

Traditional leadership laws

A review of the findings of the High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change – December 2017

The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change released its final report in November 2017. The report describes the development of laws about traditional leadership since 1994 and whether they have been successful or posed challenges. The report also makes recommendations about how these laws can be improved going forward.

Problem statement: Have post-1994 traditional leadership laws been working well?

At public hearings hosted by the Panel, many ordinary South Africans spoke about how existing laws affect their daily lives. Some people spoke about how the current Traditional Leadership and Governance Framework Act 41 of 2003 (“Framework Act”) has resulted in abuses and unaccountable conduct by some traditional leaders and councils. They also spoke about how their customary law and Constitutional rights to land, equality, transparency, security, freedom of association and cultural identity have been undermined.

Voices from public hearings

“We all know the homelands and we are still squeezed in within them where whites forcibly moved us to and there is no noticeable change when it comes to land reform. ... That Act [Framework Act] has caused the boundaries that we thought we erased in 1994 to resurface.”
(Eastern Cape)

“We tried to engage the traditional leader, but he does not give us proper answers, he says the legislations empower him to act the way he acted, to enter deals on behalf of the community. ... The royalties that the mine pays to the traditional leader do not trickle down to the people.” (Limpopo)

“Traditional leaders are asking us to pay taxes. Government is giving traditional leaders cars and money, in addition to us paying money to traditional leaders. The traditional leaders are doing nothing for the community.” (Mpumalanga)

“Our government does not understand customary law. They are treating us the very same way that the apartheid treated us, taking our land and vesting it in the hands of traditional leaders.”
(Limpopo)

Some of the points raised by people at the hearings:

1. Legislation on traditional leadership resuscitates apartheid geography in rural areas resulting in divided citizenship and inequality
2. The legitimacy of some officially-recognised traditional leaders is uncertain
3. “Tribal” structures retained from apartheid have not effectively transformed e.g. traditional council election failures
4. The legislation uses distorted versions of customary law and incorrectly assumes that traditional leaders also have authority over land
5. There is uncertainty about the roles and powers of traditional authorities in relation to government, especially local government
6. Some traditional authorities compel rural citizens to pay “tribal” levies
7. Consultation and accountability are lacking in the operations of some traditional authorities and there is a need for training and monitoring
8. The legislation has resulted in conflict and violence

Government proposals

Government has proposed three new laws that deal with traditional leadership, currently being processed by Parliament. Government could use these draft laws as an opportunity to address the problems that people have been experiencing with the Framework Act. Instead, they threaten to make conditions worse for people.

- Traditional and Khoi-San Leadership Bill 23 of 2015 (“TKLB”): This law will replace current national laws on traditional leadership and introduce legal recognition for Khoi-San communities and leaders for the first time. However, the TKLB’s provisions potentially give traditional authorities extensive roles without ensuring that they are accountable and consult with ordinary people. The TKLB also gives new life to previous “tribal” boundaries and structures but fails to ensure that they are legitimate and transformed according to the Constitution.
- Traditional Courts Bill 1 of 2017 (“TCB”): This law will govern dispute resolution in forums recognised as “traditional courts”. The TCB has a long and controversial history in Parliament, with previous versions widely criticised in public hearings and by civil society. This new TCB is an improved draft by the Department of Justice which, for example, now includes a mechanism for opting out of traditional courts. However, some aspects of the TCB – such as the status of the courts – remain unclear, concerning or difficult to implement.
- Traditional Leadership and Governance Framework Amendment Bill 8 of 2017 (“TLGFAB”): This law proposes a few changes to the existing Framework Act. For more than a decade government has failed to transform “tribal authorities” into traditional councils with 40% elected and one third women members, as the Framework Act required. Thus, traditional councils have largely been operating invalidly. The TLGFAB proposes a new chance for traditional councils to transform, but also threatens to disguise the consequences of their past unlawful operations.

High Level Panel recommendations

1. Proposed laws such as the TKLB and TLGFAB should be urgently reviewed or withdrawn from Parliament because they threaten social cohesion, Constitutional rights and equal citizenship.
2. Existing law, namely the Framework Act, should be amended to:
 - Emphasise that customary law is a voluntary and living system
 - Define “traditional communities” as groups with shared affiliations, identities, governance structures and laws, rather than being based on previous “tribal” boundaries
 - Strengthen accountability and consultation mechanisms (for example, the Code of Conduct)
 - Apply the Interim Protection of Informal Land Rights Act to decisions about communal land
 - Clarify that for traditional councils to make valid decisions, a customary consultation process must first be followed, the council must be correctly constituted and financial accounting and reporting duties must be maintained
 - Prohibit “tribal” levies and only allow voluntary contributions
 - Clarify that small groups and individuals hold rights and can participate in court cases – not just traditional leaders, councils and large “traditional communities”
 - Increase proportions of elected and women members on traditional councils
 - Set limits on the roles and powers of traditional authorities
 - Require the Disputes Commission to report regularly and make findings public
3. Parliament is encouraged to pass new legislation that clarifies the different roles and status of structures with authority over land versus political authorities.

4. The position of women in traditional communities should be improved by repealing existing patriarchal laws, consulting women about new laws, ensuring women's equitable representation and tailoring laws to women's lived realities.

Conclusion

The Panel's report suggests important methods for addressing challenges in existing and proposed laws about traditional leadership. Are the Panel's recommendations appropriate and will they achieve necessary changes within traditional communities? This will have to be informed by the experiences and views of citizens. Since the recommendations are broad, the details of how they will be implemented must also still be decided. This presents an exciting opportunity for innovative solutions. However, it remains to be seen if Parliament will adopt the recommendations and if there is political will to support shifts in traditional leadership laws that benefit ordinary South Africans. If not, can the Panel's findings be used in other ways to claim back people's power and hold traditional authorities, government and private actors accountable?