

BACKGROUND

The Traditional and Khoi-San Leadership Bill ('TKLB') was made available to the public in September 2015. The national Department of Traditional Affairs published a notice in the *Government Gazette* on 18 September 2015, saying that the Minister of Cooperative Governance and Traditional Affairs would introduce the Bill in Parliament. On 23 September 2015, Parliament announced that the Bill had been introduced by the Minister and said that the Bill was referred to the Portfolio Committee on Cooperative Governance and Traditional Affairs.

The TKLB has been given an official number, namely B 23–2015, and interested persons will soon be invited to submit comments on the Bill. A full public participation process can be expected in Parliament, with opportunities for people to send in written submissions and attend public hearings. The National Assembly, National Council of Provinces and provincial legislatures are all required to provide the public with a chance to have their say on the Bill.

This Bill follows on another draft Bill, called the Traditional Affairs Bill, which was published by the Department of Traditional Affairs for comments in 2013. The Department made some adjustments to the wording of the 2013 Traditional Affairs Bill and changed its name to the Traditional and Khoi-San Leadership Bill. However, many of the concerns that were raised about the Traditional Affairs Bill are still relevant to the TKLB. In order to prepare for public participation opportunities provided by Parliament, it is important to be aware of certain aspects of the TKLB that have a negative impact on democracy, particularly for people living in the former homelands. The aim of this document is to discuss some of these aspects of the TKLB and the concerns that they raise.

THE PURPOSE OF THE BILL

Although there are already laws on traditional leadership in South Africa, the Traditional Affairs Department has said that this new law is needed for two main reasons:

- to put the various traditional leadership laws that currently exist into a single law, while at the same time solving problems that exist in the current laws, and
- to provide recognition to Khoi-San communities, leaders and councils – since this recognition has been absent until now.

However, there are concerns that government has other motivations for creating the TKLB. These include an attempt to head off the kind of opposition that saw the closely related Communal Land Rights Act struck

down by the Constitutional Court, and resulted in Parliament being unable to pass the Traditional Courts Bill. In addition, there has been such widespread failure to meet the few protections contained in the Traditional Leadership and Governance Framework Act 41 of 2003 ('Framework Act') that many traditional councils are not validly constituted. The TKLB does not address government's failure to transform traditional institutions as required by law. It uses the same mechanisms as the Framework Act for trying to achieve transformation, except this time the consequences of non-compliance are weakened. A close reading of the TKLB is required to ensure that the types of unaccountable and centralised powers enjoyed by traditional leaders under apartheid are not being revived through the Bill's provisions.

KEY FEATURES OF THE TRADITIONAL AND KHOI-SAN LEADERSHIP BILL

1. Keeps the boundaries of the 1951 Bantu Authorities Act

In 2003 Parliament passed the Traditional Leadership and Governance Framework Act ('Framework Act'). This Act recognised 'tribes' created in terms of the Native Administration Act of 1927 as current 'traditional communities'. It also recognised 'tribal authorities' created in terms of the Bantu Authorities Act of 1951 as 'traditional councils'. The sum of the tribal authority boundaries made up the Bantustans under apartheid. The TKLB has used these controversial boundaries to define the area where the Bill will operate. This means that, in effect, except for the provisions about Khoi-San groups and leaders, this Bill applies only to people who live in the former Bantustans.

The popular saying 'kgosi ke kgosi ka morafe' or 'inkosi yinkosi ngabantu' shows that traditional leaders are supposed to gain their authority and legitimacy from the people they lead. Because of its reliance on the Framework Act boundaries, the TKLB starts with the opposite idea that traditional leaders' authority is based on territory, rather than on people. The implication is that everyone within the former Bantustans is subject to a traditional leader as per the apartheid laws. The TKLB goes so far as to specify that in order for a traditional community to gain recognition, it must first have a senior traditional leader. Traditional leaders are put at the centre of a traditional community's customary law identity. The TKLB's assumption is therefore that traditional leaders create traditional communities, contrary to customary law which states that traditional leaders exist because of traditional communities.

These imposed, apartheid-constructed boundaries undermine the consensual nature of the relationship between traditional leaders and the people that they govern. The boundaries do this by removing traditional leaders' accountability to the people. Because traditional leaders are recognised and paid by the government, they become accountable more to government than to the people that they serve. This is particularly a problem in cases where the content of customary law is contested between traditional leaders and ordinary people. Some traditional leaders commit abuses against people or are involved in corrupt practices, and try to justify their actions in the name of customary law. By allowing for the broad allocation of roles to traditional leaders, the TKLB could enable traditional leaders to enforce these controversial versions of customary law. These versions of customary law then favour traditional leaders' interests above people's customary entitlements.

2. Imposes identities

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 people. These categories ignore the reality that rural areas are not made up of neat, separate 'tribes'. Instead, in many places people from different backgrounds live together, but were labelled 'tribes' under apartheid. This top-down understanding of identity ignores that tribes and tribal authorities were created under apartheid through forced removals, land dispossession, and the imposition of compliant traditional leaders and governance structures.

In many places people dispute official tribal boundaries, or some people do not identify themselves with the traditional community or traditional leader that they have been assigned to. In other places people who are independent landowners are forced under traditional leaders who were imposed during apartheid. Thus, distortions created under apartheid are reinforced by the TKLB. The boundaries do not allow people to 'opt-out' from the traditional council or the traditional leader that they have been placed under, or reconstitute their identities and groups as they choose.

3. Re-entrenches tribalism and divided citizenship

In 1994, when apartheid was defeated after major anti-Bantustan rebellions, South Africans were promised equal rights in a unified country. The unequal legal system that oppressed black people was replaced by the Constitution, and the full rights and protections of citizenship were expanded to all South Africans. Yet the TKLB takes us back to the 'tribal' classifications of the apartheid-era, and entrenches stark legal divisions between the former Bantustans and the rest of South Africa. After 20 years of democracy, the TKLB proposes a separate legal system for the poorest South Africans – those living within the boundaries of the Bantustans. This mimics the governance frameworks that past administrations used to divide, control and exploit people. The adoption of rigid, colonially-constructed tribal identities not only starts from a flawed position, but freezes this position in time. It denies people who live within the former homelands the rights enjoyed by citizens in the rest of the country to practice the culture of their choice. This reliance on pre-democratic identity categories contradicts the consensual nature of customary law, including definitions of custom put forward by the Constitutional Court.

4. Attempts to side-step the failure of the Framework Act's existing transformative mechanisms

The Framework Act includes two primary mechanisms to transform all old apartheid and colonial traditional leadership structures in line with democratic values. Parliament justified retaining discredited institutions on the basis that provisions of the law would force these institutions to transform. The first mechanism was that traditional councils had to include 40% elected members and one third women by a certain deadline. The second mechanism was the Commission on Traditional Leadership Disputes and Claims (popularly known as the Nhlapo Commission). This Commission had to assess claims stating that in some areas illegitimate persons were holding official traditional leadership positions, or that legitimate positions had been undermined by the colonial and apartheid governments.

Yet, both of these mechanisms have failed to achieve broad democratic transformation of traditional leadership structures. Most provinces have failed to hold proper traditional council elections, while in Limpopo there have been no elections at all. Provinces have failed to meet the deadlines set for transformation in the Framework Act and many traditional councils still do not include one third women

members. The Disputes and Claims Commission has been unable to deal with the enormous volume of cases brought to it, and provincial committees have been set up to distribute the load. Meanwhile, those cases that have been dealt with by the Commission are being challenged in court. For example, in June 2013, the Constitutional Court said that the dethronement of an amaMpondo king based on a decision by the Commission had no legal effect.

Against this background, in clause 70 the TKLB gives recognition to both: (a) traditional institutions as they existed in 2004 before the Framework Act, and also (b) any institutions that have been developed under the Framework Act after 2004. Since the wording of the provision is quite confusing, it is unclear how this recognition will be implemented in practice. What is important to note is that exactly the same transformation mechanisms are kept in place for traditional institutions, even though these have proven to be unsuccessful under the Framework Act. A new mechanism for reviewing the status of all existing headmen within three years after the TKLB becomes law is also created. Furthermore the TKLB removes the protection in the Framework Act that resulted in old tribal authorities having a vulnerable legal status when they failed to meet the election and gender composition requirements. Although the TKLB still says that compliance with the composition requirements is mandatory, there is no real consequence for traditional councils who fail to meet the requirements in time. All that the TKLB says is that the Minister of Traditional Affairs can intervene to make sure that traditional councils obtain the correct number of elected and women members.

5. Provides for discretionary allocation of roles to traditional structures

The Framework Act allows national or provincial government to give roles to traditional leaders or traditional councils in section 20. This resulted in laws based on rigid colonial and apartheid understandings of customary law being introduced in Parliament, such as the Communal Land Rights Act 11 of 2004 (CLRA) and Traditional Courts Bill (TCB). Government has been unable to implement these laws because people opposed them in court, Parliament and in the media.

The TKLB also allows roles to be given to traditional leaders and councils (clause 25), but gives government departments even more scope than in the Framework Act to do so. The TKLB does not provide guidelines on what roles can be given or how this should be done. Instead, the TKLB says roles can be given to traditional structures that deal with any of government's functions (for example, health, housing, agriculture and education), and it is up to a government department to decide the process. There is the possibility that roles could be given through opaque administrative decisions – called 'delegations' – as opposed to public laws like the CLRA and TCB. This would be very difficult for people to challenge and could result in different traditional leaders having different roles across the country at the discretion of departments. The TKLB also does not make it clear what the relationship will be between elected local government and traditional structures if these roles are given to them.

This is questionable in light of the Constitutional Court's finding in 1996 that the Constitution does not provide traditional structures with governmental powers and functions. The Constitution also says that traditional leadership can only be recognised as it exists in customary law and always remains subject to the Constitution. If the TKLB is an attempt to give some of government's powers and functions to traditional leaders and councils, then it is a dangerous and unconstitutional proposal. It could have the effect of creating a fourth tier of government, despite the Constitution's provision for only three tiers.

The latest version of the TKLB introduced in Parliament includes a condition that tries to prevent an unconstitutional scenario where traditional institutions take over elected government's place in the former Bantustan areas. It tries to do this by saying that although traditional structures can be given roles, those

roles must not include any 'decision-making power'. However, it is difficult to understand how traditional institutions will be able to perform the roles that they have been given by government without making at least some small decisions along the way. The TKLB's wording also does not say how government is going to monitor that traditional structures are not making decisions that should actually be made by government. Finally, by leaving the scope of roles so vague, in practice this clause in the TKLB is open to misinterpretation and abuse by some traditional authorities in practice – making government's attempt to impose a limit on their power meaningless.

6. Closes down spaces for community consultation

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. The Constitutional Court has said that in South Africa this requires more than just voting for a political party every five years. Instead, South Africa's democracy relies on the participation of people in all political processes and decisions that will affect them – the voice of the people must be heard. To be democratic, these processes must also be open to the public and people must be aware of how the processes are going ahead. If a political process or decision leads to some kind of harm, then those responsible must answer to their mistakes.

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. Traditional councils and leaders must be accountable to their people if they make mistakes or act against the interests of people in traditional communities.

In contrast, the TKLB excludes ordinary people from being consulted on decisions that will affect them. This includes some decisions about which groups or sub-groups of people should be recognised, who should be recognised as traditional leaders and how many members there should be in traditional councils. Often, the TKLB does not even provide for ordinary people living in traditional communities to be notified of decisions that have been taken that will affect them. Instead, the TKLB highlights consultation with powerful elites such as the Houses of Traditional Leaders, royal families and traditional councils. The TKLB therefore goes against the values of public participation in both the Constitution and customary law and privileges the voices of those people or groups who already have an advantage in rural and traditional politics.

7. Supports rural elite's access to wealth and resources

In many parts of the former homelands valuable minerals have been, and are currently still being, discovered. In several cases, this discovery of minerals has generated disputes around the management of revenue from mining, the environmental impacts of mining, and the accountability of traditional leaders to the people on whose land the mining is taking place. Cases have been reported around the country of traditional leaders making decisions regarding mining that do not reflect the wishes of the community. In these contexts mechanisms that hold leaders accountable to their people are crucial. Many people have been excluded from decision-making roles by traditional leaders acting as the sole community representatives on the boards of mining companies. In the North West, where people have challenged traditional leaders making unilateral decisions around mining, they have often faced court orders punishing them with payment of the substantial costs of their court challenges.

The TKLB will worsen these disputes as it allows traditional councils to enter into deals with municipalities, government departments and “any other person, body or institution,” without consulting or attaining the approval of the community (Clause 24). Furthermore TKLB has the potential to worsen cases of abuse by traditional leaders by allowing them to be allocated roles that are difficult for community members to trace. This top-down approach to traditional leadership greatly impacts the access of ordinary people to land, resources and basic services.

8. Strays from Constitution’s understanding of customary law

Section 211(1) of the Constitution recognises traditional leaders ‘according to customary law’. While the Constitutional Court has interpreted customary law to be ‘living law’ that adapts and develops in practice, laws such as the Framework Act, CLRA, TCB and now TKLB take us backwards. This is because these laws use the colonial and apartheid governments’ understanding of customary law as a starting point.

The Constitutional Court has said that the Constitution does not protect this old official government version of customary law. Instead, the Constitution protects a dynamic ‘living’ version of customary law that also looks at the history and practice of people, not just what is written in old government laws and textbooks. Despite this understanding of customary law, the TKLB falls into the same trap that the Framework Act did by adopting the old official structure of traditional leadership and councils as a basic structure for today’s traditional governance systems.

While the Constitution allows Parliament to make laws that regulate customary law, Parliament has the responsibility to ensure that such laws do not undermine customary rights or go against the underlying nature of customary law as a ‘living’ source of law on its own terms. Parliament will therefore have to ensure that the TKLB does not entrench official versions of unaccountable traditional governance.

The Constitution’s recognition of customary law and the right to exercise culture is limited to expressions of custom and culture that are consistent with the Bill of Rights. Because the TKLB offers traditional leaders such far-ranging roles, it has the potential to conflict with rights guaranteed in the Bill of Rights, and therefore to deny constitutional protection. There are furthermore serious questions about whether you can have one system of law apply to 16 million people who live in the former homelands and not the rest of the country.

9. Treats African traditional and Khoi-San leaders differently in respect of jurisdiction

The TKLB makes an important distinction between Khoi-San leadership structures and other ‘traditional’ leadership structures. For the former Bantustans, the TKLB puts in place a hierarchy of traditional communities that occupy a geographical area over which traditional councils have jurisdiction and that are headed by traditional leaders. In other words, leaders and councils in the former Bantustans will have authority that is connected to a particular piece of land and whoever lives on it.

On the other hand, Khoi-San leaders and councils do not have authority that is connected to a particular piece of land – instead, their jurisdiction extends only over people who are considered part of the Khoi-San community. Khoi-San leaders and councils will have administrative seats based in one central location, not expanded areas of authority that go beyond an office. In contrast, in the former Bantustans, traditional leaders and councils do not only have authority at the traditional council office; the authority extends to all those living on the land included within the geographical jurisdictional boundaries derived from apartheid.

As stated earlier, the government has said that a new law like the TKLB is needed to include Khoi-San leadership institutions in the official South African legal system. Yet, the provisions of the TKLB make it clear that, in respect of jurisdiction, government is not giving Khoi-San leadership structures the *same* recognition. This is especially relevant in light of government's recent promises to Khoi-San groups that changes in the law will allow them to claim back land that was historically taken away from them.

It is important to note that the TKLB establishes a system of affiliation for Khoi-San communities, where membership is based on self-identification. To practically implement this, the TKLB requires Khoi-San community members to put their names, identity numbers and contact details on a list when applying for recognition as a community. While this rigid procedure may lead to problems, government has shown that it is possible to base customary community identity on affiliation rather than on territory. It is arguable that a similar system could be put in place for traditional communities in the former Bantustans. This would do away with the imposed apartheid and colonial tribal boundaries that currently form the basis for traditional governance under the Framework Act and TKLB.

10. Allows House of Traditional and Khoi-San Leaders to influence the making of government laws

The TKLB envisions that a National House of Traditional and Khoi-San Leaders will be given a special chance to make comments whenever Parliament is processing certain laws. The laws referred to are bills about customary law, customs or the powers and structure of local government.

According to the Constitution, Parliament, provincial legislatures and municipal councils are the primary law-making bodies in South Africa. While the House of Traditional and Khoi-San Leaders is likely to be a stakeholder in bills about customary law, customs and local government, it is questionable that the House is privileged with a special comments period above other stakeholders. The time period given to ordinary members of the public to submit comments on new bills is often short, while the House will be given 60 days in which to make comments. Furthermore, the TKLB seems to assume that traditional leaders are best-placed to answer questions about customary law. However, it has been recognised by the Constitutional Court that customary law is found in the everyday practice, values and history of ordinary people – not declared unilaterally by traditional leaders. The role of the House of Traditional and Khoi-San Leaders in making laws under the TKLB should therefore be further interrogated.

WHAT ACTIONS SHOULD BE TAKEN?

After TKLB was introduced in Parliament in September 2015 a joint committee of the National Assembly and the National Council of Provinces held stakeholder hearings in February 2016. A schedule of public hearings has also been released for September 2016 and interested persons will be able to submit their comments on the Bill to the National Assembly. The National Council of Provinces is also expected to conduct its own round of public hearings on the bill. Provincial legislatures are also likely to call for submissions on the Bill and hold extensive public hearings across the country. Individuals and organizations are encouraged to consider what impact the TKLB could have on their daily experiences and prepare submissions accordingly. This preparation is important because the timeframes for submitting comments to legislatures are usually quite short.