The problem with the Traditional and Khoi San Leadership Bill (TKLB) as illustrated by the Maledu Constitutional Court judgment

Getting beyond our fascination with corruption to focus on policies and laws that re-entrench structural inequality | November 2018

What is the TKLB?

The TKLB builds on previous bills such as the Communal Land Rights Bill of 2003, and the Traditional Courts Bill (TCB) of 2008 to re-entrench the power of traditional leaders throughout the former homelands. It gives traditional leaders and councils sole decision-making authority over the 17 million South Africans living within the tribal boundaries that make up the former homelands. These tribal boundaries were re-imposed by the Traditional Leadership and Governance Framework Act (TLGFA) of 2003.

The Traditional Courts Bill of 2012 was rejected by the National Council of Provinces, but the current Justice Portfolio Committee is arguing for its reinstatement. It would make it impossible for anyone living in a former homeland to 'opt-out' of being summonsed and tried by a traditional leader. The 2008 TCB also would have empowered traditional leaders to strip anyone living within their 'tribal' boundaries of customary rights, including land rights.

The TKLB purports to be about the recognition of Khoi and San communities, which is long overdue. But it also repeals and replaces the legislation dealing with all traditional leaders in South Africa. It treats Khoi and San leaders differently from the traditional leaders associated with the former homelands. Khoi and San leaders get jurisdiction only over the people who choose to affiliate with them. They do not get jurisdiction over specific areas of land. But all other traditional leaders get jurisdiction over the tribal areas delineated in terms of the Native Administration Act of 1927 and the much-resisted Bantu Authorities Act of 1951. These tribal boundaries exist 'wall-to-wall' within the former homelands and are deeply disputed in many instances. More claims and disputes were submitted to the Commission on Traditional Leadership Claims and Disputes than the number of officially recognised 'tribes' in South Africa.

The TKLB is in the final stages of enactment in Parliament. It has already been through the National Assembly, is currently with the National Council of Provinces, and is very close to being passed. President Ramaphosa promised to expedite it when he addressed the Opening of the National House of Traditional Leaders in February 2018.

The nub of the issue – clause 24

Faculty of Law
All Africa House, University of Cape Town,
Private Bag X3, Rondebosch 7701, South Africa
Tel: +27 21 650 3288 | **Email:** pbl-larc@uct.ac.za

www.larc.uct.ac.za
www.customcontested.co.za
@LarcUCT

Clause 24 of the TKLB provides that traditional councils, headed by traditional leaders, can sign deals binding all the people within their apartheid-era tribal jurisdictions without obtaining the consent of those whose land rights are undermined or dispossessed by such deals. The deals may be with mining companies, property developers, tourism ventures, agricultural companies, municipalities or anybody else.

Why the urgency?

This clause is necessary only because currently traditional leaders do not have the legal authority to sign deals on behalf of their 'subjects', and certainly not without their consent. Nor is there any law that authorises them to be the sole representatives of 'tribal communities' as they purport to be. In fact there is a law, the Interim Protection of Informal Land Rights Act (IPILRA) of 1996 which provides that no-one may sign deals that affect informal land rights (as defined in the Act) without the consent of the holders of the informal rights at issue. The Act protects occupation and use rights exercised by families and individuals, and also access rights to grazing land shared by sub-groups or sections within communities. IPILRA gives effect to sections 25(6) and 25(9) of the Constitution:

25(6): A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress

25(9): Parliament must enact the legislation referred to subsection (6)

Despite this, mining houses have allegedly been encouraged by the Department of Mineral Resources to sign multi-billion deals with traditional leaders. These deals are legally precarious on a number of grounds.

At the same time as the 2003 TLGFA re-instated apartheid tribal boundaries for traditional leaders, it made a small nod to transformation. It required traditional councils (the new name for tribal authorities) to include 40% elected members and one-third women members. In the fifteen years between 2003 and today only a small minority of traditional councils have met the transformation requirements. The Department of Traditional Affairs has warned that this means the deals they sign are legally vulnerable and Business Unity South Africa has urged that their legal status be clarified to enable certainty for investors.

But the most fundamental reason that the deals are legally precarious is because until clause 24 is enacted traditional leaders simply do not have this power. Only the Minister of Rural Development and Land Affairs, as the nominal owner of the land has the power to sign surface leases, and only after obtaining the consent of the rights holders directly affected in terms of IPILRA.

A related reason for the fast tracking of the bill is that a number of legal challenges to such precarious mining deals have been working their way through the courts. These challenge the manner in which both government and the mining houses have abrogated IPILRA and instead enabled traditional leaders to sign deals that are not monitored or audited by government as required by law.

To head off these legal challenges and to provide a veneer of legality to current processes of abrogation of land rights the TKLB has been expedited through Parliament.

Can it withstand Constitutional scrutiny? The Impact of the Maledu judgment.

That the TKLB would never have withstood Constitutional scrutiny has been reaffirmed by the recent *Maledu* judgment of the Constitutional Court. On the 25th of October 2018 the Court delivered a unanimous judgment in the matter of *Maledu and Others v Itereleng Bakgatla Mineral Resources.* The judgment is a game changer in relation to mining on communal land. It affirms that the MPRDA must be read concurrently with IPILRA. IPILRA requires the consent of the holders of affected 'informal land rights' (as defined in IPILRA) before decisions impacting on their land rights can be taken. If they do not consent their rights must be formally expropriated. IPILRA foregrounds the rights of the people whose land rights are directly affected by mining, as opposed to the 'tribes' that were re-imposed by the TLGFA in 2003.

The judgment states at para 5 (footnote omitted):

> *"Mining is one of the major contributors to the national economy. But there is a constitutional imperative that should not be lost from sight, which imposes an obligation on Parliament to ensure that persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to tenure which is legally secure or to comparable redress. Accordingly, this case implicates the right to engage in economic activity on the one hand and the right to security of tenure on the other."*

The judgment upheld an appeal by the Lesethleng community against an eviction order granted against them in favour of Itereleng Bakgatla Minerals Resources and Pilanesberg Platinum Mines in the Mahikeng High Court. Kgosi Nyalala Pilane is a director of the company that instigated the eviction. He relied on the fact that a *kgotha kgothe* (general assembly) of the overarching Bakgatla 'tribe' had decided to support the mining and terminate the rights of the Lesethleng villagers whose land was targeted for mining.

The judgment states at para 108 (footnote omitted):

> *"But this resolution does no more than merely indicate that it was adopted and signed by Kgosi Pilane and a representative of Barrick. Thus, there is no shred of evidence to substantiate the respondents' assertions that the applicants were deprived of their informal land rights in conformity with the prescripts of section*

2(4) of IPILRA."

This judgment sets a powerful precedent that deals brokered between mining houses and traditional leaders, without the consent of those directly affected, infringe on the Constitutional rights of people whose tenure security is already vulnerable as a result of past discriminatory laws and practices. The judgment therefore holds up a red flag to the TKLB model of traditional leaders having the unilateral power to sign deals with third parties in respect of mining at least.

Last ditch proposed amendments to get around Maledu judgment

In an attempt to pre-empt that impact the Department of Traditional Affairs has proposed some last-minute amendments to the TKLB. It justifies these amendments as a response to concerns that the TKLB is in conflict with IPILRA. Instead of stating that the TKLB is <u>subject</u> to IPILRA, which the Constitutional Court has now done in respect of mining deals, the proposed amendment seeks to <u>override</u> IPILRA.

The proposed amendments to 24(3):

> *"(3) Any partnership or agreement entered into by any of the councils contemplated in subsection (2) must be in writing and, <u>notwithstanding the provisions of any other national or provincial law –</u>*
>
> *…*
>
> *(c) is subject to –*
>
> > *(i) a prior consultation with the relevant community represented by such council;*
> >
> > *(ii) <u>a decision in support of the partnership or agreement taken by a majority of the relevant community members present at the consultation contemplated in subparagraph (i)</u> …"*

Far from solving the problem, this amendment seeks to oust IPILRA by using the word 'notwithstanding' as opposed to 'subject to' or 'in addition to'. The TKLB, as more recent legislation, would thereby trump the older IPILRA.

The new reference to 'a majority of relevant community members' takes us nowhere because it operates within the framework of the TKLB. This does not start with rights holders as IPILRA does. It starts with councils and traditional leaders who represent the 'traditional communities' formerly named 'tribes'. The relevant community is that represented by the council, according to old Bantu Authorities Act delineations. This would trump IPILRA's focus on the people directly affected by mining who are never whole 'tribes' but always families and sub-groups whose homes, fields and grazing land are targeted for mining activities.

The only way for the TKLB to be consistent with the *Maledu* judgment is for it to state,

in terms, that it is subject to the Constitutional rights that IPILRA was enacted to protect and secure.

What is at stake?

This is a fundamental betrayal of rural struggles against the Bantustans and autocratic forms of chiefly power. Inkosi Albert Luthuli and ZK Matthews had a vision of customary law feeding into, and becoming part of South African law. But legislation such as the TCB and TKLB takes us back to segregated legal systems and segregated systems of property rights applying only in the former homelands. Citizenship and property rights are no longer denied on the basis of race but instead by geographical boundaries that are deeply racially inscribed. It is a return to tribalism and contrary to everything that people fought for in the struggles against colonialism and apartheid.

Mining and the Bantustans have been the key drivers of structural inequality. This bill reinforces the modus operandi of both. It preempts an inclusive vision of mining that could benefit rural communities and lead to stability. The mining industry and government appear to consider it more important to cut politically connected elites into profits generated by mining than to set up a regulatory system that provides protections and oversight for the vulnerable

What is to be done?

- Spread this information far and wide. Push for debates on radio stations, particular vernacular radio stations. Political parties seem to believe that traditional leaders will deliver the rural vote. Let rural voters tell them what they think about measures such as the TKLB and the Traditional Courts Bill.

- Support the struggles of rural people affected by mining. Reach out to rural community groups who are waging lonely life and death struggles to hold on to their land. Break the divide between urban and rural spaces. Show rural people that urban people understand and support their struggles.

- Reach out to those in business and in the mining industry. Challenge them to explain why they negotiate with traditional leaders rather than with the people directly affected by mining on their land. Challenge them to explain why they prefer to cut politically connected elites into mining, rather than compensate the people directly affected for their lost livelihoods and the environmental devastation that many mining projects leave in their wake.

- Challenge politicians to explain why they have resorted to the same stereotypes used during colonialism and apartheid to deny black property and citizenship rights. Then and now we are told that customary systems do not deliver property rights to families and individuals. This makes their land 'free for the taking'. Then and now we are told that rural people are primarily rural subjects as opposed to 'equal citizens' of South Africa.