The Legal Framework Governing Traditional Leaders' Role in Land Use Planning in South Africa

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Abstract

This article investigates the legal framework governing the role of traditional leaders in land use planning, through a historical gaze at the nature and authority of traditional leadership in South Africa. It is through this brief historical discussion that the influence of colonial and apartheid concepts of traditional leadership, as concretised in legislation, comes to the fore. This then creates a basis from which the *Traditional and Khoisan Leadership Act* 3 of 2019 and the *Spatial Planning and Land Use Management Act* 16 of 2013 are explored.

Keywords

SPLUMA; traditional leadership; land use; spatial planning; equality.

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1 Introduction

Twenty-nine years after the demise of formal apartheid South Africa is still in the process of addressing spatial equality. Part of this process included the promulgation of the *Spatial Planning and Land Use Management Act* 16 of 2013 (hereafter SPLUMA) to provide a unified approach to planning and land use management in all geographical areas in South Africa, and to bring planning legislation in line with the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) as to what sphere of government is responsible for planning. While municipal planning is a municipal power, traditional authorities have been given a role in planning law. This paper deals with what playing the role entails and how it fits into planning by looking at the current legislative framework on land use (in general) and traditional leadership.

The powers and functions of traditional leaders in local land-use decisions will be historically analysed and evaluated before specific land use decision-making powers will be considered. The most pertinent provisions of SPLUMA and the *Traditional and Khoisan Leadership Act* 3 of 2019 (hereafter TKLA), recently declared unconstitutional, will be discussed.[1]

* Elmien (WJ) du Plessis. BA (International Relations) LLB LLD (SU). Professor, Faculty of Law, North-West University, Potchefstroom Campus, South Africa. Email: elmien.duplessis@nwu.ac.za. ORCiD: https://orcid.org/0000-0002-9287-7445. I have learned many things from many Professors du Plessis, and this is also true from Prof Willemien du Plessis. With such a diverse interest and research field, it was difficult to decide the most appropriate research link between our interests. Land, customary law, history. That is where I ended up. I am sure that if I sent this piece to her for comment it would come back with many useful comments and spark many conversations. It did so for the generous reviewers, some of whom might still feel unsatisfied by the corrections I have made to the piece after their invaluable feedback. I am grateful for every academic that takes the time to review an article, and who takes the time to give constructive feedback in a collegial manner. This is certainly true of the anonymous reviewers for this piece. I regard the piece as an overview within the word limit, and by no means the final or even the penultimate view on this topic. For that reason, I have not incorporated all the reviewers' comments on the piece but have focussed on those that helped clarify the point I was trying to make.

1 After this article had been submitted for review the Constitutional Court in *Mogale v Speaker of the National Assembly* 2023 9 BCLR 1099 (CC) ruled that the Act was adopted in a manner that was inconsistent with the *Constitution of the Republic of South Africa*, 1996 (the Constitution). It thus made an order to declare it invalid, but the order of invalidity was suspended for 24 months to enable Parliament to re-enact the statute in a manner consistent with the Constitution. The legal position as set out in this paper will thus remain until 30 May 2025. It may remain the same after, depending on what the new legislation would provide.

This will lay the foundation for a critical evaluation of the role of traditional leaders in land use decision-making today.[2]

2 A brief historical overview of traditional leadership in South Africa

This section will look at how traditional leaders' powers and the systems of accountability developed (or not) over time. The ultimate aim is to understand what customary land use management might have looked like before the colonial and apartheid authorities governed South Africa.

2.1 The nature of the authority of a traditional leader

It is said that pre-colonial African societies had a kind of participatory democracy.[3] This stance should be qualified with reference to the specific time and the communities, however. While many devolved polities had community participation in decision-making on important matters that affected them (often through a general assembly comprising adult men),[4] later – with the clash between African, Boer and Portuguese forces, and the conditions of insecurity – communities became willing to give up this power in favour of more security.[5]

2.1.1 Early colonial times

To understand the role of traditional leaders in land use management, it is valuable to look at the historical dynamics that still impact on it today. Since this is not a detailed historical paper, the next paragraphs are an overview intended to lay the foundation for the discussion in terms of the current legislative framework.

Traditional leadership has a long history spanning back to probably around 300 AD.[6] It seems as if particular communities were defined by recognising particular traditional leaders (in colonial terms, referred to as "chiefs"). These leaders were often descendants of a particular lineage. While some community members, or subjects, belonged to related lineages, others did

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2 This paper will not dwell on the question of whether traditional leadership as an institution, and as an institution of governance, is still relevant in a democratic society. I accept for the purpose of this paper that the Constitution in s 212(1) recognises this institution, subject to the Constitution.

3 Du Plessis and Scheepers 2000 *PELJ* 23; Tlhoaele *Interface between Traditional Leadership* 20, 42; TARG 1999 *Koers* 297; Poncian and Mgaya 2015 *Int'l J Soc Sci Stud* 111.

4 Known as *kgotla, pitso* or *ibizo*. Rugege 2003 *LDD* 172. Also see Bikam and Chakwizira 2014 *IJHSS* 145.

5 Delius 2018 *JSAS* 11.

6 Delius 2018 *JSAS* 6.

not. In fact, some members arrived later and required permission to settle in the area. There is often not only one history of the origins of a group, probably due to the high levels of mobility generally centred on the availability of land.[7] Since the land was abundant, power and wealth did not lie in its accumulation but rather in a leader's ability to build large groups of followers by offering material and military security. In contrast, capricious and incompetent leaders lost followers.[8]

Noting the considerable movement between leaders is important, as it restrained their ability to abuse power.[9] It also means that control was not based on territorial boundaries but on affiliation with a particular leader. People living in a geographical area were sometimes under the authority of different traditional leaders. Likewise, with the movement of people between leadership, some households recognised and paid tribute to more than one leader.[10] Thus, the idea of a "tribe" as a culturally homogenous group with unambiguous political, social and geographical boundaries is more rooted in Eurocentric misconceptions and colonial manipulation than was the reality on the ground.[11] There were thus areas between traditional leaders where there were no forms of overarching political authority, and individual homesteads could run their own affairs.[12]

Homesteads had considerable power to make important decisions. At the lowest level of decision making was the family, where household heads had political authority and oversight over their residences and resources, the clan or village over the ward or village, and the chief over the community at large.[13]

Traditional leaders also relied heavily on their councils. These councils were expected to communicate the will of the people, and the chief was expected to consult with them before making important decisions.[14] The council was another level in the decision-making structure. The decision-making was more inclusive, involving each sphere. Most decisions were made locally.[15]

The above goes against the colonial understanding of succession to office, where clear rules were devised regarding who should become the traditional leader – usually the oldest son. Historical accounts of "chiefdoms" rather

7 Delius 2018 *JSAS* 3.
8 Delius 2018 *JSAS* 4.
9 Delius 2018 *JSAS* 4.
10 Delius 2018 *JSAS* 5; Krige 1937 *Bantu Studies* 325.
11 Delius 2018 *JSAS* 5.
12 Delius 2018 *JSAS* 5; Delius *The Land Belongs to Us* xi.
13 Mofokeng *et al African Customary Law in South Africa* para 13.2.1.
14 Mofokeng *et al African Customary Law in South Africa* para 13.2.1.
15 Mofokeng *et al African Customary Law in South Africa* para 13.2.1.

show it as being fragmented and reforming as factions gain power, sometimes becoming stronger, and at other times losing control over groups. However, officials later in the 19th century believed that succession disputes could better be dealt with by turning to rules and genealogies for guidance.[16] This was precisely what the Department of Native Affairs and later of Bantu Affairs busied itself with.[17]

Chiefs did not have unbridled power but were under pressure to rule fairly. The threat of the internal competition meant that they could easily be displaced if they were not accountable to followers. If they were not displaced, followers could easily align themselves with other traditional leaders.[18]

Councillors[19] played an important role in the appointment of a new leader.[20] The idea that rules determined succession was over simple and was based on colonial misperceptions and a specific idea of African customary law.[21] There was also no linear pattern of political evolution over the centuries – powerful states rose and collapsed. Often, powerful rulers relied on armies to defend their chiefdoms and thereby relied on the willingness of people to go to battle. Unpopular or incompetent chiefs thus might find recalcitrant subjects unwilling to do so.[22] In that sense, there were checks on power.[23]

All these relative uncertainties, the state of flux and the occasional threats to resources made leaders vulnerable and required flexibility between the different levels of leadership. This helped to ensure the establishment of consultation processes to gather the views of royals and commoners and gain support for initiatives.[24] The more divisive the issue, the greater the processes of consultation. This was important for the leaders to stay in power.[25]

2.1.2 Colonial and apartheid rule

16 Comaroff 1974 *JSAS* 45 onwards; Delius *The Land Belongs to Us* 4; Morton 2017 *JSAS* 699-714.
17 Delius 2018 *JSAS* 6.
18 Mofokeng *et al African Customary Law in South Africa* para 13.2.1.
19 Men highly regarded by their peers and drawn from the ruling lineage and subordinate groups. Delius 2018 *JSAS* 13.
20 Delius 2018 *JSAS* 8.
21 Delius 2018 *JSAS* 8.
22 Delius 2018 *JSAS* 10.
23 Later on, when standing regiments emerged, many leaders had more coercive powers with the loyalty of these fighters being vertically directed, to the greatest chief, rather than horizontally to local leaders. The Zulu Kingdom is one such example.
24 Delius 2018 *JSAS* 13.
25 Delius 2018 *JSAS* 13.

This hold on power was distorted during colonial and apartheid rule, where traditional leaders were allowed to preside over the day-to-day running of the community as government agents. This meant that accountability shifted from the people to the government. This also enabled the state to fire and appoint traditional leaders[26] to suit their agenda in the furtherance of colonial and apartheid policies. The traditional institutions were changed into tribal authorities, and power resided in these authorities as agents of the apartheid state, to rule the people and serve the government's interests. Access to land and labour, therefore, took place through these traditional authorities. This meant that if people believed their traditional leader no longer served their interests, they could no longer rely on traditional methods to keep the leaders accountable, and access to land and jobs was threatened. Since the leaders were no longer required to be accountable to the people, some became oppressive, thereby losing their legitimacy with the people.[27]

The imperial powers settling in the Cape and the colonial expansion created additional contestation, especially with respect to land and labour. The conflict led to a centralisation of power in African polities and increased militarisation to protect against additional threats of land occupation and deprivation.[28] Despite this, communities were dispersed around the country, with people living on various kinds of land: land held by the state, abandoned farmlands, and reserves (where taxes had to be paid).[29] The colonial government did not recognise traditional leaders' powers, which means that in some rural regions homesteads had relative autonomy to make their own decisions regarding land use. It was eventually the *Bantu Authorities Act* 68 of 1951 that led to the eviction of African families from white-owned land and sparked the revival of chiefly control.[30]

A development of the hierarchies of land rights accompanied the above – with European land rights being regarded as superior to African land rights. This was reflected in the 1883 Native Laws Commission that stated that

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26 Rugege 2003 *LDD* 173. This was done in terms of the *Black Administration Act* 38 of 1927 ss 2(7) and (8).

27 Rugege 2003 *LDD* 173.

28 Delius 2018 *JSAS* 14.

29 Those living on reserves were taxed more than those living on state or abandoned land. Reserves were also the least preferred as rent had to be paid in cash rather than labour, and "existing forms of social control and production could be maintained" here: Harries in Delius 2018 *JSAS* 15.

30 Delius 2018 *JSAS* 15. Of course, this followed on many other legislative instruments already enacted that enabled this, starting with the *Natives/Black Land Act* 27 of 1913 that put in place a system where black people were allocated land in scheduled areas, followed by the *Development Trust and Land Act* 18 of 1936 that extended the area.

land occupied by a tribe was theoretically regarded as the property of the paramount chief, holding the land in trust for the benefit of the community, and where the community held it in subordination to him.[31]

This, however, is only part of the picture. Some African families did not access land through a customary law system. Due to war, drought and economic changes, there was much mobility, with groups merging and splitting up and forming new communities. Land rights came from more localised kinship or residential groups, often with the permission of the subordinate leaders by the chief of the area. Families fleeing from war, for instance, separated from the larger groups and settled on land independently. If they settled on the land and established fields it became theirs. In settled communities the chief would grant particular areas of land to subordinate leaders. These leaders would grant the land to ward heads. Thus ward heads had the right to allocate land to household heads, according to the family's needs.[32] Once in the household, the land would be passed from generation to generation, either through allocation or marriage and death.[33] Once it had been so allocated it was unusual for a leader to reclaim it.[34]

Chieftainships were often established over people rather than over vacant land. The practice was to recognise the rights of groups and their relationship to land, once they had been taken over by new chieftaincies.[35] Chiefs who denied land access or tried to take away land ran the risk of losing the support of their followers. This was an accountability mechanism for the powers of the chiefs.[36]

The point is that communities were not static but rather dynamic. Households and local communities had considerable power.[37] This was changed by colonial rule, where chiefs were often used by the colonial power as instruments of control over land, people and labour. During Apartheid, this power flowed downwards from the Governor General (the Supreme Chief) to native administrators. The Supreme Chief had vast powers.[38] Succession was no longer through political processes but rather through officials who had a simplistic understanding of the rules of

31 Delius 2018 *JSAS* 16.
32 Delius 2018 *JSAS* 17; Beinart *Twentieth-Century South Africa* 18.
33 Delius 2018 *JSAS* 17; Delius *The Land Belongs to Us* 5.
34 Schapera *Handbook of Tswana Law* 196.
35 Delius 2018 *JSAS* 17.
36 Delius 2018 *JSAS* 18.
37 Williams *Famework for a Sustainable Land Use Management System* 65.
38 This included powers to control the land in their territory, including collecting tax, as well as administrative powers.

succession, drawing genealogies and seeking candidates that would do the colonial and apartheid government's bidding.[39] Chiefs were chiefs by state recognition, which was later captured in legislation.[40] These leaders had considerable powers – they made rules, executed the rules, and settled disputes while administrating the land and the people.[41] This is also true with regard to land use decisions.

2.1.3 The influence of legislation on land use management and traditional leaders

Land administration was greatly influenced by legislation, with planning beginning from the late 1800s.[42] The *Natives/Black Land Act* 27 of 1913 resulted in land being set aside for African occupation only. This was increased somewhat by the *Development Trust and Land Act* 18 of 1936 to release additional land to consolidate reserves. This Act provided that land occupation was in terms of a "permission to occupy" (hereafter PTO) system.[43] The Act permitted magistrates to grant permission if the tribal authority allocated the land – provided that it was no more than one residential unit with arable land and provided that the person to whom it was allocated was married in terms of customary law.[44] The idea was that these PTOs provided for secure rights. However, in reality PTO holders were vulnerable to government permission being withdrawn for reasons such as betterment plans, irrigation and other schemes. The traditional authorities played a crucial role in land allocation, especially after the 1951 *Bantu Authorities Act*.[45] This further showed that local chiefs were accountable to the Department of Native Affairs rather than their communities.[46]

This pattern of power was largely confirmed in the post-apartheid political dispensation. Traditional leadership remained top-down governance reliant on state recognition and simplistic rules based on genealogy. It was a far cry from the pre-colonial dynamic and competitive system, where unpopular

39 Delius 2018 *JSAS* 20; Koenane 2018 *Africa Review* 61.
40 Devenish "Development of Administrative and Political Control" 31-32.
41 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 83. Also see Koelble and LiPuma 2011 *Governance* 10 on the role of chiefs and access to job opportunities.
42 For a summary of the legislation, see Pienaar *Land Reform* 80-93.
43 See *Council for the Advancement of the South African Constitution v The Ingonyama Trust* 2021 8 BCLR 866 (KZP) para 37 for a historical overview of how this worked. Van Wyk *Planning Law* 3rd ed para 2.3.7 is also a great resource to consult in this regard.
44 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 85.
45 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 85.
46 Koelble and LiPuma 2011 *Governance* 10.

leaders could be removed and subjects had choices as to what leader, if any, they wanted to be ruled by.[47]

It is this system that is contained in the Constitution through legislation. The Constitution provides a framework in section 211 that recognises traditional leadership institutions, status and roles according to customary law. It is not clear if what is meant by the "role of traditional leadership in accordance with customary law" is pre-colonial leadership or leadership as distorted by colonialism and apartheid. However, as will be discussed below, the colonial and apartheid misunderstanding of pre-colonial leadership persists.[48]

While traditional leaders do not have specific powers in the Constitution, the legislature may pass laws to provide for the role of traditional leadership as an institution at a local level, and on matters that affect the local communities. It first did so in terms of the *Traditional Leadership and Governance Framework Act* 41 of 2003 (hereafter the TLGFA), now replaced by the TKLA. The latter will be explained after looking at traditional leaders' historical land use management functions under colonial and apartheid governments.

2.2 Historical overview of traditional leaders and land use decision-making

Most of the land communities lived on under traditional leadership before 1990 was unregistered and unsurveyed state land. This emanates from the *Glen Grey Act* 25 of 1894, introduced by then Governor of the Cape Colony, Cecil John Rhodes, which is generally seen as the foundation for segregation policies.[49] This Act restricted the jurisdiction of the traditional authority, replacing it with a governance system consisting of district councillors, with separate reserve areas under Rhodes's vision of what communal land tenure involved.[50] The idea was one of "one-man-one-lot", where the land was divided into four or five morgen, with a restriction on land alienation and the risk of losing the land if it was not occupied beneficially.[51]

In terms of the 1913 *Natives Land Act*, scheduled areas were envisioned for exclusive occupation by Africans.[52] African people were not legally

47 Delius 2018 *JSAS* 20.
48 Delius 2018 *JSAS* 8.
49 Nicholson 2006 *Fundamina* 186.
50 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 85.
51 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 85.
52 See Beinart and Delius 2014 *JSAS* 667, who make a convincing argument that the Act confirmed dispossession that happened in the decades before its enactment.

permitted to acquire land outside the scheduled areas. When these areas became overcrowded, the *Development Trust and Land Act*[53] was promulgated to acquire additional land to consolidate the reserves or so-called scheduled areas. In terms of the *Development Trust and Land Act*, land occupation was based on PTO systems.[54] This allowed the holder of the right to remain on the land until his death and to elect the person to whom the site could be allocated after his death. This right could be forfeited if the occupation was not taken up within a year or when there was no beneficial use for two years.[55]

This form of tenure, however, was very insecure. The PTO holders could be forcibly removed without consultation with the government if the nominal owner of the land deemed fit. This was the case with so-called betterment plans – development schemes for land that Black people occupied. Some houses were demolished without compensation or recourse to the law to implement betterment schemes. These PTOs were also not recognised as collateral by financial institutions.[56]

In terms of the regulations passed under the *Black Administration Act* 38 of 1927, tribal authorities or traditional leaders had a role to play in the allocation of arable land and residential lots in relation to areas set aside as "black areas". African people were required to get permission from the Bantu Affairs Commissioner for such allocation, and permission was granted after consultation with the tribal authority.[57]

With the promulgation of the *Black Authorities Act* 68 of 1951, traditional authorities started playing a more critical role in land allocation in the relevant areas.[58] Traditional authorities were involved in the construction and maintenance of roads, rural bridges and drains; the supply of water to

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The scheduled land would be determined by the Beaumont Commission, provided for in the Act.

53 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 85.

54 Section 4 of Proc 26 in GG 2334 of 7 February 1936 empowered the magistrate to grant permission "To any person domiciled in the district, who has been duly authorized thereto by the tribal authority, to occupy in a residential area for domestic purposes or in an arable area for agricultural purposes, a homestead allotment or an arable allotment, as the case may be." In terms of the Act, "not more than one homestead allotment and one arable allotment shall be allotted … to any Native, provided if such Native is living in customary union with more than one woman, one homestead and one arable allotment may be allotted for the purpose of each household."

55 See in this regard reg 51(2) read with reg 61 of Proc R188 in GG 2486 of 11 July 1969 made in terms of s 25(1) of the *Black Administration Act* 38 of 1927 read with ss 21(1) and 48(1) of the *Development Trust and Land Act* 18 of 1936.

56 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 85.

57 Proc R188 in GG 2486 of 11 July 1969 regs 19 and 49.

58 Section 4(1)(c) of the *Black Authorities Act* 68 of 1951.

rural communities; the establishment and maintenance of hospitals and clinics; and the improvement of farming afforestation and agricultural methods.[59] Land in these areas was owned by the state, and traditional authorities, operating through tribal authorities, played an important role in its administration. Their powers were not only administrative but also judicial and executive; traditional authorities ruled the communities with a clenched fist.[60]

In the early 1990s, before the end of apartheid, the National Party introduced a reform programme that upgraded land rights, redistribution and utilisation, by way of the publication of the *White Paper on Land Reform* of 1991.[61] The *Upgrading of Land Tenure Rights Act* 112 was introduced in 1991 to convert the PTOs to ownership.[62] Section 19 provides that "[a]ny tribe shall be capable of obtaining land in ownership and … of selling, exchanging, donating, letting, hypothecating and otherwise disposing of it", subject to certain restrictions.[63] There was also a possibility of obtaining title deeds on communal land, but this was criticised by the National Land Committee, which warned that there might be overlapping land rights in terms of customary law.[64] There was thus a dual system of land administration and land use management to deal with the different types of rights.

In this situation and in the transition years the leaders were given recognition in a constitution that embodied democratic principles in local government, as well as in relation to land. Land reform programmes aimed at communal land should be understood in this context.[65]

After 1994 the Department of Agriculture and Land Affairs divided land reform into three programmes: redistribution, tenure reform and restitution. In the 1997 *White Paper on Land Policy*[66] the Department recognised the

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59 Bikam and Chakwizira 2014 *IJHSS* 145.

60 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 85. Mamdani *Citizen and Subject* 23. These tribal authorities have been transformed into traditional councils governed under s 28(4) of the *Traditional Leadership and Governance Framework Act* 41 of 2003 (the TLGFA).

61 Republic of South Africa *White Paper on Land Reform.*

62 Pienaar "Living in the Shadow of Apartheid" 215-244.

63 Restrictions included that land might not be sold, exchanged, donated, let or allocated to any person that was not a member of the tribe unless there was consent from the court. The court could consent only subject to the relevant disposal authorised by tribal resolution, if it was not in conflict with the interests of other members of the community and if there was other property available for those residing on the land.

64 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 86.

65 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 86.

66 Department of Land Affairs *White Paper on South African Land Policy*.

unique character of customary law rights in the land. It argued that these rights should vest in the people as the rights holders, not in institutions such as local authorities or tribal authorities. It differentiated between group rights and individual or family rights. The argument was made that when the rights are held on a group basis, the right holders must have a choice about how land administration would manage the land and rights on a day-to-day basis. In doing so, the rights of all the community members must be protected, especially the right to democratic decision-making and equality.[67] The Minister made it clear in a meeting with the Congress of Traditional Leaders of South Africa that government cannot disregard the views of communities or individuals who have historical land rights that are registered as state-owned. Such actions would be regarded as unlawful.[68]

As has been shown, in early history a distinction was drawn between landownership and governance. Communities could decide how they owned the land, and they could make decisions about the land. This distinction gave power to communities.[69] During apartheid the administration of land rights was the state's function, as delegated to traditional authorities (and thus governance).[70] This changed to a large extent, however, with the introduction of legislation promulgated in the new constitutional dispensation. In what follows I first set out the powers of traditional leaders in terms of the TKLA before discussing their role in land use management under SPLUMA.

3 Traditional leadership under the *Traditional and Khoisan Leadership Act*

Sections 211[71] and 212[72] of the Constitution recognise the institution of traditional leadership and require that national government provide for a role

67 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 87.
68 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 87.
69 See para 2.1 above.
70 Ntsebeza 1999 *Comparative Studies of South Asia, Africa and the Middle East* 87.
71 Section 211 of the Constitution notes that:
"(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."
72 Section 212 of the Constitution notes that:
"(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

of traditional leadership as an institution functioning locally. The TLGFA was enacted to this effect and replaced in 2019 by the TKLA. Since many of the provisions of the TKLA are similar to those in the TLGFA, the former will be discussed first.

Section 2 of the TLGFA provides that a community could be recognised as traditional only if it were subject to a system of traditional leadership. Section 8 recognises specific traditional leadership positions, whether existing in customary law or not.[73] In section 1 each of these leaders was defined as a leader holding a position in a "traditional community". The implication is that a traditional community that did not have a traditional leader would not be recognised in terms of the Act.

The TKLA goes further by criminalising leadership assertions by those not officially recognised. Section 3(4) of the TKLA states that a community can be recognised as traditional only if it is subject to a system of traditional leadership. Section 7(1) again recognises specific traditional leadership positions.[74] Any contestation of traditional leadership is a criminal offence, in that any person not recognised as a traditional leader but purporting to be one "is guilty of an offence and liable upon conviction to a fine or imprisonment not exceeding three years".[75] It is thus difficult to challenge the authority of unpopular incumbents by alignment with other leaders. This confirms the colonial and apartheid distortion of customary law rather than reflecting the practice in societies before the distortion.

Section 211(1) of the Constitution further clarifies that the institution of traditional leadership is subject to it. The Constitution establishes a democratic society with three spheres of government: local, provincial and national. Section 212 states that national legislation may be passed to provide for traditional leadership as an institution on the local level concerning local communities. Such legislation, however, is still subject to the Constitution. Sections 5 and 20 of the TLGFA envisaged a quasi-governmental role for traditional leaders to give effect to this constitutional provision. Section 5 of the TLGFA provided for "partnerships" between

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders."

73 These were kingship or queenship, principal traditional leaders, senior traditional leaders and headmanship.

74 Similar to s 8 of the TLGFA.

75 Section 7(9) of the *Traditional and Khoisan Leadership Act* 3 of 2019 (the TKLA).

municipalities and traditional leaders. Section 20(1) further provides that national and provincial governments could provide a role for traditional leaders through legislative or other measures in respect of land administration and the management of natural resources, among other things.

Once again the TKLA goes further. In section 24 national and provincial governments may regulate partnerships and agreements as contemplated in that section. This includes traditional councils that may enter into partnerships with each other and municipalities.[76] These partnerships must be in writing and beneficial to the community represented by such a council. Such an agreement is subject to prior consultation with such a community and agreement by the majority of the community members present at the consultation.[77] This also includes entering into a service delivery agreement with a municipality.[78]

These are great powers on a local level that can have a profound impact on the lives of people living in rural communities, specifically with respect to land use. The TKLA also provides plenty of governmental and decision-making powers for traditional councils and excludes the participation of traditional communities in decisions regarding community resources that fall outside section 24(3)(c). It is also not clear that meetings can always ensure maximum participation.

The exercise of this power should be considered in the context of the whole Act. Unlike the TLGFA,[79] the TKLA does not refer to democratisation. Furthermore, the Code of Conduct of traditional councils is replaced with a code similar to the Code of Conduct from the *Municipal Systems Act* 32 of 2000. There are no references to community or democracy. Traditional leaders and traditional councillors must act in the council's best interest, not the community's interest, as the TLGFA required.[80] Thus, the traditional leaders sometimes have powers similar to those of municipal councils but are not accountable to the people they lead or to the communities who live on the land about which they can make decisions.

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76 Section 24(2) of the TKLA.

77 Section 24(3)(c) of the TKLA.

78 In accordance with the *Local Government: Municipal Systems Act* 32 of 2000. In s 5(10) the Act requires a partnership between the municipalities and the traditional leaders that promotes a cordial relationship based on mutual respect and a sharing of responsibility.

79 See the TLGFA Preamble and the Code of Conduct item 1(k).

80 TLGFA Code of Conduct item 1(e).

The TKLA makes limited calls for the transparency and accountability of traditional leaders and councils to the community in that the new Code of Conduct provides for confidentiality, in that council discussions and decisions about common resources are not required to be open. It also no longer has a requirement as in the TLGFA[81] for councils to disclose their records, financial statements, gifts and donations to the community. Instead, these must be disclosed to the Premier. There is also no obligation, as was the case with the TLGFA,[82] to give effect to the principles of public administration. Thus, where meetings of the municipal councils are open to the public by default and where members of the public have a right to access to all documents that served before a council, traditional councils do not have such openness and transparency.

4 The *Spatial Planning and Land Use Management Act*

During apartheid each province and some Black homeland had separate planning legislation.[83] Land use management systems applicable in white urban areas were absent from the rest of the country, especially in customary law areas under traditional leadership.[84]

After 1994 the challenge was to develop an integrated, overarching policy for spatial planning. Thus, the Constitution also provides the overarching framework for planning law. In this respect the Constitution assigns powers and functions to the different spheres of government.[85] Municipal powers[86] include municipal planning.[87]

The 1998 *White Paper on Local Government*[88] lays down the new paradigm in which this must happen, focussing on integrated development planning. From this *White Paper* emanated the *Municipal Structures Act* 117 of 1998 and the *Municipal Systems Act*. The latter made a spatial development

81 Section 4(2) of the TLGFA.
82 TLGFA Code of Conduct item 2(e).
83 Van Wyk *Planning Law* 2nd ed 27, 49. She lists various examples of the legislation from 49. During apartheid each province had their own planning ordinance.
84 Dubazane and Nel 2016 *Indilinga* 223.
85 Sections 155 and 156 of the Constitution.
86 Section 156 of the Constitution.
87 Schedule 4 Part B of the Constitution.
88 Department of Provincial and Local Government *White Paper on Local Government*.

framework[89] part of the integrated development plan,[90] but did not provide for comprehensive spatial and physical planning legislation. This was left to the 2001 *White Paper on Spatial Planning and Land Use Management*,[91] which proposes some aspects for a new spatial planning and land use management system.[92] Included are certain principles,[93] land use regulators,[94] integrated development plan-based local spatial planning,[95] uniform procedures for land development approvals,[96] and national spatial planning frameworks. A Spatial Planning and Land Use Management Bill emerged from this in different formats, until SPLUMA was promulgated.

SPLUMA[97] brought about several fundamental changes to spatial planning and land use[98] management.[99] Firstly, this Act gives municipalities and not the provincial government the sole mandate in planning (land development and land use management), which means municipalities are the authorities in the first instance.[100] Secondly, it establishes and determines the composition of municipal planning tribunals and appeal structures and sets out who can determine and make decisions on land development

89 A spatial development framework is a comprehensive plan that guides land use decisions and provides a framework for development in a specific area or region. It deals with various sectors – including economic, social and environmental – and promotes sustainable development according to Todes *et al* 2010 *Habitat International* 415.

90 An integrated development plan strategically guides the development of a municipality or local government area. It integrates various sectoral plans and promotes social and economic development, good governance and service delivery, according to Van Biljon "Imagining the Future Phuthaditjhaba" 172.

91 Department of Agriculture and Land Affairs *White Paper on Spatial Planning*.

92 Section 1 of *Spatial Planning and Land Use Management Act* 16 of 2013 (SPLUMA) defines this as "the system of regulating and managing land use and conferring land use rights through the use of scheme land development procedures".

93 Aimed at achieving sustainability, equality, efficiency, fairness and good governance in spatial planning and land use management, which must be adhered to by the planning authorities.

94 Mostly municipalities.

95 With the inclusion of the spatial development framework, creating a direct link with the land use management scheme.

96 This is for the whole country and includes alignment with important legislation such as environmental legislation.

97 Implemented nationally from 1 July 2015.

98 In terms of s 1 of SPLUMA "land use" is defined as "the purpose for which land is or may be used lawfully in terms of a land use scheme, existing scheme or in terms of any other authorization, permit or consent used by a competent authority, and includes any conditions related to such land use purposes".

99 Land use management (LUM) refers to the process of managing the use and development of land in a specific area or region. It involves the regulation of land use activities, such as zoning, subdivision and development control, to ensure consistency with overall development goals and objectives.

100 This was confirmed in *Johannesburg Metro v Gauteng Development Tribunal* 2010 9 BCLR 859 (CC).

applications.[101] Thirdly, it also develops a single and inclusive land use scheme for the entire municipal area (including land held in terms of customary law) with an emphasis on a municipally differentiated approach.[102] SPLUMA operates with the *Municipal Structures Act* and the *Municipal Systems Act*, which recognise traditional leaders as advisors to municipal councils.[103]

As explained, as first instance authorities, municipalities are responsible for land use management. The land use management systems involve the planning of new land development or managing change in the existing developed areas – such as the subdivision of land, the consolidation of land and land use change. It includes managing the density of the proposed land development. These land use management functions take place on a municipal level within the framework and standardised guidelines of SPLUMA.

In terms of SPLUMA municipalities can also make by-laws to make provision for matters dealt with in the Act and Regulations.[104] The ability to provide for matters dealt with in the Act and Regulations allows municipalities to consider how they will administer land not previously administered as part of land use management schemes and accommodate local conditions such as customs and customary practices.

Municipalities do so mainly through municipal planning tribunals. These tribunals are established in terms of chapter 6 of SPLUMA, and are responsible for the facilitation and enforcement of land use and development measures.[105] They must consider and approve municipal development applications and, since all land now falls under a municipality, this includes land administered by traditional authorities. Section 36 sets out the composition of the municipal planning tribunal, consisting of full-time officials employed by the municipality and persons not employed by the municipality but who have experience with spatial planning, land use management and land development. It does not say anything about the role of traditional leaders, councils or community members.

However, it does allow for the participation of traditional councils in planning matters, where such planning will have an impact on communities in areas

101 Sections 36 and 38 of SPLUMA.
102 Section 24 of SPLUMA. Also see Dubazane and Nel 2016 *Indilinga* 223.
103 Section 81 of the *Local Government: Municipal Structures Act* 117 of 1998 – a maximum of 20% of the number of councillors; Dubazane and Nel 2016 *Indilinga* 227.
104 GN R239 in GG 38594 of 18 March 2015 (SPLUMA Regulations).
105 In general, see Van Wyk *Planning Law* 2nd ed 175-183.

where traditional councils exist.[106] In terms of section 23(3) "a municipality, in the performance of its duties in terms of this Chapter [on land use management], must allow the participation of a traditional council".[107] In terms of the SLUMA Regulations, a service level agreement may be concluded with the municipality where the traditional council is located, and the traditional council may perform functions as agreed to in the service level agreement.[108] It may not, however, make a land development or land use decision. Without such an agreement the traditional council will be required to provide proof of land use allocation in terms of customary law.[109]

This brings us to the third point: SPLUMA envisions a single inclusive spatial planning and land use system. Land held in terms of customary law rules has not been subjected to land use management systems. This is also why SPLUMA was so important. It ensures that through land use management the whole country has equal rights concerning a healthy and safe environment.[110]

If one looks at the living customary law, being the customary law that is recognised and promoted by the Constitutional Court,[111] then the layered character of land administration is evident. Decision-making processes about land happen on different social organisational levels – family, household, clan, sub-village and village level.[112] The allocation of land also implies "land use rights". Land use includes activities such as the erection of a homestead, the cultivation of crops and the keeping of livestock. Different rights can be held in relation to the same parcel of land, and community members also often have access to various communal resources on the land, such as water, clay or thatching. The allocation of

106 Section 23(2) of SPLUMA and reg 19(1) and (2) of the SPLUMA Regulations.

107 This is subject to the *Local Government: Municipal Structures Act* 117 of 1998.

108 SPLUMA Regulations reg 19 states: "(1) A traditional council may conclude a service level agreement with the municipality in whose municipal area that traditional council is located, subject to the provisions of relevant national or provincial legislation, in terms of which the traditional council may perform such functions as agreed to in the service level agreement, provided that the traditional council may not make a land development or land use decision. (2) If a traditional council does not conclude a service level agreement with the municipality … that traditional council is responsible for providing proof of allocation of land in terms of the customary law applicable in the traditional area to the applicant of a land development and land use application in order for the applicant to submit it in accordance with the provisions of the Regulations."

109 SPLUMA Regulations reg 19(2).

110 Dubazane and Nel 2016 *Indilinga* 228.

111 *Mayelane v Ngwenyama* 2013 4 SA 415 (CC) para 43.

112 Claassens and Cousins *Land, Power and Custom* 129.

these rights is informed by indigenous knowledge and sometimes in the knowledge of formal town planning processes and procedures.[113]

In *Tongoane v National Minister for Agriculture and Land Affairs*[114] the court described the common features of customary land tenure as land use that requires different degrees of "control at different levels of socio-political organisation". Land use decisions, although not always legally binding on outsiders, happen on different levels of society, and members have the right to participate in decision-making on various levels as relevant. The term "communal tenure" is somewhat problematic in this context because there are often strong family and individual rights in residential and arable plots, while certain land rights are communal.

Likewise, in *Baleni v Minister of Mineral Resources*[115] the court stated that in terms of customary law, land accrues to persons by being members of a society and that land use decisions take place on a majoritarian basis. However, it is not just a majority vote; it requires a higher degree of consensus.[116] Similarly, in *Council for the Advancement of the South African Constitution v The Ingonyama Trust*[117] the court noted that in terms of customary law some land was not allocated to individuals. However, land used for residential and tillage purposes was allocated to individuals (using the term "individuals" loosely). Importantly, it also points out that as the nominal owner of land so held,[118] the Trust does not have an unfettered right to deal with such land. Land allotted to a family becomes the property of its members, and their involvement or consent is needed for any and every decision relating to it.[119] Pertinent from this case,[120] as was also evident from the historical discussion, is the substantial rights in property that families held. This family property is nested in institutional layers based on social relations and order, creating reciprocal rights and obligations that determine beneficial land use and access.[121] This has three implications.

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113 Dubazane and Nel 2016 *Indilinga* 228.

114 *Tongoane v National Minister for Agriculture and Land Affairs* 2010 8 BCLR 838 (GNP) para 29.

115 *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP).

116 *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP) para 10.

117 *Council for the Advancement of the South African Constitution v The Ingonyama Trust* 2021 8 BCLR 866 (KZP) para 80.

118 Unlike other areas in South Africa, the Ingonyama Trust holds land in trust in a large geographical area in KwaZulu-Natal. See Lynd 2021 *South African Historical Journal* 320; Luthuli *Roles and Functions of Traditional Leaders* 3.

119 *Council for the Advancement of the South African Constitution v The Ingonyama Trust* 2021 8 BCLR 866 (KZP) para 96.

120 *Council for the Advancement of the South African Constitution v The Ingonyama Trust* 2021 8 BCLR 866 (KZP) paras 98-102.

121 Williams *Famework for a Sustainable Land Use Management System* 68.

Firstly, that land ownership is not vested in any one person.[122] This has implications for a planning system that often relies on the input from owners indicated as such on a formal title deed. Secondly, these rights are secure in terms of customary law and cannot easily be taken away by traditional leaders. Land management therefore should reflect this. Thirdly, traditional leaders do not allocate land to families as set out in planning legislation and by-laws, and the boundaries are not clear-cut but often refer to natural landmarks.[123] Land rights are furthermore based on a social hierarchy – with families having authority over the cultivation and residence, the clan and lineage over grazing, hunting or redistribution, and at the bottom other cross-cutting functions relating to territorial expansion and defence.[124] This implies that multiple, layered authority exercises control over and the management of land. Colonial and apartheid models that form the basis for current land use management in South Africa are a poor fit.[125]

5 Conclusion

Land use management in some rural areas, as has been highlighted above, is subject to a dual system. In some instances traditional authorities allocate land, and in others the local authority is in charge. There is thus not, as SPLUMA requires, a uniform spatial planning and land use management system for the entire country. This is perhaps also not desirable, given the difference between the Western style ownership of land and the holding of land in terms of customary law briefly alluded to above. There thus seems a need for planning law to transform as well.[126]

When the focus falls on the service level agreements with municipalities, the question is whether these powers can legally be granted to the traditional councils. In terms of our Constitution traditional councils do not have governmental functions or powers. The *First Certification* case[127] stated that only the "institution, status and role" of traditional leaders are recognised, with no specific local government functions being allocated. This recognition is also subject to customary law. One should therefore be concerned about the possibility that largely unelected and sometimes still apartheid-inherited traditional councils will perform the municipality's land

122 Williams *Famework for a Sustainable Land Use Management System* 65.
123 Williams *Famework for a Sustainable Land Use Management System* 66.
124 Williams *Famework for a Sustainable Land Use Management System* 69; Okoth-Ogendo 1989 *Africa* 11.
125 Dubazane and Nel 2016 *Indilinga* 224.
126 Maluleke *Implications of SPLUMA* 2.
127 *Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 189.

use and management functions without proper guidance or oversight on how to do so in a manner that reflects the values of the Constitution.

Should the power to make decisions on land use and spatial planning rest with the people, traditional councils or local government? The question is who is best suited to look after the people's needs. More importantly, how do we ensure that the principles of democratic decision-making are respected when it comes to these decisions and engagements?

It seems as if SPLUMA's regulations empower the "traditional councils" to define custom, as land use must be approved "in terms of the customary law applicable in that traditional area".[128] This assumes that traditional councils or leaders determine customary law, and their particular interpretation or application of customary law does not need consent. This assumption in turn puts the decision of what land use is customary and what is not – which can influence land development – in the hands of traditional councils and leaders.[129]

This scenario does not reflect customary law, where decision-making occurs on various levels of the social organisation. It leaves people, especially marginalised groups, especially women, extremely vulnerable. The centralisation of power, with few mechanisms to hold the decision-makers accountable, is not only against customary law but also against the principle of democracy as contained in our Constitution, limited by land use systems, by-laws and the public participation requirement.

What should also be of concern is how to approach land use management where the systems were designed for demarcated parcels of individually owned land that might not be easily duplicated on communal land. Nevertheless, land use management is important for issues such as the provision of basic services, especially in disaster-prone areas. One could also question the suitability to local needs of the current land use systems.[130]

Problems surrounding traditional leadership will remain unresolved unless the roles, powers and functions of traditional authorities not only *vis-a-vis* local government but also concerning the communities themselves are demarcated, especially those pertaining to land. Without clear guidelines on how decisions should be made, specifically regarding community involvement, it is left to the traditional council to judge compliance with

128 SPLUMA Regulations reg 19.

129 Custom Contested date unknown http://www.customcontested.co.za/laws-and-policies/the-spatial-planning-and-land-use-management-act-SPLUMA.

130 Dubazane and Nel 2016 *Indilinga* 222-238.

customary law. The proposed powers of traditional councils to be involved in land allocation in the way that SPLUMA envisions, read with the TKLA, therefore distorts customary law.[131]

Historically the authority of a traditional leader was not so much territorial as it was governance related. At least as far as family property was concerned, the above historical exposé has shown that there was limited involvement on the part of the traditional leader. A leader who did not rule fairly stood to risk losing followers (who needed to compose armies for the community's protection). Some communities, though living in terms of customary law, did not necessarily follow a specific leader.

It is encouraging to see that the courts are trying to grapple with the nature of land rights and the power of decision-making over land. Regrettably, legislation keeps returning to the distorted blueprint of customary law. Perhaps the solution would be to ensure that legislation has mechanisms for communities to hold their leaders accountable, that the same principles of transparency in decision-making are applicable, and that where some of the local governance functions are delegated to traditional leaders, there are clear guidelines on how such a discretion must be exercised.

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List of Abbreviations

IJHSS	International Journal of Humanities and Social Science
Int'l J Soc Sci Stud	International Journal for Social Science Studies
JSAS	Journal of Southern African Studies
LDD	Law, Democracy and Development
LUM	land use management
PELJ	Potchefstroom Electronic Law Journal
PTO	permission to occupy
SPLUMA	Spatial Planning and Land Use Management Act 16 of 2013

TARG	Traditional Authorities Research Group
TKLA	Traditional and Khoisan Leadership Act 3 of 2019
TLGFA	Traditional Leadership and Governance Framework Act 41 of 2003