Submission from the Cobuqua People of the Eastern Cape with Respect to the Traditional Leadership and Governance Framework Amendment Bill, 2017

Submitted by the Cobuqua Community of the Eastern Cape, with the assistance of Khulumani Support Group, 4 June 2017

Introduction

The Cobuqua community of the Eastern Cape submits comments and concerns relating to the Traditional Leadership and Governance Framework Amendment Bill, 2017. This Bill has many implications for this community, and so it is important that their voice is heard, and that they are incorporated into this process in a meaningful way.

The Bill concerns provisions for extended timeframes within which kingship or queenship councils and traditional councils must be established; the provision of extended timeframes within which community authorities have to be disestablished; the alignment of the term of office of tribal authorities, traditional councils and kingship or queenship councils with the term of the National House of Traditional Leaders; and the provision for matters connected therewith. This submission will address these issues, but will also use the opportunity to address broader issues relating to traditional law, and indigenous issues more generally.

This Bill has been presented as an amendment to the Traditional Leadership and Governance Framework of 2003, and addresses the issues noted above. Khoi-San communities are expected to adjust to and comply with the provisions stipulated in the bill, regardless of whether they address the fundamental issues affecting these communities for which specific remedies are needed if their ongoing marginalisation is to be ended.

Background on the Cobuqua Community of the Eastern Cape

The Cobuqua people are scattered across five municipal districts in the Eastern Cape. The traditional land of the Cobuqua people lies between the Great Fish and the Umzimkulu Rivers. This is the land on which the members of the community sustained a way of life that remains an example of how people can live within environments without destroying those environments.

The community was dispossessed of their land by Chief Kaiser Matanzima[1] in 1976 and were displaced to the following five District Municipalities of the Eastern Cape - Amathole, Chris Hani, uKuhlamba, Alfred Nzo and O R Tambo District Municipalities. The communities were artificially divided by boundaries created by successive political dispensations. Most Khoi-San communities in the Eastern Cape reside in Cacadu Municipality. The traditional ancestral land of the Cobuqua people was in the area known as the former Transkei homeland.

Despite the adoption of legislation to enable the restitution of the land rights of people with proof of their former occupation and use of traditional land, the land claim of the Cobuqua people has never been resolved by the Eastern Cape Office of the Commission on the Restitution of Land Rights without "fear, favour or prejudice", despite the Cobuqua's respectful engagement with this Commission. Instead the community has been publicly ridiculed by the official who has been representing the Commission.

A Founding Flaw in The Traditional Affairs Bill

A starting point in a review of the bill is to assess whether the bill provides for meeting the aspirations and needs of Khoi-San communities as recognised indigenous communities, along with providing for the needs and aspirations of traditional communities with their different scales of marginalisation prior to and subsequent to colonialism and apartheid.

It is the contention of this submission that the assumption that indigenous and traditional communities are located on a post-apartheid level playing field and that the only requirement for new legislation is to provide for Khoi-San communities to be included into provisions for

[1] Kaiser Matanzima was a chief of the Thembu people. It was Matanzima who persuaded the Bunga, the Council of Transkei chiefs, in 1955 to accept the Bantu Authorities Act, despite it having been previously rejected by the Bunga. The purpose of the Act had been to give chiefs more local power, but simultaneously to use them as puppets, dependent on the financial and military support of the apartheid government, to control the homelands. In 1963, the apartheid authorities granted Transkei self-government with Matanzima being elected as Chief Minister. He then founded the Transkeian National Independence Party with his brother, George, and began lobbying for independence. In 1976, Transkei became the first Black homeland to become independent, with Matanzima as Prime Minister and George as Minister of Justice. Only Taiwan and Israel recognised the sovereignty of Transkei. In 1978 Matanzima made various territorial demands on the apartheid government but was forced to conform to the South African government's requirements, in order to keep receiving money from the apartheid government. In 1979 Matanzima became State President and his brother George, Prime Minister. They implemented severe measures to crush all opposition, including banning in 1980, the Democratic Progressive Party led by the popular Thembu king, Sabata Dalindyebo who was accused of violating the dignity of President Matanzima. Despite being from the same royal family, Nelson Mandela once described Matanzima as a "a sell-out." Matanzima tried for many years to persuade Mandela to accept banishment to the Transkei instead of captivity. But Mandela refused every request from Matanzima for an interview. Matanzima was forced by the apartheid government to retire from the presidency of the Transkei in 1986, to be succeeded by his brother George, who was found guilty of corruption and forced to resign. Matanzima died in 2003 in Queenstown at the age of 88. (Reference: http://www.sahistory.org.za/people/kaiser-daliwonga-matanzima)

traditional communities, obscures the reality of the impacts of the entrenched and prolonged marginalisation of the country's indigenous populations and fails to address the consequences of these realities.

In this regard, the Bill fails to make distinctions between indigenous and traditional communities and tries to assimilate Khoi-San indigenous communities into provisions for traditional communities in South Africa. This approach perpetuates the existing situation of discrimination and marginalisation.

Additionally, and more broadly, as brought up by the Helen Suzman Foundation, the Bill and the Act that it is amending, "[fail] to reconcile traditional leadership and local government, and may provide for traditional leadership to encroach upon areas of provincial competence." Indeed, there is a gap between traditional law and local law, which often leads to stalled processes and misunderstandings. This has a large impact on these indigenous communities, and has impacted the way many communities obtain resources, particularly land.

Democracy and the Traditional Leadership and Governance Framework Amendment Bill

One of the most fundamental problems is that many policies relating to indigenous people are not created with the input of the indigenous people themselves. In their own words, the Khoi-San, and the Cobuqua people in particular, are seen as a landless and homeless persons and have not received much attention from the government.

The Constitution protects democratic values of equality, human dignity and freedom for all people in South Africa and says that the people will decide how the nation is governed.[2] Customary law also includes many of these democratic principles. People must be involved in decision-making within traditional communities and be free to have their say at public meetings. Since democracy in 1994, the Cobuqua people have been marginalised and left out of the conversation, and that is still the case with the Bill of 2017.

Furthermore, another flaw in the design of the Bill, and many of the laws that preceded it is that many traditional leaders and rights are subordinate to local authorities. Specifically relating to leadership, many of the policies in place put aside indigenous sovereignty and democracy, in that they place local laws and authorities above indigenous leaders. This means that "rather than empowering members of Khoi-San and traditional communities, many aspects

[2] Custom Contested. Notes on the Traditional and Khoi-San Leadership Bill [B 23–2015] – October 2015

of the Bill aim to (or, have the effect of) subordinating their right to self-determination to the President, Premiers and more centralised forms of control."[3]

Broad Guidelines for Engaging with Indigenous People Moving Forward

Based on local and international reports, such as the ILO Convention No 169 of 1989, the African Commission on Human and Peoples' Rights (ACHPR) 2003 Report, the UN Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly on 13 September 2007, and a 2009 ILO-ACHPR Report drafted in 2009, these are some of the most important issues facing indigenous South Africans. All these issues apply to indigenous South Africans in general, and indeed to the Cobuqua people.

1. Issues of self-determination that is compatible with the principle of territorial integrity, with national unity and the other organizational structures of states. Article 46 of the Declaration on the Rights of Indigenous Peoples (DRIPS) as revised, clarifies that the right of self-determination does not give indigenous peoples the right to be separate and independent from their countries of residence. For the Cobuqua people, the issue of having their ancestral lands recognised and restored to them, is a critical issue that remains unaddressed through the land claims process to which the Cobuqua applied in 1998. Self-determination requires recognition of the traditional lands of indigenous people. Any solution that fails to address this founding provision, cannot succeed on the basis of recognising land in a virtual reality only. The Cobuqua recognise that rights to land and territory need to be addressed within the constraints of the protection of third party and other public interests. However, the failure of the Commission on Land Restitution to begin this negotiation with the community, signals that any adoption of legislation based on recognising traditional communities would be unreasonable until the issues of land restitution have first been addressed. Substance would have to be given to the right of indigenous people to autonomy or self-government in matters relating to their internal and local affairs, through providing access to critical budgets to support their development initiatives. To date, there has been a dearth of investment in or access to resources for indigenous communities in South Africa.

2. Issues of recognising the valuable contributions of indigenous communities to national development: In line with the National Development Plan and its Vision 2030, the

[3] A critical analysis of the Traditional and Khoi-San Leadership Bill, 2015 III – Authoritarian, anti-democratic and unconstitutional

Cobuqua people desire to be involved in their own development on an equal basis with all other communities. In this regard, the South African Constitution supports and recognises the rights of cultural, religious and linguistic communities which form the basis of development planning of these communities. Specific heritage-related initiatives in this regard are of especial significance towards restoring and recognizing the histories of indigenous peoples whose identities were erased in processes of forced assimilation through colonialism and apartheid. Amongst these most valuable contributions of Indigenous peoples, were their efforts to keep raising their voices to ensure the protection and preservation of Mother Earth.

3. Issues of recognizing the collective rights of indigenous peoples to live in freedom, peace and security through the full realization of the human rights of all peoples as a prerequisite for attaining peaceful and harmonious co-existence, thereby opening the door for a better future for indigenous peoples worldwide.

4. Issues of protecting and maintaining specific cultural identities of indigenous peoples: This requires providing for the social, cultural and economic aspirations of a people with full respect for their values, traditions and language.

5. Issues of supporting access to land for indigenous communities: States acknowledged that land remains a crucial issue for the cultural identity of a people within the context of a country's national identity and that the door should be opened for the ancestral claims of indigenous peoples.

6. Issues of adopting dialogue, partnership, consultation and collaboration as the modalities for underpinning cooperative relationships with indigenous communities that are characterised by respect for the dignity and well-being of indigenous communities with an emphasis on the achievement of their equal status before the law and the prevention of discrimination and marginalisation of any community.

7. Issues of ensuring full participation in all decision-making affecting indigenous peoples: This should include continuing efforts to remedy many years of injustice with a focus on assistance in such areas as poverty alleviation and improved education.

Specific Recommendations

These are some specific recommendations, relating to the Bill, and to traditional law more generally.

1. Guaranteed representation of indigenous peoples in Parliaments and policy decisions: The Cobuqua people have felt marginalised for a very long time. It is necessary that their voices and stories are represented in government and that their submissions receive proof that they have been duly and appropriately considered so that the continuing flaws in proposed legislation are confronted and resolved in meaningful ways without simply continuing the practice of avoiding the problems inherent in the legislation. The present situation represents the imposition of legislation on a deeply flawed system. There will be no long-term solution without the causes finally being addressed. The Khoi-San people are aware of the risks that they face with opportunists within their communities being seduced by the offers of the state to provide significant monthly salaries, even where the community they claim to represent do not accept their traditional leadership. Pursuing amending flawed legislation that has not resolved these fundamental issues sets up communities for long-term conflict and continuing marginalisation. This is not in the best interests of any citizens of our country.

2. Consent-seeking of indigenous people: Over the last twenty years or so, many laws have been created relating to customary law. However, few have received the consent of the indigenous people themselves. There are many flaws with existing policy, and piling new policy on top of that does not address the fundamental issues. Thus, moving forward, the Cobuqua people should be consulted about new laws, and they should be enabled to exercise their democratic right to provide input for these laws. The state-provided road shows have not attended to the real concerns of the majority of Khoi-San peoples.

Recommendations for the Traditional and Khoisan Leadership Bill, a Related Piece of Legislation

The proposal for the Traditional and Khoi-San Leadership Bill was released in 2015. Before any further legislation or legislative amendments are considered, the fundamental flaws in currently relevant legislation that attempts to apply a one-size-fits-all solution to peoples whose marginalisation exceeds the marginalisation of traditional black African communities, needs to be addressed. There is a need to collaboratively develop targeted solutions to unstitch and to remedy the additional layers of exclusion and marginalisation to which these

communities have been subjected. There are numerous valuable examples within the African continent itself as well as across the globe as the rights and voices of indigenous communities have become formally acknowledged as having legitimacy. The current process provides a very important moment to take stock of how the fundamentally flawed decision to apply the same legislation to traditional communities who have had rights over communally-owned land with their chiefs recognised as stewards of these lands to be managed and administered in the best interest over decades, cannot be applied to Khoi-San communities who have never been afforded the same rights over territory on which they existed from the precolonial era. It is critical to halt the enforcement of legislation that fails to address measures of redress for Khoi-San communities until new solutions to this fundamental dilemma of reconciling the land and other rights of all peoples is resolved through inclusive and democratic participation that generates more creative solutions to these consequences of colonialism and apartheid on people who are an integral component of our diverse citizenship in South Africa.

Some possible solutions for the inclusion of Khoi-San peoples into a customary law regime include:

1. The provisions of the 1996 Constitution for the consolidation of a truly participatory democracy need to be upheld so that there are meaningful possibilities for indigenous peoples to participate collaboratively in resolving the underlying situation – that of differential levels of discrimination against different apartheid-imposed racial groups that continue to produce differential degrees of exclusion and marginalisation in the present. This is based on the country's apartheid history which has been perpetuated into the present continuing problematic categorisations of people using apartheid categories. Presently Khoi-San communities have been identified through the work of Statistics South Africa as being more adversely affected by these continuities with apartheid than are traditional black African communities[4]. Much of the state's post-apartheid legislative processes with regard to the need to systematically undo apartheid systems and practices, have failed to confront and redress the plight of Khoi-San communities. Short-term remedies such as imposing the same structures on people whose land restitution

[4] The recent Johannesburg ELDOS riots of early may 2017 represent the failure of the state to apply Constitutional principles of equality before the las, to communities who were forcibly assimilated into the apartheid dispensation as "Coloured people". There remains a profound sense of Khoi-San people of the failure of the post-apartheid state to apply the Constitution equally to all communities in South Africa.

claims remain unaddressed as those who have lived on communally-owned land under a regime of traditional chiefs, will inevitably lead to future conflict.

2. The Land and Accountability Research Centre has commented quite extensively on how "the TKLB's use of the Framework Act's terms 'traditional community' and 'traditional council' means that the TKLB adopts many of the categories created under apartheid to define African peoples."[5] This approach provides only short-term unsatisfactory solutions to political leaders who operate in the short-term within frameworks of 5-years per term of office. This is very problematic given that short-term solutions are no basis for developing a systematic approach to undoing the harm caused by apartheid categorisations of peoples whose disadvantage continues to be advanced by a post-1994 constitutional democracy. As citizens with equal rights in our constitutional state, it is important that we enable government through our participation to undo the harms inflicted on our peoples through developing considered and just frameworks that will specifically redress the harm caused by apartheid's categorisation of different communities in our country. This includes the need to intentionally use language carefully when referring to indigenous people so that the histories of oppression and subjugation are recognised and helpful solutions are developed. The perpetuation of apartheid categorisation of the peoples of this country needs to end.

Conclusion

For too long, the Cobuqua people, as representative of most Khoi-San communities in South Africa, have been marginalised. The current effort to produce amendments to the existing legislation fails to deal with the flaws in the legislation that affects the lives of rural and traditional communities. The process needs to be stalled until the critical issues are addressed through more meaningful engagement with these communities. The format of engagement by the state has perpetuated the exclusion of many communities who are deeply aware of the problems associated with the existing legislation and now with the attempt to amend the legislation to adjust to timeframes that the existing Act wishes to impose on peoples whose existential challenges are not met through the legislation. This approach will leave a legacy of a sense of deep betrayal by a state that purports to operate democratically. It seems the system serves only a certain component of those who choose to continue to be recognised as traditional communities, without engaging the distinctions between and amongst these

[5] Custom Contested. Notes on the Traditional and Khoi-San Leadership Bill [B 23–2015] – October 2015

communities. Every opportunity to formally recognise and to halt a process that will inevitably set up future problems, should be embraced, as the Cobuqua have continuously demonstrated by the efforts to participate, However, the failure of the state to engage in creative policy-making in respect of the still-unaddressed land restitution issues of most of these communities, represents a failure of policy-making and an attempt to include all communities in an overarching system of rural governance, that does not address the existential needs and aspirations of the majority of Khoi-San communities.

Every opportunity to bring these fundamental flaws to light, must be embraced in the interest of satisfactorily redressing the differential impacts of colonialism and apartheid on the different peoples of our country. The Cobuqua community implore the state to use the opportunity to “go back to the drawing board” to use the current debates to promote the meaningful recognition of indigenous communities in South Africa and to protect their fundamental human rights as detailed in international law that applies to indigenous communities.