The Boundaries of Tradition: An Examination of the Traditional Leadership and Governance Framework Act

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Introduction

One of the critical victories that was won with South Africa’s transition to democracy in 1994 was the formal guarantee of equal citizenship for all South Africans with the reincorporation of the Bantustans into a unitary state. Under apartheid, the land delineated for black people’s ownership and occupation under the 1913 Land Act and the 1936 Natives Trust and Land Act served as the basis for the state’s establishment of homelands, or Bantustans. The 1913 Land Act marked seven per cent of the total land mass for the black majority and the 1936 Natives Trust and Land Act increased this to 13 per cent. The boundaries of the Bantustans served as spatial definers of areas under tribal authority. People within these boundaries were treated by the state as tribal subjects, often unable to access many of the rights associated with citizenship. The Bantustans were some of the most fiercely resisted and materially devastating features of apartheid South Africa. Hundreds of thousands of black South Africans were forcibly removed from their homes and ‘dumped’ into different Bantustans, each purportedly created along ethnic lines under the doctrine of separate development. The question of the treatment of the spaces that marked the former Bantustans came to the fore as Parliament passed the 2003 Traditional Leadership and Governance Framework Act (TLGFA).

The TLGFA was developed to provide a national framework for the definition of “the place and role of traditional leadership within the new system of democratic governance.” One of the outcomes of the TLGFA was the recognition of “tribes” and “tribal authorities” created before 1994 as current “traditional communities” and “traditional councils” respectively, provided that they comply with new composition requirements. This recognition of pre-existing structures provided for the maintenance of the tribal authority boundaries, the sum of which constituted the Bantustan boundaries under apartheid. Legislation related to traditional governance introduced to Parliament since the TLGFA has used traditional councils as the primary structures for application of the legislation. The context of intense violence expressed through the tribal authority boundaries begs the question of how the democratic government has explained the spatial preservation of these boundaries.

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I seek to answer this question by examining the policy documents and the draft legislation that led to the TLGFA. This draft legislation illustrates some of the formal discussions surrounding the defining of the boundaries of traditional governance and reveals some of the justifications provided for the adoption of the tribal authority boundaries. I show how this draft legislation employs a history that presents tribal authorities as pre-colonial structures and then frames their retention as restoring the integrity of traditional leadership and governance institutions. I argue that although the draft legislation presents serious critiques of colonial and apartheid legislation on traditional leadership and governance, by maintaining the tribal authority boundaries the TLGFA reproduces many of the violations and material inequalities around access to justice that its predecessors set in place.

Over the past decade, legislation targeted at traditional governance has relied on the TLGFA’s definitions of traditional councils, communities, and leadership. This legislation has seen power centralized in traditional leadership at the expense of people served by the institution, in line with models of leadership cemented during colonialism and apartheid. Although the TLGFA, and many of the related provincial laws allow premiers to modify traditional council boundaries and to redefine traditional communities, few have done this. The 2004 Communal Land Rights Act (CLR A) gave traditional councils land administration powers allowing for title deeds held by landholding groups to be ‘endorsed’ to ‘traditional communities.’ This would have allowed traditional councils control over the occupation, use and administration of communal land. The Constitutional Court struck down the CLRA in its entirety. The Traditional Courts Bill (TCB) was introduced in 2008 and then again in 2012, but lapsed in Parliament in 2014. It would have made it an offence for people not to appear before a traditional leader, would have denied people living under traditional councils the option of using state courts, and given decisions of the traditional courts the legal status of rulings by the magistrates’ courts. Most recently, the draft Traditional Affairs Bill (TAB) was published for comment in September 2013. This draft bill provides that traditional leaders and councils can be allocated roles by government departments through ‘legislative or other measures.’ A 2011 version of the Bill provided for these roles to be administratively delegated, bypassing the consultative processes required in Parliament and making it difficult to discover which powers have been delegated to whom. The maps of the former

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Bantustans correspond with the areas with the highest levels of poverty in the country. These pieces of legislation have treated traditional councils areas as separate from the rest of the country, potentially compromising access to justice for people living in these areas by allowing for them to be treated as ‘tribal subjects.’

This piece focuses on the internal logics set out in the TLGFA draft legislation to understand how the TLGFA comes to a conclusion that results in the preservation and promotion of some of the crudest structural markers of racialized, tribalized inequality in South Africa’s recent history. Understanding the terms on which these boundaries have been internally legitimized can contribute to more targeted challenges to these boundaries that threaten to undermine access to justice and equal citizenship rights for the approximately 16.5 million people who live in the former homelands.

**Discussion document: Identifying key themes in conceptualising the boundaries of traditional leadership**

The first document towards the TLGFA was the Discussion Document towards a White Paper on Traditional Leadership, published in April 2010. While the Discussion Document very briefly addresses questions that directly relate to the boundaries, it raises a series of questions that relate to the authority and powers that traditional leaders gain access to through the boundaries. These broader questions point to some of the early logics that underline the treatment of traditional leaders in relation to the people that they govern and show justifications for the boundaries that appear in later documents.

The Discussion Document describes processes through which Union and then apartheid administrations co-opted traditional leadership structures and governance systems to assert greater power over African people, explaining:

> With the introduction of the Black Administration Act… the African system of governance and administration was changed and the white government took control of the African population. The customary structures of governance of traditional leadership were put aside or transformed. New structures were established in their place in terms of the Black Authorities Act of 1951. These were termed ‘tribal authorities’… ‘community authorities’… and ‘regional authorities’…

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6 [DEPARTMENT OF PROVINCIAL AND LOCAL GOVERNMENT, A DISCUSSION DOCUMENT TOWARDS A WHITE PAPER ON TRADITIONAL LEADERSHIP 14 (2000).](#)
The Discussion Document goes on to describe the role traditional leaders came to occupy alongside the development of the homeland system, saying:

[N]o ‘chief’ who held views contrary to those of government was confirmed in his position as ‘chief’... traditional leaders became important tools in the government’s strategy of extending its control over Africans in the countryside, through the establishment of ‘reserves’, ‘self-governing states’, ‘homelands’ and later ‘independent states.’

The Discussion Document uses descriptions of the ways that customary law was distorted by colonial and apartheid administrations to argue that the integrity of and loyalty to the institution can only be restored through the redevelopment of legislation in the area.

Related to the functions of the boundaries, two major themes emerge in the Discussion Document’s strategic questions on how to legislate traditional governance. The first is how to ensure traditional leaders’ accountability to the people that they serve when they do not enjoy popular support through elections, they are paid by the state, and systems of patronage and loyalty have been systematically undermined by past state interference. The second question is how to redefine traditional governance systems and structures in line with the Constitution, without having them overlap with the government’s functions and roles or “emasculating” the institution of traditional leadership.

The first theme engages with the different sources of traditional leaders’ power and authority, including how they gain legitimacy and to whom they account in maintaining the authority necessary to exercise power. A prominent thread in this theme is how to ensure traditional leaders’ accountability to the people that they serve when they are remunerated by the state. This thread follows how remuneration creates an employee–employer relationship between traditional leaders and the state, which it argues contributes to traditional leaders being accountable to the state rather than the people that they are intended to serve. Much of the text around this theme grapples with traditional leaders not being given a mandate by the people they serve and not having to answer to these groups to maintain their position.

These discussions around authority and accountability draw attention to whether the sources of traditional leaders’ power protect the interests of the people under their leadership. They also speak to the terms on which people come under

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7 Id at 36.
8 Id at 13.
traditional leadership – how they organise and are represented by the institution of traditional leadership.

The second theme points to the centrality of the institution of traditional leadership, and the interests of people within it, in the (re)imagining of systems and structures of traditional governance. It points to the delicate balances between local government and traditional leadership in terms of roles and functions. This theme becomes pertinent to thinking about the boundaries because it illustrates the negotiations of power between different institutions that were considered in defining the parameters of traditional governance.

The history represented in subsequent documents supports the idea of privileging traditional leaders’ interests, or not emasculating them, by focusing on the structures that existed before colonialism without asking how these structures were distorted and traditional leaders’ powers inflated under apartheid, or most importantly, how they serve people’s interests in current contexts.

**Draft White Paper: delineating colonial and pre-colonial structures**

The Draft White Paper, published in October 2002, stresses the idea of restoring the integrity of the institution of traditional leadership and uses this as a framework for discussing traditional leaders’ jurisdiction. It references the same history as the Discussion Document, but adds significant distinctions around structures created in terms of custom and those imposed by colonial and apartheid regimes. It juxtaposes structures that it presents as having pre-colonial roots with those that it argues were purely colonial or apartheid constructions to argue that the former need to be supported to move away from corruption done to traditional governance by pre-democratic regimes.

The Draft White Paper identifies pre-colonial customary structures as “comprised of the traditional leader, headmen and members of the community.” It differentiates these structures from others which it argues were perverted forms of traditional leadership, arguing, “[t]hese structures were also brought under formal control, and legislation was introduced to regulate them. The existing customary structure of traditional leadership came to be referred to as tribal authorities. However, the constitution of these structures remained essentially the same.”

The Draft White Paper goes on to justify the maintenance of spatial restrictions to traditional leadership arguing that the institution’s “governance functions were not exercised in a unified territory, as this only came about later with the formation of the South African nation state... the institution only operated within the defined limits of its prescribed jurisdiction. The institution was, however, affected by colonisation as the colonisers altered its governance functions and
roles.” While the Draft discusses distortions to governance roles and functions under colonialism, it seems to suggest these forces did not alter the institution’s spatial jurisdiction.

The White Paper presents the same history as the Draft White Paper. It suggests that the names used to identify traditional leadership structures be changed because of their negative historical associations. This proposal posits that the category of ‘tribe’ and the structure of tribal authorities are not themselves the problem, but rather the language attached to them.

**TLGF Bill and Act: The transitional arrangements set in place**

The transitional arrangements that deem tribal authorities traditional councils first appear in the Traditional Leadership and Governance Framework Bill, published in September 2003. The history that features prominently in earlier documents is absent in the bill. However, the impact of this history is most clearly represented here. The structures that were discussed as having pre-colonial roots in earlier documents are maintained in the bill, while those that are framed as apartheid constructions are disestablished. For example:

Any tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council...

In contrast,

Any community authority that had been established in terms of applicable legislation and still existed as such immediately before the commencement of this Act, continues to exist until it is disestablished in accordance with provincial legislation, which disestablishment must take place within five years of the commencement of this Act.

This same text appears in section 28 of the TLGFA, which was passed by Parliament in December 2003. In the following section I examine some of the internal contradictions and historical misrepresentations that scholarship points to with regard to the history of pre-colonial organizing discussed in the draft legislation.

**The boundaries in context**

A rich body of literature challenges the model of pre-colonial organizing put forward in the TLGFA draft legislation. Much of this literature locates the creation of
tribal authorities and the roles and powers afforded to traditional leaders under tribal authorities, at the heart of the Bantustan project.10 By exploring the diversity of pre-colonial political and social organisation and leadership, this literature demonstrates how colonial officials turned every kind of African polity into a tribe to make it legible and most useful for indirect rule.11 The creation of standardized governance structures with power centralized in chiefs served as processes of simultaneous creation and erasure. In consolidating power in individuals who were accountable to the state administration of the day, these structures marginalized existing, layered and diverse governance and leadership formations and worked to homogenize often linguistically and historically diverse groups.12 At times this resulted in the conflation between traditional leadership, customary law and the Bantustans, as these institutions and systems were superimposed onto each other.

That the tribal authorities that existed at the commencement of the TLGFA are not the pre-colonial structures that the draft legislation suggests is not in itself the sole harm of maintaining these structures. The harm has, and continues to be, primarily linked to the material consequences of colonial and apartheid distortions. The fundamental disfiguration of traditional governance systems and structures changed the power relations between traditional leadership and the people governed, impacting the rights that people are able to claim, especially those with marginalized identities.13 It also changed the ways that they are able to access justice. In this sense, the TLGFA has not just maintained dimensions of the spatial dynamics of the former Bantustans, but also aspects of its governance systems, leadership structures, and identity categories.

In assessing the present impacts of these structures, some scholars have argued that traditional councils are being allowed to function as a fourth tier of government that is not provided for in the Constitution.14 When viewed in the

14 Mazibuko Jara, Research Associate, UCT Law, Race & Gender Research Unit, Remarks at Traditional Leadership in South Africa: Facing the Contradictions and Embracing the Realities at Goedgedacht Farm (Feb. 9–10, 2012) (transcript available at http://www.wolpetrust.org.za/dialogue2012/Microsoft%20Word%20-
context of the recent legislation mentioned earlier, this has the potential to delimit traditional council areas from the rest of the country in terms of access to justice and services.¹⁵

The draft legislation presents itself as rupturing from an old ideological framework to a new one aimed at restoring the integrity of traditional leadership. This representation is undermined, however, by challenges throughout the former homelands to marginalisation because of ascribed tribal identities. This has been illustrated as valuable minerals have been discovered in several former homelands. For example, the former Lebowa and Bophuthatswana account for approximately 80% of international platinum production. 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.¹⁶ Writing about this context, Claassens and Matlala argue that “laws and judgments emanating from the North West province have cemented the Bophuthatswana legacy of excluding the majority from access to resources and from processes of collective definition.”¹⁷

The violence inflicted through the tribal authority boundaries is also illustrated by the scale of registered disputes over these boundaries and of land claims by people who were dispossessed in the consolidation of the homelands. Over 1,322 claims and disputes have been registered nationally over traditional council boundaries and traditional leaders’ status.¹⁸ This is significantly higher than the approximately 900 senior traditional leaders and communities officially recognised under apartheid.

Conclusion

The arguments presented in the draft legislation that the preservation of tribal authority structures contributes to restoring the integrity of the institution of traditional leadership contradicts decades of scholarship by leaders in the field. Work by people engaged with traditional councils points to the potential of these

¹⁷ See id.
structures to undermine the rights of people who live within them. The TCB, which would have made it an offence not to attend a traditional court when summoned and denied access to magistrates courts, is an example of the ways that the TLGFA boundaries can be used to promote unequal access to justice. The TLGFA’s reliance on the tribal authority boundaries for conceptualising traditional governance illustrates a lack of imagination and a failure to thoroughly engage with the diversity of histories and current practices around vernacular governance.

Past administrations intentionally constructed tribal identities and authorities, and imbued these identities and structures with meanings that were used to justify denying African people basic rights, and treating them as subjects rather than citizens. By maintaining the tribal authority boundaries, the TLGFA has referenced the ideological structures that gave ‘tribal’ identities form and meaning.