



STOP THE BANTUSTANS CAMPAIGN

Taking the Traditional and
Khoi-San Leadership Act 3
of 2019 to court





The TKLA is important because it gives statutory recognition to Khoi and San communities and leaders for the first time in South Africa.

Like its predecessor, the Framework Act, the TKLA recognises traditional institutions, communities and custom, which continue to be a significant part of the identity of millions of South Africans. The Act combines all legislation on traditional leadership. However, it also poses a great danger to rural democracy and land rights. The drafting of this Act and its predecessor offered an opportunity to democratize traditional leadership institutions and customary law, and cleanse them of colonial distortions. Unfortunately, that opportunity was squandered.



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STOP THE BANTUSTAN



**BILLS is a campaign
initiated by the
Alliance for Rural
Democracy
(ARD) in 2018.**

Among other things, the campaign alerted South Africans to the dangers of the Traditional and Khoi-San Leadership Act 3 of 2019 (TKLA). Some struggle veterans have stood in solidarity with the campaign's message. In June 2019, the ARD led over 1200 people, including rural citizens, in a march to the Union Buildings, asking President Ramaphosa not to make the TKLA law. This plea was ignored by the President! In April 2021, the TKLA became law.



Today..

- ◇ The campaign is supporting communities and organisations who are challenging the TKLA in court.
- ◇ They are saying that the TKLA does not meet the standards set by the Constitution and poses many dangers for rural citizens in the former Bantustans, as well as Khoi-San communities.
- ◇ However, this campaign is **NOT** opposed to the long overdue statutory recognition of Khoi and San heritage, communities and leaders.
- ◇ This campaign is also **NOT** opposed to customary law and traditional leadership. It seeks to ensure that the form of traditional leadership and customary law that is recognized in the legislation is accountable to the people, does not violate living custom and is rid of colonial distortions.



History and background of the TKLA

2015

- Traditional and Khoi-San Leadership Bill introduced to Parliament.

2016-2018

- Public participation conducted by the National Assembly and the Provincial Legislatures to gather feedback on the Bill.

NOVEMBER 2019

- President Ramaphosa signs the Bill into an Act – *The Traditional and Khoi-San Leadership Act 3 of 2019* (TKLA). This is the last step for making a new law.

DECEMBER 2020

- President Ramaphosa publishes the start date for the TKLA.

1 APRIL 2021

- The TKLA comes into effect and replaces previous traditional leadership laws like the Traditional Leadership and Governance Framework Act of 2003 (Framework Act).



**What is wrong
with the TKLA
for traditional
and Khoi-San
communities?**



1. Rural citizens may face dispossession of their land rights

Section 24 says that Traditional Councils can enter into deals, without requiring consent from the people whose land or other rights will be affected (see page 30).

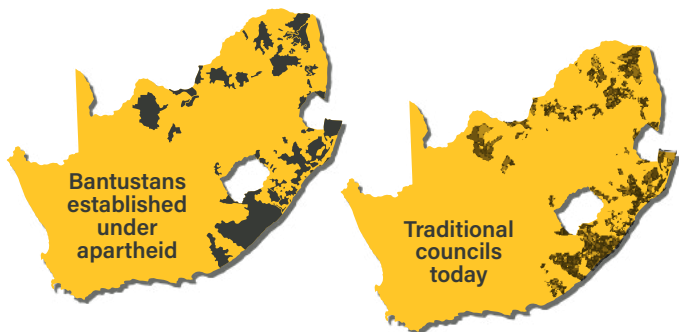
- ◇ People with customary and other 'informal' land rights are not protected, consulted or compensated, which undermines the requirements of the Interim Protection of Informal Land Rights Act of 1996 (IPILRA).
- ◇ IPILRA says that when people's land rights are taken away lawfully, they must be compensated.



2. Rural citizens are unable to hold traditional authorities accountable for how they use community money

The TKLA gives no effective tools for rural citizens to get information about how the traditional council is managing their money.

- ◇ All traditional community money from any source will now go into government-controlled bank accounts (See Section 23 of the Act on page 26). This model has been active in the North West for decades where it has led to massive losses of community funds.
 - » Many traditional communities have lost large amounts of money because of the actions of traditional councils, traditional leaders and provincial governments.
 - » In the North West, the Bakgatla ba Kgafela lost an estimated R5 billion (see the Baloyi Commission's report www.saflii.org/images/baloyi.pdf), while the Bapo ba Mogale lost R800 million (see the Public Protector's report www.customcontested.co.za/wp-content/uploads/2017/07/Bapo-Ba-Mogale-D-Account-Investigation-Report-002.pdf).
- ◇ Yet, the disastrous "D-account" finance model for traditional councils that only applied in the North West province, will now apply in all provinces.



3. Keeps colonial/apartheid structures and re-entrenches the Bantustan geography

These structures were created through forced removals with some people being forced to identify as one tribe or put under tribes and tribal authorities they did not identify with.

- ◇ Tribes are renamed Traditional communities.
- ◇ Tribal authorities are renamed Traditional councils.
- ◇ Boundaries of the traditional councils recreate former Bantustans (see maps above).
- ◇ Rural citizens remain locked under the same Bantustan areas that continue with the TKLA, being imposed with identities and autocratic versions of traditional leadership created by the colonial and apartheid governments.
- ◇ Much of the TKLA will only apply in these areas in South Africa.

4. Anti-democratic and entrenches colonial notions of customary law

The TKLA strays from the Constitutional Court's understanding of customary law as 'living law' that adapts and develops over time and is defined by people who practice it.

- ◇ The TKLA instead uses the official colonial and apartheid notion of customary law with a top-down approach that places traditional leaders at the top and communities at the bottom of the hierarchy.
- ◇ The few references to democracy that were in the Framework Act are taken away.
 - » All the decision-making rests with traditional councils, royal houses and government without any requirement of consent of the directly affected land rights holders and the community.
 - » Replaces the Code of Conduct for traditional councils with one almost identical to the Code of Conduct from the Municipal Systems Act that applies to elected officials, removing all references to "*community*" and "*democracy*".
 - » It replaces the duty upon traditional leaders and councillors to act "*in the best interest of the traditional community*" with the duty to act "*in the best interests of the ... council*".



- » The new Code of Conduct adds additional confidentiality provisions upon which traditional councils can rely to keep discussions and decisions about the common resources of the community secret.
- » The TKLA no longer requires traditional councils to disclose their records, financial statements and gifts and donations to their community, but now to the Premier.
- » It excludes or reduces participation of traditional communities in traditional governance.
- » It reduces mechanisms of transparency and accountability of traditional leadership; and
- » It introduces state-controlled banking for traditional communities – a model that has been shown to be open to corruption and abuse.

5. Side-steps the government's failure to transform traditional institutions

When the Constitution became law in South Africa, government recognised a need to merge traditional leadership institutions with democratic values – a process called ‘transformation’. This was because many people had lost faith in traditional leaders after the apartheid and colonial governments used them as tools for oppression in the past.

- ◇ The Framework Act provided for the transformation of tribal authorities into traditional councils through elections – requiring 40% of the members to be elected by the community and a third of members to be women.
- ◇ A Commission on Traditional Leadership Disputes and Claims was set up to investigate widespread disputes and claims about who should be in positions of traditional leadership.
- ◇ Both mechanisms have failed – in some provinces the elections were conducted improperly and after the cut-off date, while in Limpopo no elections were conducted.
- ◇ Many of the findings of the Commission have been challenged in court.
- ◇ The TKLA creates no effective mechanism to hold accountable tribal authorities that have not transformed. Instead it puts in place the same failed transformation mechanism.
- ◇ The Commission has been closed under the TKLA, while many disputes are still ongoing.



6. Creates a fourth tier of government

The Constitution provides for only elected government structures to hold governmental powers. That is important to ensure that South Africans can hold those in power to account through elections.

- ◇ However, Section 25 of the TKLA (see page 33) allows government departments to allocate the functions that they normally perform to traditional leaders and councils in the form of unclear 'roles'
- ◇ A similar provision in the Framework Act has resulted in traditional authorities taking on a wide range of powers that should belong to municipalities or other community structures.
 - » Issuing of proof of address letters, which people need to access critical services such as Identity Documents and opening bank accounts.
 - » Spatial Planning and Land Use Management Act 16 of 2013 land use decisions.
 - » Land allocation.
- ◇ Traditional leaders are not elected and therefore they should not hold governmental powers. If they abuse those powers, they cannot be held to account!

7. Treats Khoi-San communities differently

While Khoi-San leaders have jurisdiction over specific people only, with no connection to areas of land, traditional leaders have jurisdiction within a particular area and over all the people who live in that area.



Parliament is turning a deaf ear to rural voices

The Alliance for Rural Democracy (ARD) and rural citizens attended public hearings called by Parliament and rejected the Traditional and Khoi-San Leadership Bill.



The government marginalised rural citizens at the hearings.

- ◇ Problems with public participation processes included:
 - » late announcements of hearings;
 - » last minute venue changes;
 - » hearing venues being far from rural communities;
 - » no copies of the Bill at many hearings; and
 - » the Bill being available in English only.
- ◇ In many places the Bill was advertised as only affecting Khoi-San communities.
- ◇ Traditional leaders' voices dominated some hearings.



Going to court

The ARD is turning to the Constitutional Court on behalf of rural citizens whose constitutional and customary rights are in danger under the TKLA.

They argue that the TKLA undermines the very values that our Constitution is based on, which are also found in customary law. These values are democracy, accountability and freedom. The TKLA also threatens community rights to property, equality, freedom of association, administrative justice and the right to public and political participation.

ARD and rural citizens are opposed to parts of the TKLA that threaten their lives and land rights. They are concerned about the TKLA because they have seen the struggles and problems brought about by the Framework Act.

◇ Since the Framework Act has been in effect:

- » In Limpopo, traditional authorities have been able to obtain court interdicts to stop community members from holding meetings. This is even after the Constitutional Court declared this illegal in *Pilane vs Pilane* (2013).
- » Traditional authorities in Limpopo and parts of KwaZulu-Natal have been charging rural citizens levies. When rural citizens fail to pay these levies, they are denied proof of residence, which they need to open bank accounts and obtain Identity Documents. People are also denied burial sites and other services for failure to pay levies.
- » A community in Limpopo has been terrorised by a senior traditional leader who imposes his authority on them. When the community does not comply with the traditional leader's orders, he uses his private army called the "Green Berets". He has demolished structures built by people because they did not have his permission. The Green Berets are also used to assault, abduct and detain at the premises of the traditional council, any community members who resist the impositions of this traditional leader.



- ◇ The court case will set out the problems that occurred while Parliament and provincial legislatures were dealing with the TKLA and indicate why the process was unconstitutional – especially issues with getting feedback from the public.
- ◇ The case will also highlight some of the problems with the wording and sections in the TKLA.
- ◇ The ARD is in favour of Khoi and San recognition and stands in solidarity with the Khoi and San people who will also be negatively affected by the Act. Their land and democratic rights are also at risk.
- ◇ The ARD is also in favour of living customary law and accountable traditional leadership that gets its legitimacy from the people. The ARD will support a legislative framework that promotes that kind of traditional leadership and customary law.
- ◇ It is possible for government to recognise the Khoi and San people, traditional leadership and living customary law without threatening the rights of rural citizens.



Relevant Sections from the Traditional and Khoi-San Leadership Act 3 of 2019

Section 23

Support to kingship or queenship council, principal traditional council, traditional council, Khoi-San council and traditional sub-council

23. (1) The national government may and a provincial government must adopt such legislative or other measures as may be necessary to—

- (a) support and strengthen the capacity of kingship or queenship councils, principal traditional councils, traditional councils, Khoi-San councils and traditional sub-councils to fulfil its functions, and such support includes the provision of administrative and financial support; and
- (b) monitor and manage the finances of such councils: Provided that the Department must, subject to section 62, monitor the management of the finances of such council.

(2) The Premier of a province may, after consultation with a kingship or queenship council, principal traditional council, traditional council or Khoi-San council situated in the particular province—

- (a) determine the number and remuneration levels of posts needed to perform the administrative, financial and related duties relevant to the functions of the specific council;
- (b) determine any other conditions of service applicable to such posts; and

(c) appoint suitable persons in such posts in accordance with the recruitment procedures applicable to that provincial government or second officials from the provincial government to perform such duties.

(3) (a) For the purposes of subsection (1) a Premier must, in consultation with the relevant Provincial Treasury and subject to any legislative or other measures as contemplated in subsection (1), cause to be opened an account for each established council referred to in subsection (1) into which must be paid—

- (i) all voluntary contributions made by members of the relevant community;
- (ii) all moneys derived from any property owned or managed by such council;
- (iii) any financial donation made to such council by any person, body or institution;
- (iv) any moneys payable to the council in accordance with the provisions of a partnership or agreement as contemplated in section 24; and
- (v) any other moneys as may be determined or agreed to by the Premier.

(b) For the purposes of the management of any account referred to in paragraph (a), a Premier must, in consultation with the relevant Provincial Treasury and subject to paragraph (c) and any legislative or other measures as contemplated in subsection (1), determine—

- (i) the financial systems and controls applicable to such account;
- (ii) any conditions applicable to such account;
- (iii) the investment of any moneys by the council concerned; (iv) the payment of any expenditure by the council concerned;
- (v) the purposes for which any moneys in such account may be used by the relevant council;
- (vi) the closure of any other accounts, including a trust account but excluding a trust account as contemplated in section 10 of the Trust Property Control Act, 1988 (Act No. 57 of 1988), and the transfer of any moneys in such other account or trust account to the account contemplated in paragraph (a);
- (vii) the reporting requirements applicable to such account; and
- (viii) any other measures as may be deemed necessary by the Premier to ensure the efficient and effective management of such account, and may designate any official from the provincial government to assist the council concerned with the management of such account or to manage such account on behalf of the relevant council: Provided that for the purposes of subparagraphs (ii) to (vii) the Premier must consult the relevant council prior to making any determination as contemplated in those subparagraphs.

(c) The Minister must, in consultation with the Minister of Finance and after consultation with the Premiers, by notice in the Gazette determine the minimum standards to be complied with by a Premier for the purposes of paragraph (b)(i) to (vii).

(d) The financial year of any council contemplated in this section must be aligned to the financial year of the provincial department responsible for providing financial support to such council.

(4) (a) The provincial government of a province where a branch of a Khoi-San community has been recognised must adopt such legislative or other measures as may be necessary to provide administrative support to such branch: Provided that if a branch is situated in a province other than the province where the Khoi-San council has been recognised, the Premier of the province where the branch is situated must first consult the Premier of the province where the Khoi-San council is situated to ensure uniformity in the provisioning of such administrative support.

(b) The provincial government of a province where a branch of a Khoi-San community has been recognised is responsible for the financial expenditure in relation to the attendance of Khoi-San council meetings by the relevant branch head.

Section 24

Partnerships and agreements

24. (1) The national government and provincial governments may, through legislative or other measures, regulate partnerships and agreements as contemplated in this section.

(2) Kingship or queenship councils, principal traditional councils, traditional councils, Khoi-San councils and traditional sub-councils may enter into partnerships and agreements with each other, and with—

- (a) municipalities;
- (b) government departments; and
- (c) any other person, body or institution.

(3) Any partnership or agreement entered by any of the councils contemplated in subsection (2) must be in writing and, notwithstanding the provisions of any other law, —

- (a) must be beneficial to the community represented by such council.
- (b) must, in addition to any other provisions, contain clear provisions on the responsibilities of each party and the termination of such partnership or agreement;
- (c) is subject to—
 - (i) a prior consultation with the relevant community represented by such 45 council;

- (ii) a decision in support of the partnership or agreement taken by a majority of the community members present at the consultation contemplated in subparagraph (i); and
- (iii) a prior decision of such council indicating in writing the support of the 50 council for the particular partnership or agreement;

(d) is subject to ratification by the Premier of the province in which the relevant council is situated and will have no effect until such ratification has been obtained; and

(e) may not bind the state or any person, body or institution who is not a party to 55 such partnership or agreement.

(4) Any partnership or agreement contemplated in subsection (2) must—

(a) be based on the principles of mutual respect and recognition of the status and roles of the respective parties; and

(b) be guided by and based on the principles of co-operative governance.

(5) Any council contemplated in subsection (2), may enter into a service delivery agreement with a municipality in accordance with the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), and any other applicable legislation.

(6) A Premier must—

(a) monitor all partnerships and agreements as contemplated in this section and may take the necessary steps to ensure the effective and efficient implementation or termination thereof.

(b) provide the Minister with copies of all partnerships or agreements contemplated in subsection (3)(d) which copies must be kept by the Department in an appropriate database; and

(c) review all partnerships and agreements as contemplated in section 63(22).

(7) (a) A Premier, when considering the ratification of any partnership or agreement as contemplated in subsection (3)(d), must be satisfied that the provisions of subsection (3)(a), (b), (c) and (e) have been complied with

(b) If a Premier is of the opinion that a partnership or agreement does not comply with the provisions of subsection (3)(a), (b), (c) or (e), the Premier must refer such partnership or agreement to the parties who entered into such partnership or agreement, together with his or her reasons for not ratifying the partnership or agreement, and request them to rectify any shortcomings as referred to in his or her reasons.

Section 25

Allocation of roles to kingship or queenship council, principal traditional council, traditional council, Khoi-San council, traditional sub-council and traditional and Khoi-San leaders

25. (1) A department within the national or provincial sphere of government, as the case may be, may, through legislative or other measures provide a role for a kingship or queenship council, principal traditional council, traditional council, Khoi-San council, traditional sub-council and traditional and Khoi-San leaders in respect of any functional area of such department: Provided that such a role may not include any decision-making power.

(2) (a) The process and procedure to be followed for the provision of a role contemplated in subsection (1) to any of the councils or leaders contemplated in that subsection, as well as the extent thereof, and the conditions and resources attached to any such provision, may, subject to paragraph (b), be determined by the department concerned.

(b) Before a department makes provision for a role as contemplated in subsection (1), such department must—

(i) in the case of a national department, obtain the concurrence of the Minister and consult with the National House; and

(ii) in the case of a provincial department, obtain the concurrence of the member of the Executive Council responsible for traditional affairs of the relevant province and consult with the relevant provincial and local houses.

(3) Where a department has made provision for a role for any council or leader contemplated in subsection (1), such department must monitor the execution of the role and ensure that—

(a) the execution of the role is consistent with the Constitution and any other relevant law; and

(b) the role is being executed efficiently and effectively.

(4) Where any of the councils or leaders contemplated in subsection (1) does not execute a role as envisaged in subsection (3), such role or any resources provided to such a council or leader to perform that role may be withdrawn by the department concerned: 50 Provided that before any such withdrawal, the relevant department must first establish the reasons for the non-execution of the relevant role and, where necessary, capacitate such councils or leaders to enable them to execute the role.

(5) (a) When a national or provincial department has made provision for a role as contemplated in subsection (1), such department must inform the Department of—

(i) the extent thereof;

(ii) the conditions and resources attached thereto; and

(iii) the name of the relevant council or leader.

(b) When a national or provincial department withdraws a role or resources as contemplated in subsection (4), such department must inform the Department of the reasons for such withdrawal.

(c) The Department must keep proper records of the information contemplated in paragraphs (a) and (b).

(6) The allocation or withdrawal of a role as contemplated in this section must be published for noting in the Gazette or Provincial Gazette, as the case may be, by the relevant department.

Section 63. (3), (4), (21) and (22)

Transitional arrangements

63 (3) Any “tribe” that, immediately before 24 September 2004, had been established in terms of applicable legislation and was still recognised as such, is deemed to be a traditional community contemplated in section 3 of this Act, subject to—

- (a) the withdrawal of its recognition in accordance with the provisions of section 4; or
- (b) a recommendation of the CTLDC, where applicable.

(4) (a) A tribal authority that, immediately before 24 September 2004, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 16 of this Act and must perform the functions referred to in section 20: Provided that such a tribal authority must be reconstituted to comply with the provisions of section 16(2) within two years from the date of commencement of this Act.

- (b) If, prior to the commencement of this Act, any tribal authority was reconstituted as contemplated in paragraph (a), but such reconstitution did not comply with all the requirements of section 16(2), such tribal authority is deemed to be a traditional council and must, within two years of the commencement of this Act, be reconstituted in full compliance with the provisions of section 16(2).

(c) If the timeframes contemplated in paragraph (a) or (b) are not met, the Minister may, within one year after the timeframes have lapsed and after consultation with the relevant Premier, apply the provisions of section 16(2) to ensure that such tribal authority or traditional council is constituted or reconstituted in accordance with the provisions of section 16(2).

(d) The provisions of section 16(5) apply to any constitution or reconstitution contemplated in this subsection.

(21) In any instance where the area of jurisdiction of a traditional council or traditional sub-council has been defined in terms of national or provincial legislation prior to the commencement of this Act, a Premier must, within three years of the commencement of this Act, or such further period as the Minister may determine, have such areas of jurisdiction mapped and publish such maps by notice in the relevant Provincial Gazette.

(22) (a) Any partnership or agreement entered into by a kingship or queenship council, principal traditional council, traditional council or traditional sub-council prior to the commencement of this Act, must, within three years from such commencement, be reviewed by the relevant Premier to determine whether such partnership or agreement meets the requirements of section 24(3)(a), (b), (c), (e) and (4).

(b) If a Premier is of the opinion that a partnership

or agreement contemplated in paragraph (a) does not meet such requirements, the Premier must refer such partnership or agreement to the parties who entered into such partnership or agreement and request them to either amend or re-enter into such partnership or agreement to ensure compliance with section 24(3)(a), (b), (c), (e) and (4), or to cancel such partnership or agreement.

(c) The provisions of section 24(6) apply to partnerships and agreements contemplated in this subsection.

(d) The provisions of this subsection do not apply to any partnership or agreement which, at the commencement of this Act, has been entered into in accordance with any enabling provisions of any other law.

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