance beyond just voting in elections. The Constitution of the Republic of South Africa enshrines this principle in several provisions. Section 1 (d) of the Constitution, establishes a democratic system based on "*universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness*". Section 59(1) (a) and section 72 (1) (a) require the National Assembly and the National Council of Provinces (NCOP), respectively to facilitate public involvement in legislative processes. Similarly, section 118(1)(a) mandates that provincial legislature ensures public participation in their proceedings. The process of making laws in South Africa follows a structured procedure where a Bill is introduced in Parliament, undergoes public consultation, and passes through various readings and committee reviews before being enacted. Public participation is critical



in this process as it ensures that laws reflect the needs and interests of the people, uphold democratic values and enhance government accountability. Without meaningful consultation, legislation risks being out of touch with the lived realities of citizens undermining both legitimacy and compliance. Thus, participatory democracy strengthens governance by fostering transparency, inclusivity and public trust in the law-making process.

8. The Bill in its current form, undermines the public participation process that took place previously, calling into question the legitimacy of the present process. For democracy to thrive, the people of South Africa must have confidence that their voices are heard, and their contributions are given genuine consideration. We sincerely hope that this is not merely a tick-box exercise but rather a meaningful and substantive engagement between the government and its citizens.
9. Therefore, the ARD is making further submissions and comments with the aspiration that the concerns and grievances of traditional and rural communities are considered, and fundamental changes are made to the Bill.

COMMENTS ON SPECIFIC CLAUSES OF THE TRADITIONAL AND KHOI-SAN LEADERSHIP BILL

10. Clause 3: Recognition of kingship or queenship, traditional community, headmanship or headwomanship

- 10.1. Subsection 3(4)(d) states that a community may be recognised as a traditional community if it occupies a specific geographical area.

10.2. Based on South African history, basing a traditional community's recognition on geographical location could have a negative impact on the lives of many people who do not identify as being part of that traditional community.

10.3. In South Africa many traditional communities are located in former Bantustans that were formed on the principle of segregation and denying black South Africans their citizenship rights. Black South Africans were grouped based on language and ethnicity in Bantustans. This led to many communities integrating, traditional and non-traditional communities, and even though Bantustans have ceased to exist since 1994, many communities are still integrated. This is why you will find in one geographical area, where there is a traditional authority, there might be people who grew up in the community stating that they do not recognise the traditional authority. And neither did their parents and grandparents. This is a legacy of the forced removals and formation of the Bantustans.

10.4. In *Mohlaba and Others v Minister of Cooperative Governance and Tradition Affairs and Others* the first applicant, Ingwana John Mohlaba, was told by the Mukhomi Traditional Authority to pay levies when he did not even recognise Chief Mukhomi as his chief but rather Chief Phaphazela. He stated that his situation was not unique in Limpopo because there were many leaders who were not recognised under the Bantu Authorities Act that did not become recognised on the commencement of the TLFGA and the Limpopo Act. He paid the levies to the chief because he would need them to provide documents such as a proof of address, not because he identified as part of his traditional community.

11. Clause 15: Functions and resources of traditional and Khoi-San leaders

11.1. Subsection 15(1) states that traditional authorities will be allocated resources to enable them to perform their functions according to their customs. The functions will differ from community to community and there is no manner to verify any authenticity because these functions were greatly altered during the colonial and apartheid period. Even with the Traditional Leadership and Governance Act 41 of 2003, chapter 5 mischaracterises the functions of traditional leaders/authorities. Chapter 5 allowed national or provincial to delegate power to traditional authorities with respect to land administration, health, disaster management and other administrative and bureaucratic processes and functions. This is not an accurate representation of how traditional authorities' function. According to customary law, traditional authorities are custodians of land. They make decisions on the land based on the traditional community's wants and desires. They should not have governmental powers delegated to them.

12. *Clause 19: Functions of kingship or queenship council and principal traditional council*

12.1. Subsection 19(2) states that the traditional authorities are to keep financial records and have them audited. It does not seem practically possible to ensure that there is financial accountability when the auditors are already struggling with municipalities. The financial issues in municipalities range from unauthorised, irregular and wasteful expenditure. These issues have persisted for years, especially in impoverished provinces such as the Eastern Cape, KwaZulu-Natal (KZN) and Limpopo. In the 2022-23 period, the Auditor-General of South Africa reported that Eastern Cape municipalities incurred R5,18 Billion of irregular expenditure, KZN had R8,26 Billion and Limpopo had R1,44 Billion. These are provinces where hundreds of traditional communities are located. If the local and national governments have failed

to improve the financial distress for municipalities, how will adding the auditing of traditional councils benefit from this failing system? The irregular expenditure is also because auditing is not done on a regular basis to identify mismanagement that can be rectified quickly. It therefore seems highly likely that traditional councils will go unchecked.

12.2. There has been a history of a lack of transparency between traditional authorities and the community. If there is to be an auditing report, would the community be provided with the report and made aware of the financial standing of its council? Communities can no longer rely on the good faith of traditional authorities.

12.3. Subsection 19(3) states that the auditor will withhold financial support if no auditing has been done. However, it is probable that auditing will not be done regularly, as mentioned above, to withhold financial support in time to ensure that traditional councils adhere to the auditing requirements.

13. *Clause 20: Functions of traditional council, traditional sub-council, Khoi-San council and branch*

13.1. Similar to clause 15, The functions will differ from community to community and there is no manner to verify any authenticity because these functions were greatly altered during the colonial and apartheid period.

13.2. Under the Traditional and Governance Framework Act (TLGFA) – 41 of 2003, the functions of traditional councils are outlined in section 2(4), and this is the overarching law for institutions of traditional leadership. The TLGFA outlines key functions which broadly relate to administering the land on behalf of the traditional



communities; making recommendations to municipalities on community priorities and supporting traditional communities to participate in local planning; and performing functions in accordance with customary law of the community. Whilst this may be happening in practice, there is certainly little proof that members of a traditional council complying with section 4(2) to adhere to a code of conduct or to keep proper records. This is the experience of communities in Mpumalanga and Limpopo where they may be charged levies to access residential sites, but the process is poorly regulated and a single site in the same village can be charged at a different amount. Further, section 4(3) requires traditional councils to convene an annual meeting with members of the traditional community to account for activities undertaken and revenue received. When this does not happen, it renders rural residents unable to hold their traditional leadership institutions accountable and there is little transparency on investments, deals or lease agreements signed on communal land.

14. Clause 23: Support to kingship or queenship, principal traditional council, traditional council, Khoi-San council and traditional sub-council

14.1. Subsection 23(2) provides for the provision of support to traditional councils by the Premier's office. We contend that it will not be practical for the Premier's office to be able to have capacity to fully support traditional authorities in this thorough manner. There are approximately 882 traditional councils in South Africa. Even though the 882 traditional councils would be split across multiple provinces, the Premier's office also has other duties and obligations such as implementing legislation and developing policy.

14.2. Subsection 23(3) stipulates that the monies will be collected from community members who volunteer to do so, however, it has been witnessed that when

community members do not pay levies to a traditional authority, they will be denied the assistance that the traditional authority is supposed to provide them. The history of these levies is that through customary law, community members would provide tributes through goods and labour. However, the apartheid government altered this system that was based on consent and reciprocity to collect taxes for themselves through traditional leaders. [obj]¹ To ensure that these levies are voluntary, it should be explicitly stated that the voluntary levy will be consulted with community members and not imposed on them by traditional leaders. It is important to have consultations with community members and their consent because previously, such as in the communities in *Mohlaba and Others v Minister of Cooperative Governance and Traditional Affairs*, the failure to pay could result in a denial of services or resources. Some individuals were even denied a proof of address letter that is very essential in applying for commercial and government services, for example bank accounts and social grants. Communities should be assured that they will be consulted and not forced to pay levies as is currently the practice in parts of rural Limpopo, Mpumalanga and KwaZulu-Natal. In our experience, the bank accounts of traditional councils do not all get audited, nor do the traditional communities get any reports regarding monies and revenue collected by the traditional councils. In the North West and Limpopo various models were introduced such as the Development Accounts, and Community Trusts respectively that were intended to hold the royalties from surface lease agreements with mining companies on behalf of communities. In several instances, these models were wracked by maladministration, lack of transparency and poor record-keeping which has meant that rural communities did not fully enjoy the benefits of land-based deals and investments on their land.

¹ *Mohlaba and Others v Minister of Cooperative Governance and Traditional Affairs and Others* [2024] ZACC 32, para 5.

15. Clause 24: Partnerships and agreements

- 15.1. The ARD has noted two problematic aspects to this clause, the first deals with subsection 24 (3) (a) and the second, is subsection 24 (3) (C) (i).
- 15.2. Subsection 24 (3) (a) provides that any partnership or agreement entered into by any of the councils contemplated in subsection (2) must be in writing and, notwithstanding the provisions of any other law, must be beneficial to the community represented by such council.
- 15.3. We are of the view that this provision is too vague and should explicitly state that the community must determine what is beneficial to them. The subsection in its current form, suggests that the council can make this determination without community input, which is problematic.
- 15.4. With regards to subsection 23 (3) (C) (i), this subsection provides that, any partnership or agreement entered into by any of the councils contemplated in subsection (2) must be in writing and, notwithstanding the provisions of any other law, is subject to **prior consultation** with the relevant community represented by such council.
- 15.5. The ARD is of the opinion that this subsection must require consent rather than mere consultation. There is a fundamental distinction between the two in decision making, as consultation does not necessarily ensure that the affected parties have a decisive say. In the following section, we will outline reasons consent is essential and why it should be expressly provided for.

15.6. Informed consent ensures that the individuals or groups impacted by a decision have an active role in approving or rejecting a decision. This empowers them and respects their autonomy. Consultation on the other hand may only involve seeking opinions without any obligation to act on them, leaving the final decision in the hands of others. Furthermore, decisions made with consent of community members are more likely to be seen as legitimate and fair, fostering trust and cooperation. Consent reduces the likelihood of disputes since all parties explicitly agree to the outcome. This is particularly important in contexts of land use, resources management, and community governance. Informed consent is a foundational principle that ensures respect for individual and collective rights, unlike consultation, which may not offer the same protection. Lastly, in international human rights law, free, prior and informed consent is a requirement for projects affecting indigenous peoples. It ensures that decisions are not only discussed (consultation) but, approved by those communities (consent), acknowledging their sovereignty and rights. For example, article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), provides that, states shall consult and cooperate in good faith with the indigenous people concerned through their own representative institutions in order to obtain their **free, prior and informed consent (FPIC)** before adopting and implementing legislative or administrative measures that may affect them. The declaration has many other articles that mandate states to obtain the **free, prior and informed consent** of indigenous people. This is the same respect that rural communities are asking for in South Africa.

15.7. As it currently stands, subsection 24 (3) (c) (i) allows traditional councils to enter into agreements with third parties such as private companies, mining corporations or government entities without requiring the explicit consent of the affected communities.

Instead, it only mandates consultation with the communities. This we contend is unacceptable.

15.8. This clause further conflicts with *Interim Protection of Informal Land Rights Acts* (IPILRA), which protects informal land rights holders by ensuring that decisions affecting their land can only be made with their **consent** or in accordance with customary law practices. The key conflict can be found in the different categories of rights under IPILRA. For example, many rural communities have rights to use and occupy land, even if they do not hold formal title. Subsection 24 (3) (c) (i) undermines these rights by allowing leaders to make deals that could limit access to land without community consultation. Additionally, IPILRA recognises the collective decision-making authority of communities, whereas the current Bill centralises power in traditional leaders, sidelining community participation.

15.9. In addition to the reasons raised above, this subsection also raises Constitutional concerns in several ways. For example, section 25 (1) of the Constitution, protects against the arbitrary deprivation of property. Many rural communities hold informal or communal land rights, yet subsection 24 (3) (c) (i) of the Bill allows traditional councils to sign agreements affecting land use without direct community consent. This could result in land dispossession without adequate participation, violating the right to tenure security. Additionally, the subsection fails to uphold the right to just administrative action as envisaged in section 33 of the Constitution. The South African Constitution guarantees fair and just administrative action. If a traditional council enters into a contract that negatively impacts the community (e.g granting mining rights), affected individuals should have a direct say in the decision. However, subsection 24 (3) (c) (i) limits community agency by allowing

traditional councils to make binding decisions after mere consultation, rather than requiring full community approval (**consent**).

15.10. Lastly, the Bill in its current form, conflicts with customary law principles recognised in sections 211 and 212. In these sections, the Constitution recognises customary law, but it also guarantees that customary law practices must be consistent with the Bill of Rights. Subsection 24 (3) (c) (i) empowers traditional leaders over communities in a way that resembles the colonial and apartheid-era Bantustan governance system, where traditional leaders acted as intermediaries for the state rather than truly representing their communities. Overall, clause 24 risks weakening land tenure security for informal rights holders by granting traditional leaders significant discretion, potentially exposing communities to land dispossession and exploitation by third parties without adequate legal safeguards.

16. *Subsection 24 (3) (c) (ii)* provides that a decision in support of the partnership or agreement taken by a majority of the community members present at the consultation contemplated in subparagraph (i).

16.1. When decisions are being made with regards to partnerships, the majority of the traditional community must be in support of it. It is not adequate to provide for just the majority of those present. The decision must be that of the community not just those in attendance.

17. *Clause 25: Allocation of roles to kingship or queenship council, principal traditional council, traditional council, Khoi-San council, traditional sub-council and traditional and Khoi-San leaders*

17.1. Subsection 25(1) states that the government as the case may be, through legislative or other measures provide a role for a kingship or queenship council, principal traditional council, traditional council, Khoi-San council traditional sub-council and traditional leaders in respect of any functional area of such department. However, we contend that it is not clear as to the circumstances this is possible.

17.2. The Bill must state under what circumstances will the government be able to exercise this power and what is the purpose for appointing a non-voting member? If the government is able to exercise this power, is it not reminiscent of the apartheid era when the government was able to elect leaders that would favour their agenda? Even if the elected person has no voting power, it does not mean that they will not be able to influence others in the council. Furthermore, will the ability of the government being able to exercise this power not decentralise power from the communities even further?

CONCLUSION

18. The objective of the comments made in this submission is to emphasise the importance of participatory democracy, even in traditional and Khoi-San leadership and council structures. The ARD truly believes that peoples' interest and consent should be central in traditional and Khoi-San communities and not just those of traditional and Khoi-San leaders.

19. As we submit comments on this second Bill, we sincerely hope that our comments, and those from other communities and organisations, will be taken into consideration and the necessary changes be implemented. Unlike what was done previously. It is admirable that the government is showing initiative to acknowledge our customs and

customary law, however, doing so in a manner where our opinions and comments are ignored takes away from the initiative. The ARD appeals to lawmakers to consider that many more concerns have been raised since 2015, and they have not all been addressed in this draft Bill released in 2024. For this reason, the ARD requests the opportunity to make further submissions to COGTA with some of the community voices that are directly affected by the contents of this draft Bill but have not had the time or resources to meaningfully engage.

We trust that you will find this submission valuable. If you have any comments or questions, please feel free to contact the following people:

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