

HOW THE TRADITIONAL AND KHOI-SAN LEADERSHIP BILL LINKS TO TRADITIONAL COURTS

What was the Traditional Courts Bill?

- In 2008 and 2012 Parliament was processing a law called the Traditional Courts Bill (“TCB”) that tried to regulate the courts of chiefs (senior traditional leaders) and require them to transform according to the rights and values in the Constitution.
- However, there were many problems with the TCB and people from across the country rejected it. People said that the TCB denied rights because it would not protect women and other vulnerable groups from discrimination in traditional courts, banned legal representation even in criminal matters, and allowed forced labour or stripping of land rights as punishment.

How did the Framework Act link to the TCB?

- One big criticism about the TCB was that it linked to the 2003 Traditional Leadership and Governance Framework Act (“Framework Act”). The Framework Act revives the apartheid boundaries of tribes and tribal authorities from the 1951 Bantu Authorities Act that were used by the apartheid government to create the Bantustans (section 28).
- The TCB and the Framework Act worked together to provide one traditional court for every traditional community, previously called a “tribe” under apartheid. Each traditional court would be headed by a senior traditional leader, previously called a “chief”. And the court would have authority in the same geographical areas as traditional councils, previously called “tribal authorities”. There was no way for people living in these areas to opt out of the courts.
- People said that this would betray their struggles against apartheid and also go against their customs and laws. This is because during apartheid and colonialism people were moved from their land and forced to go under chiefs or tribes that they did not recognise. People said that the TCB would again divide South Africa into a country with two different legal systems for people in cities and people living in the former Bantustans.
- People pointed out all these problems to Parliament and attended public hearings to voice their concerns. As a result, the TCB could not get enough votes in the National Council of Provinces and it did not become law.

What effect will the new TKLB have on traditional courts?

- The Framework Act is still in operation as a law today, but now government wants to replace it with the Traditional and Khoi-San Leadership Bill of 2015 (“TKLB”).

- The Framework Act empowers government to give traditional leaders and traditional councils a role in the administration of justice (section 20). This is usually the role played by judges, magistrates, prosecutors, police officers and other government officials. Section 20 is what enabled government to draft the Traditional Courts Bill in the first place.
- The TKLB includes a similar provision that allows government to give traditional leaders and councils certain roles (clause 25). This provision would again empower government to draft a law like the Traditional Courts Bill. However, in the TKLB the wording of the provision is so vague that government could have wide discretion about what kinds of roles traditional leaders and councils can play when administering justice. There are legal questions about whether this complies with the structures and powers set up for government, parliament and the judiciary in the Constitution.
- There is also the possibility that instead of these roles being given through a law like the TCB, the roles are given through a process called delegation. Delegation is a method of handing over power and responsibility that can occur between two government officials. This means that unlike with the TCB, people will not be able to voice their concerns about roles that government wants to hand over to traditional leaders and councils.
- Like the Framework Act, the TKLB revives the previous tribes, tribal authorities and chiefs from apartheid and retains the geographical areas that formed the Bantustans (clause 70).
- If a new law on traditional courts links to the TKLB like the TCB linked to the Framework Act, then that new law will again be creating a separate justice system for people living in the former Bantustans.

Is there a new law on traditional courts? Does it have links to the TKLB?

- Although the TCB did not get passed by parliament, government is in the process of drafting a new law on traditional courts. Government has indicated that it hopes to introduce it as a bill in parliament before the end of the year. Government has also said that it is taking on board all of the criticisms that people raised against the old TCB.
- Since the bill is still being written, it is difficult to say exactly what the provisions will be. However, the latest versions include references to the same structures that are recognised in the Framework Act and TKLB, such as traditional leaders.
- There are also indications that the new law on traditional courts will also establish traditional courts for Khoi-San communities. The TKLB will be the first law in South Africa to recognise Khoi-San communities and leaders. This makes it clear that the new law on traditional courts will work together with the TKLB, like the TCB worked with the Framework Act.
- The Department of Cooperative Governance and Traditional Affairs, which is responsible for drafting the TKLB, is also providing extensive input to the Department of Justice and Correctional Services while it is drafting the new traditional courts law.

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