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State regulation and misconstructions of customary land tenure in South Africa

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Summary: *The state resorts to misconstructions of customary land tenure rights in its land reform policy that emulate apartheid-era thinking, rather than facing the realities of modern-day land practices, which include collective decision making in the everyday management of land separate from the state's regulatory control. A developmental custodial state treads a thin line in the implementation of its statutory and policy interferences so as not to overstep the boundaries of existing land rights already operating under a living customary law system. Only through public participation and consultation with communities can the reasonableness of regulatory legislation and policies be accurately assessed and determined. Space must be created for all South Africans to participate in the economy to enable inclusive growth in various ways. In so doing, the state should avoid creating a hierarchy of land rights holders and should regulate the natural resource through policies that are aligned with reform objectives, without encroaching on spaces already regulated by customary and communal law systems. In this article the legal implications of applying a state custodianship approach to communal land, traditional leadership and misconstructions of customary law, and the political interpretation of constitutional land reform objectives is discussed.*

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Key words: *traditional leadership; living customary law; state regulation; custodianship and stewardship; secure land rights*

1 Introduction

The legal implications of applying a state custodianship approach to communal land, traditional leadership and misconstructions of customary law, and constitutional land reform objectives that are influenced by political agendas are critically discussed in this article. South Africa's security of land tenure is replete with tenure legislation and policy that seeks to protect and 'upgrade' so-called informal land rights. However, the socio-economic benefits associated with secure land tenure and the equitable access to resources such as land, water and other natural resources receive little attention in tenure legislation and policy formulation. This article demonstrates how regulatory laws and policies in the statutory land tenure space can result in the circumvention of intended constitutional reforms such as equitable access and benefit in natural resources such as land, in ways that lead to continued dispossession and life-long custodianship, and little regard for lived customary and informal land rights practices. It results in poor socio-economic circumstances for land reform beneficiaries if the purpose and outcomes of tenure security legislation and policy reforms are not carefully examined.

Land holding continues to evolve in the modern context, and for many individual and communal rural landholders this means acquiring ownership title, while still operating under living customary law. In *Tongoane v National Minister for Agriculture and Land Affairs* (*Tongoane*)[1] the Constitutional Court held that the Communal Land Rights Act,[2] which was promulgated to give effect to section 25(6) of the Constitution of the Republic of South Africa, 1996, seemed to be stepping back into a space already regulated by living customary law.[3] Consequently, South African courts recognise the developmental nature of living customary law.[4] Ownership is but one form of tenure

1 2010 (6) SA 214 (CC).
2 Communal Land Rights Act 11 of 2004 which has since been declared unconstitutional.
3 *Tongoane* (n 1) para 79; W Wicomb 'The exceptionalism and identity of customary law under the Constitution' (2014) 6 *Constitutional Court Review* 131.
4 Presidential Report, *High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 489. 'The judiciary has established an understanding of customary law as a 'living system of law' that develops as it is lived by the community, taking care to give effect to an understanding of customary law not as mere cultural practice, but as law. It recognised customary property rights, customary land and resource governance and customary rules of evidence. The legislature, on the other hand, focused on the institution of traditional leadership. This de-recognition of customary law by the legislature

although it is highly valued largely due to the prevailing insecurity of land tenure and the private property system that historically prioritises ownership title as a form of security. However, living customary law is able to adapt to modern-day land practices, with some individual land holders possessing ownership title to meet their unique needs, all the while continuing to apply norms based on shared communal value systems and customary principles of land management.[5] Therefore, the enjoyment of one does not automatically prevent the benefit of the other, and the pursuit of common values and collective objectives remains an essential function of rural land-holding communities. This article discusses how these customary law communities define their own values which, in turn, define the community[6] and shapes its land tenure rights and limitations. The article highlights that a developmental *custodial* state treads a thin line in the implementation of its interferences through statute so as not to overstep the boundaries of existing land rights already operating under a living customary law system, a system that requires active participation and consultation on any proposed legislation and other measures that directly affect the land rights of communities and their interests. Only through public participation and consultation with communities can the reasonableness of regulatory legislation and policies be accurately assessed and determined.[7]

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has far-reaching consequences for communities who live by customary law. Their customary land rights continue to be denied while the powers of traditional leaders are bolstered through laws such as the Traditional Leadership and Governance Framework Act 41 of 2003 and Mineral and Petroleum Resources Development Act 28 of 2002.' Since the 2017 High Level Panel Report the following notable developments has taken place: the Traditional and Khoi-San Leadership Act 3 of 2019 (TKLA) which was intended to repeal the Traditional Leadership and Governance Framework Act 41 of 2003; the National House of Traditional Leaders Act 22 of 2009; and the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 was declared unconstitutional and invalid for its failure to facilitate public participation in the passing of the TKLA, which deficiencies were numerous and material. The Constitutional Court struck down the TKLA, stressing the transformative significance that this legislation holds for the lives of millions of South Africans and directing Parliament to revisit the constitutional processes.

5 A Pope 'Get rights right in the interests of security of tenure' (2010) 14 *Law, Democracy and Development* 338; A Claassens 'Denying ownership and equal citizenship: Continuities in the state's use of law and "custom" 1913-2013' (2010) 40 *Journal for Southern African Studies* 768. See also sec 211(1) of the Constitution. 'The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.'

6 H Bull *The anarchical society: A study of order in world politics* (1995) 51; R Barnes *Property rights and natural resources* (2009) 70.

7 HG van Dijk & PA Croucamp 'The social origins of the developmental state: Reflections on South Africa and its local sphere of government' (2009) 42 *Journal of Public Administration* 666, who comment that '[m]odern society, and the involvement of civil society in South Africa, has called for a new type of state, namely one that is both democratic as well as developmental in both content and character, and maintains that the centrality of the state in nation-building and socio-economic development be reaffirmed, while also asserting participatory democracy and a culture of human rights as key features of the developmental state'.

A failure to consult with communities increases the risk of inadvertently infringing on the human dignity of communities and individuals with existing land rights, as well as on their individual and collective sense of self-determination as contributing members of society.[8] It would also have a detrimental impact on democracy.[9] Conversely, research and real-world experience have shown that economic progress for marginalised groups emerges in contexts where the law permits individual liberty in the broadest possible sense.[10] For example, not all rural land owners and communities wish to be commercial irrigation farmers. Land can have a multitude of other uses that are equally productive and valuable to the economy and environmental sustainability.[11] The state should avoid creating a hierarchy of land rights holders that prioritises and prefers commercial farmers over all other land users. Furthermore, the state, as steward, must regulate the natural resource through land policy that seeks to achieve reform objectives, without encroaching on spaces already regulated by customary and communal law systems.[12] Otherwise, the state runs the risk of replacing existing land rights that are already operating under established living customary law with

8 GWF Hegel *Elements of the philosophy of right* (1991) 46; P Drahos *A philosophy of intellectual property* (1996) 73-94; H Mostert & C Lei 'The dynamics of constitutional property clauses in the developing world: China and South Africa' (2010) 17 *Maastricht Journal of European and Comparative Law* 378.

9 Van Dijk & Croucamp (n 7) 664. 'Democracy provides a voice for the poor and marginalised, protects and accrues the rights of citizens, promotes institutional separation of powers and functions, transparent decision making, accountability and effective monitoring and control.'

10 W Njoya *Economic freedom and social justice: The classical ideal of equality in racial diversity* (2021) 192.

11 P Mograbi 'South Africa's land reform policies need to embrace social, economic and ecological sustainability', https://theconversation.com/south-africas-land-reform-policies-need-to-embrace-social-economic-and-ecological-sustainability-145571 (accessed 20 September 2022). 'They [land reform discussions] haven't included the multiple functions that land offers humans, beyond its agricultural potential. The success (or failure) of many land reform programmes is measured in hectares of farmland transferred. This approach portrays the land as uniform, static, independent from its social-environmental context and disconnected from future beneficiaries and broader society ... [T]his narrow focus undermines the goals of equitable and sustainable land reform … Land provides more than just food … The multiple possible benefits derived from land suggest multiple possible uses. Beneficiaries of a land reform programme may be able to use land in various ways other than farming. The state has explicitly emphasised maintaining agricultural productivity and food security during the land reform process. This limits the function land should provide, especially in the land redistribution models. The state should support a variety of livelihood options, especially on land with low agricultural potential.'

12 AJ van der Walt *Constitutional property law* (2003). See also GJ Pienaar & E van der Schyff 'The reform of water rights in South Africa' (2007) 3 *Law, Environment and Development Journal* 189, partly citing Van der Walt. '[P]roperty has a … "propriety" aspect to it that transcends individual economic interests and that involves interdependency and the common obligations that result from it. Individual and public interests are the weights that must balance the scale of property as a social construct.' Mostert & Lei (n 8) 384-385. '[T]he individual freedom to exercise property rights is protected to the same extent as the public interest in individual property.'

regulatory measures that are politically motivated and are unable to meet the particular needs of communal land holders. Yet, this appears to be exactly what is transpiring under recent land reform laws and policies. What follows is a discussion that highlights how statutory regulation of communal land by the state can inadvertently create land tenure confusion and support the misconstructions of customary law in ways that disempower the community but instead favour despotic traditional authorities.

2 Disempowering regulatory land reform laws and policies

The Constitution (the supreme law of South Africa) expressly recognises the role of traditional leaders in sections 211(2) and 211(3) of the Constitution. However, the unfortunate wording of the provision is open to misinterpretation and abuse. It creates the opportunity for a narrative that elevates the status of traditional authorities above that of the community they serve. It is argued that the wording only muddies the status of living customary law in respect of traditional authorities by placing emphasis on the relationship between the traditional authorities and the state, with no mention of the communities on whose behalf they serve and in whose best interests they must act. These two provisions provide the loophole needed for the statutory regulation of communal land by the state: The phrasing is wide enough to be understood to allow traditional leaders control over the meaning and intention of customs, making the functioning of traditional authority both justified by and subject to the Constitution, and to 'any legislation that specifically deals with customary law'.[13]

A steady stream of state land reform laws, policies and plans continues to be churned out.[14] These laws and policies often

13 Secs 211(2)-(3) of 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.'

14 Including the Department of Rural Development and Land Reform *Communal Land Tenure Policy* (2014); the Communal Land Rights Act 11 of 2004 (declared unconstitutional in 2010); the Traditional Leadership and Governance Framework Act 41 of 2003; the Traditional Leadership and Khoi-San Leadership Act 3 of 2019 (declared unconstitutional and invalid due to Parliament's lack of public participation); the Traditional Courts Bill B1-2017 (signed into law on 16 September 2023 and becomes Act 9 of 2022); the Restitution of Land Rights Amendment Bill B19-2017 (the Bill lapsed in terms of National Assembly Rule 333(2) in 2019); the Department of Rural Development and Land Reform Recapitalisation and Development Policy Programme (2010); the Department of Rural Development and Land Reform Green Paper on Land Reform (2011);

perpetuate paternalistic misconstructions of customary communal land tenure with disempowering outcomes, thereby establishing a dual land-holding system by eliminating privately-controlled means of production on the assumption that individual forms of production do not exist within customary and communal landholding structures.[15] This is despite the fact that the Constitutional Court has found that customary law provides for ownership of land; that people in rural areas are entitled to the same rights as all South Africans, including the recognition of their customary ownership of land; and that Parliament must ensure that no laws or policies abrogate these rights.[16]

Disempowering outcomes are a consequence of land reform laws and policies that often rely on the same ideological assumptions used to justify the denial of black land rights during apartheid.[17] The rigid regulation of land is not conducive to the socially-transformative

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the Rural Development and Land Reform Strategic Plan (2010-2013) and its accompanying Comprehensive Rural Development Programme (2013); the Department of Rural Development and Land Reform Land Tenure Security Policy and draft Land Tenure Security Bill (2011).

15 W Greffrath 'Land reform, political instability and commercial agriculture in South Africa: An assessment', https://www.academia.edu/37320502/Land_reform_political_instability_and_ commercial _agriculture_in_South_Africa_An_assessment (accessed 30 November 2022).

16 Presidential Report (n 4) 39; *Bhe v Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC) paras 11 & 87. See also *Alexkor Ltd v Richtersveld Community* 2003 (12) BCLR 1301 (CC) fn 51: 'The Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system.' A Claassens & B Matlala 'Platinum, poverty and princes in post-apartheid South Africa: New laws, old repertoires' in C Ballard and others *New South African review* (2018) 121; A Claassens 'Who told them we want this bill? Traditional Courts Bill and rural women' (2009) 23 *Gender and the Legal System* 9-10. See also S Mnwana 'Why giving South Africa's chiefs more power adds to land dispossession', https://theconversation.com/why-giving-south-africas-chiefs-more-power-adds-to-land-dispossession-93958 (accessed 15 September 2022). 'Distributive power over land doesn't rest exclusively with chiefs. There are multiple layers of power that rests in different social units, families (and individuals within them). Most importantly, chiefs have never had powers to alienate land rights from ordinary residents. African land rights are acquired through membership to a group – a productive and social unit such as a family or clan. Once allocated, land rights were passed from one generation to the next. It is at the level of this unit that, by and large, decisions about distribution of such rights were taken in precolonial times ... The assumption that chiefs are custodians of rural land and mineral wealth – and as such can distribute and alienate land rights and sign complex mining deals on behalf of rural residents – has no precolonial precedent. It's no surprise that ordinary people are resisting chiefly power over their property. It's even more crucial to closely examine and understand the character of power over land and landed resources as rural land increasingly becomes a target for large scale resource extraction.'

17 Presidential Report (n 4) 54. See also HWO Okoth-Ogendo 'The nature of land rights under indigenous law in Africa' in A Claassens & B Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) ch 4 95. referring to 'juridical fallacies' imposed by the colonial state and subsequently internalised by postcolonial governments', with the 'central fallacy' being that indigenous law 'confers no property rights in land'. See also TW Bennett *Customary law in South Africa* (2004); M Chanock *The making of South African legal culture 1902–1936: Fear, favour and prejudice* (2001); Claassens (n 5) 772.

character of indigenous land law, which inherently includes collective decision making to deal with the infrastructural needs that would enable socio-economic development.[18] For example, customary communal landholders are expected to comply with unnecessarily procedural statutory requirements, even though this is challenging given their rural conditions and the limited support they receive from the state. The consequence is that uneducated and poorer land claimants and/or beneficiaries are inevitably regarded as non-compliant.[19] A non-compliant status may result in the skewed perception that these categories of land tenure make no real contribution to national agrarian markets and food security, whereas they are likely contributing to the sustainability of local lower-income households. Furthermore, an excessive regulatory approach to communal land tenure only adds to state officials' administrative burden of state officials and is impractical given their lack of capacity, limited resources and fights against corruption.[20]

The continued mode of custodial overregulation through statutory mechanisms with little to no consultation with the people who hold the rights in the natural resources is untenable. This coupled with a *modus operandi* whereby the state exercises its statutory regulation and custodianship almost exclusively through traditional leaders wherever communal land tenure occurs poses practical challenges. These lead to disempowering challenges that influence political ideologies, the legitimacy of the living customary law reporting structure, community's prior informed consent and participation in decision making, and the accountability of traditional leaders. In the next parts, to illustrate these practical challenges, I examine the implementation of traditional leadership and state custodianship and the political misinterpretation of constitutional objectives.

18 Pope (n 5) 353.

19 M Weeks 'Securing women's property inheritance in the context of plurality: Negotiations of law and authority in Mbuzini customary courts and beyond' (2011) *Acta Juridica* 147, who comments that 'while customary norms exist to be invoked, they should not be thought to be either strictly dictated by a sovereign or by 'rules, compliance or non-compliance' which determine dispute resolution outcomes'. Moreover, at Agriculture, Rural Development and Land Reform Minister Thoko Didiza's ministerial oversight visit in April 2022 at Ilanga Estate, Free State, most CPAs voiced concern about the lack of support received from government, and the fact that they were still awaiting their ownership title deeds.

20 C Engelbrecht 'The ANC's two-state South African state: Its own colonialism and affinity for monopoly capital in the era of the Capitalocene', http://academia.edu/39392895/The_ANCs_Two_state_South_African_State (accessed 5 May 2022); CF Swanepoel 'The slippery slope to state capture: Cadre deployment as an enabler of corruption and contributor to blurred party-state lines', http://dx.doi.org/10.17159/2077-4907/2021/ldd.v25 (accessed 15 July 2022); M Siboto 'The betrayal of the struggle: ANC, EFF and VBS Bank'; J Cronin 'We've been structured to be looted – Some reflections on the systemic underpinnings of corruption in contemporary South Africa', https://works.bepress.com/jeremy_cronin/2/2 (accessed 10 October 2022).

2.1 Traditional leadership and state custodianship of communal land

Central to the political ideology found in recent land policy is the significant administrative and political role that traditional leaders are positioned to play in the management of communal land. This is a noticeable shift in national land reform policy away from the previous position, which demonstrated sensitivity to the controversial history of 'tribal' or traditional authorities.[21] Earlier land policies of the African National Congress (ANC) aligned with the Constitutional Court that traditional leadership derived their authority from (living) customary law, and not the other way around.[22]

However, a definitive shift in political ideology and perhaps allegiances was made clear through the enactment of the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) and, subsequently, the Traditional and Khoi-San Leadership Act 3 of 2019 (TKLA). These laws have made the existence of customs entirely dependent on traditional leadership and have codified traditional leadership powers through statute rather than the authority of the defined community in accordance with living customary law.[23] The TKLA has since been declared unconstitutional and invalid after its constitutionality was challenged in the Constitutional Court primarily due to the lack of public participation and democratic engagement on the statute, among other concerns echoed in this article.

Land reform experts have persistently expressed their concerns about the dangers of changing or overregulating custom and community decision-making structures through statutory interventions. However, the tenure of communal land continues

21 Land and Accountability Research Centre *Submission to National Council of Provinces on the Traditional Leadership and Governance Framework Amendment Bill* (2017) 2. 'Tribal authorities were fiercely contested by many ordinary people and political activists, who recognised their role in the oppressive apartheid state machinery.' See also Wicomb (n 3) 132-133. 'The customary structures of governance of traditional leadership were put aside or transformed by the colonial and apartheid governments.'

22 *Alexcor Ltd v the Richtersveld Community* 2004 (5) SA 469 (CC); *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC); *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC); Du Plessis & Frantz 'African customary land rights in a private ownership paradigm', https://ssrn.com/abstract=2381922 or http://dx.doi.org/10.2139/ssrn.2381922 (accessed 30 November 2022); Wicomb (n 3) 128; Claassens (n 5) 769; C Lund & C Boone 'Introduction: Land politics in Africa – Constituting authority over territory, property and persons' (2013) 83 *Africa* 13. See also Presidential Report (n 4) 486. 'The Constitution of South Africa recognises customary law as a part of the South African legal system equal to the common law. As such, the Constitution presents a radical departure from the pre-constitutional position that recognised customary law rules only where no rules could be sourced from the common law or statute law.'

23 Wicomb (n 3) 132-133.

to be the target of several statutory interventions that have placed large tracts of communal land under the control of traditional councils which, in turn, report to the state. This in effect removes the legitimacy of the customary reporting structure of traditional leaders to their communities and *vice versa* and undermines the authority by silencing the voices of the collective. It creates the impression that the community no longer is a stakeholder in rural development and decision making.[24] State custodianship has similarly resulted in the silencing of land-holding communities under the Mineral and Petroleum Resources Development Act (MPRDA).[25] While communal land tenure is customarily ruled by an inclusive collective majority decision under living customary law, the state custodianship approach as applied to land ostensibly has little regard for the unique customs and diversity of communal land holders. In reality, the statutory authority granted to traditional leaders could very well reduce the ability of customary communities to hold their traditional leaders accountable.[26] The statute supplants living customary law practices, rendering shared values, such as informed collective decision making, subordinate to the authority of traditional leaders and the state. It assumes that traditional leaders have the support based on their status as representatives and that consultation with representatives absolves the state of its responsibility to consult the

24 Parliament of RSA 'The National Development Plan unpacked', https://www.parliament.gov.za/storage/app/media/Pages/2019/august/30-08-2019_ncop_committees_strategic_planning_session/docs/The_National_Development_Plan-Simplified.pdf#:~:text=The%20National%20Development%20Plan%20%28NDP%29%20offers%20a%20long-term,what%20we%20want%20to%20achieve%20by%202030.%202 (accessed 30 November 2022). 'High-level leadership meetings will be held regularly between government and business, government and labour, and government and civil society …These high-level meetings will be underpinned by more focused stakeholder engagements … intended to find solutions to specific challenges.' It is not clear whether the engagements will involve rural communities as well, or whether only traditional leaders will be included.

25 Presidential Report (n 4) 503-507. '[T]he MPRDA abolished landowners' rights to say no to mining on their land. While intended to advance transformation, this change has had devastating impacts for members of rural and customary communities, who have borne the brunt of the removal of the express right to say no. With much of mining's expansion taking place on "communal land", communities have faced land dispossession, displacement and loss of traditional agrarian livelihoods.' Pope (n 5) 352, citing Claassens & Cousins (n 17), commenting that 'the law should not be permitted to impose mechanisms that stifle "democratic possibilities inherent in the development of a living customary law that reflects all the voices currently engaged in negotiating transformative social change in rural areas"'.

26 Pope (n 5) 339-340; Claassens & Cousins (n 17) 98-100. See also Okoth-Ogendo (n 17) 95, who states that (paraphrased) indigenous or living customary law cannot be summarised in its entirety as communal in nature. Instead, the social order creates reciprocal rights and obligations that bind members together and vest power in community members over the land. It is the continuous performance of rights and obligations that determine who may have access to or exercise control over land and associated resources. Access to land is a function of membership of a group, and it is the group that is self-limiting rather than artificial bureaucracy.

community on partnerships and agreements with respect to their land.[27] The state places the (patriarchal) status of traditional leaders as 'functionaries'[28] or state agents above that of the community, enabling the ongoing establishment of untransformed colonial-apartheid structures in the form of tribal authorities, first established in terms of the Black Authorities Act 68 of 1951.[29] These tribal authorities had been transformed into traditional councils for the purposes of section 28(4) of the TLGFA.[30] Therefore, it is contended that while the state, as custodian of all land, has the fiduciary duty to ensure the security of tenure of land claimants and beneficiaries, it has opted by statute to delegate or outsource its fiduciary duty to traditional leaders.[31]

27 Sec 24(3)(c)(i) of the TKLA. The TKLA did not provide for community consent for any partnerships or agreements regarding communal land entered into by traditional leaders. In addition, the phrasing pertaining to consultation is unclear, stating that such agreements are subject to 'a prior consultation with the relevant community represented by such traditional council'. This implies that consultation with the community is considered to have taken place if the traditional council, as representative of the larger community, is consulted. See also Land and Accountability Research Centre *Submission to National Council of Provinces on the Traditional Leadership and Governance Framework Amendment Bill* (2017) 6. '[C]lause 24 of the Traditional and Khoi-San Leadership Bill of 2015 now proposes to cement this reality [of traditional authorities negotiating mining deals without consulting communities] into law by giving traditional councils the power to conclude contracts with any institutions with no corresponding duty to consult or obtain the consent of persons living within their jurisdiction.' Therefore, by enabling the enactment of legislation that contravenes its fiduciary duties owed to communal land beneficiaries, the state has failed to protect land as a natural resource for the public good.

28 Land and Accountability Research Centre (n 27) 1-2, where it was submitted that the TLGFA failed to provide clarity regarding the status of traditional councils. Sec 20 of the TKLA. The administrative functions of traditional councils include supporting municipalities in the identification of community needs, participating in the development of policy and legislation at a municipal level, participating in development programmes of the local, provincial and national spheres of government, and performing the functions conferred by customary law, customs and statutory law consistent with the Constitution. D Atkinson 'Patriarchalism and paternalism in South African 'Native Administration' in the 1950s' (2009) 54 *Historia* 271-272. 'This paternalistic approach was nothing new. The Native Affairs Department had, since its re-organisation in 1910, prided itself on its benign, sympathetic attitude towards the needs of blacks. This approach had evolved from early forms of colonial administration, and it flourished where administration involved personal contact between rulers and ruled ... According to Dubow, "the administrator's [functionary's] role was portrayed in terms reminiscent at once of a chief in traditional society, and a Victorian patriarch"'.

29 The Black Authorities Act 68 of 1951 authorised the state president to establish tribal authorities for African 'tribes', as the basic unit of administration.

30 *Tongoane* (n 1) para 24.

31 F von Benda-Beckmann, K von Benda-Beckmann & J Eckert 'Rules of law and laws of ruling: Law and governance between past and future' in F von Benda-Beckmann, K von Benda-Beckmann and J Eckert (eds) *Rules of law and laws of ruling: On the governance of law* (2009) 2, listing examples of outsourcing demonstrated over time, including colonial regimes relying on indirect rules, and social and economic corporations and private agencies that are put in charge of security and justice in specific areas. See also Claassens (n 16) 20.

The delegation of authority is problematic as it inevitably blurs the lines of accountability. This is particularly problematic in the event of mismanagement of agricultural land and associated resources. It also raises questions as to who the true trustee or custodian of communal land is: Is it the state or the traditional authority? For example, in the event of corruption or unscrupulous decision making that places communal land and other natural resources at risk, does the community to whom the stewardship duty of care is owed hold the state, as custodian, accountable? Or should the state hold traditional leaders accountable? Moreover, in the event of collusion between the state and traditional leaders, accountability would be virtually impossible and would necessitate collective court action by the community to safeguard their rights. Ordinarily, in terms of living customary law, communities would have decisively removed corrupt traditional leaders by way of a majority decision. However, because of the commanding role of traditional leaders in land governance statutes, their removal may carry political implications, which complicates matters.

In fact, according to the provisions of the now unconstitutional and invalid TKLA, the withdrawal of the recognition of headmanship or headwomanship could be considered only where the relevant traditional council (not the community) requested the premier concerned to withdraw such recognition, unless done through a court order.[32] Furthermore, the recognition, establishment and constituency of traditional communities and traditional councils were made expressly subject to determinations by the state.[33] The recognition of traditional structures in the TLGFA affirmed tribalism as the centre of traditional councils and retained the obsolete discriminatory apartheid land divisions of the former homelands, which was built upon undemocratic power relations between traditional leaders and their subjects under the colonial and apartheid regimes.[34] In so doing, it is made clear that the state, through its regulatory powers, will control traditional councils and

32 Sec 4(8)(a) TKLA.
33 Secs 3 & 16 TKLA.
34 Land and Accountability Research Centre *Submission to National Council of Provinces on the Traditional Leadership and Governance Framework Amendment Bill* (2017) 3; Law, Race and Gender Research Unit 'Custom, citizenship and rights: Community voices on the repeal of the Black Authorities Act July 2010', http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/LRG_ book_ combined%2c_Dec_2010_-_Final%2c_Amended.pdf (accessed 2 May 2022); G Capps & S Mnwana 'Claims from below: Platinum and the politics of land in the Bakgatla-ba-Kgafela traditional authority area' (2015) 42 *Review of African Political Economy* 611.

hold traditional leaders accountable – it is not up to the community these councils and leaders represent.[35]

The present trajectory of land reform laws in the form of the TLGFA, the TLKA, and the 2017 Traditional Courts Bill (TCB),[36] the latter now known as the Traditional Courts Act 9 of 2022, makes the erroneous assumption that individuals and groups living and farming on communally-held land automatically ascribe to 'tribal' and 'traditional' constructs as their way of life. This discriminatory assumption – the same one made by previous apartheid land policies – does not take into account the diversity of South Africa's people. The state's abdication of its fiduciary responsibility to traditional leaders by statute is in conflict with the public trust that informs the state's role as a trustee of the environment.[37] Traditional leadership should exist to promote the interests of the community through modern-day communal land-holding practices that the community develops collectively over time. Instead, the state has statutorily positioned traditional leaders above living customary law by essentially removing their obligation to acquire consent from the community, and making the exercise of community decisions subject to the consent of the state.[38] The state's custodial land policy does not mean that the state acquires the communal land as its private

35 Sec 22(1) TKLA. 'A kingship or queenship council, principal traditional council, traditional council, traditional sub-council and a Khoi-San council (in this section jointly referred to as a council) must endeavour to perform its statutory, financial and customary obligations in the best interest of its community and is accountable to the Premier concerned for the efficient and effective performance of such obligations.'

36 Presidential Report (n 4) 54. The panel reported on the status of the Traditional Courts Bill 2017 (TCB) and that the National Assembly was seeking legal advice on the constitutionality of not allowing people to opt out of the proceedings in the traditional courts. The underlying assumption made by the TCB appeared to be that people in the former homelands were more appropriately governed by traditional leaders than elected local government, and its limitation on access to other courts and the inclination towards the sole jurisdiction of traditional courts was concerning.

37 CN Brown 'Drinking from a deep well: The public trust doctrine and Western water law' (2006) 34 *Florida State University Law Review* 12. 'The state was neither free to alienate its navigable waters nor abdicate its public trust responsibilities over such waters in a manner inconsistent with its public trust duties.' See also Presidential Report (n 4) 482. It is at odds with the duty to ensure that 'individual families should have secure rights legally equivalent to ownership … along with defined rights to grazing and natural resources held in common'. According to GJ Pienaar & E van der Schyff 'The reform of water rights in South Africa' (2007) 3 *Law, Environment and Development Journal* 184, '[t]he public trust doctrine is the legal tool that encapsulates the state's fiduciary responsibility towards its people and bridges the gap between the Roman-Dutch based property concept and the notion that water as a natural resource "belongs to all people"'.

38 Sec 24(3)(d) TKLA. Traditional councils may enter into partnerships and agreements with one another and with municipalities, government departments and any other person, body or institution, but such partnership or agreement 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'.

property. Yet, the state does hold ownership-like entitlements as custodian and regulates the use of the communal land through its statutory establishment of, and authority over, traditional councils. This is an overregulation of communal land rights that subjugates the exercise of customary communal land rights by adopting the paternalistic notion that 'native' land rights cannot contribute to modern agrarian development without supervision.[39] It smacks of the colonial-apartheid action of vesting ownership of land in the state and using traditional leaders as 'state employees',[40] which gave traditional leaders the same kind of power to the detriment of the communities they served.

It therefore is clear that security of land tenure involves much more than land ownership, as there are varying interests and stakeholders involved. Each stakeholder has a vested interest in the land use and benefits that can be derived from the land, but none more so than the communities themselves. It therefore is unsurprising that, even with the extensive tenure land laws and policies that the socio-economic benefits associated with secure land tenure and the equitable access to resources such as land, water and other mineral resources are not expressly secured in favour of previously-disadvantaged communities in tenure reform legislation and land reform policy formulation. At this juncture, the next part will examine the political misinterpretations of constitutional objectives and how the political interpretation of legally-secure tenure and redistribution for equitable access to natural resources is developed and/or changed dependent on the stakeholder interests and political ideologies involved.

2.2 Political misinterpretation of constitutional objectives

Economic wealth redistribution and legally-secure tenure are interdependent and, as such, the state must apply mechanisms that achieve just outcomes. Land reform for the most part is a process embodied in the state, and its policies must allocate funds to the development of land in a way that promotes wider access to the resource, though *without* undermining the property rights of land reform claimants and beneficiaries. The constitutional land reform objectives require the colonial-apartheid legacy to be reversed, land to be restored to those dispossessed, and people's tenure to be made legally secure or comparable redress to be provided for land unlawfully taken.[41] Ngcobo CJ has emphasised just how important

39 Pope (n 5) 339-340.
40 Pope (n 5) 345.
41 Sec 25(6) Constitution.

it is for legislation to do precisely this.[42] Why, then, do recent land reform laws and policies seem to run counter to these foundational objectives?

It is proposed that, in the context of land reform, the political interpretation of legally-secure tenure and redistribution for equitable access has changed. It would appear that the state has reviewed its role according to a different political interpretation of the security of tenure and redistribution, which interpretation requires the state to have authority as custodian of all agricultural land. For now, this occurs through its implicit state custodianship approach to rural land through land reform policies. If, however, state custodianship were to be expressly enacted by statute on the same basis as in the MPRDA, it would facilitate a property regime change that eliminates the need to pay compensation. Whereas expropriation is procedural law and is not applied along racial lines, and even though expropriation would inevitably affect predominantly white agricultural land owners, it could also have a negative effect on the business interests of a handful of black elite land owners, who would expect commensurate compensation. As such, without a credible threat of expropriation, the (underperforming) *status quo* of land reform is likely to continue.[43] In addition, the regular utilisation of expropriation ultimately depends on the political will of the state. Therefore, positioning of the state as the custodian of land by way of policy and not by statute could be a political preference that protects the private capitalist interests of both groups, although at the institutionalised material disadvantage of all South Africans.[44]

It is contrary to living customary law to confer proprietary powers of alienation and control on individuals without obtaining the

42 *Tongoane* (n 1) para 2.

43 E du Plessis 'Silence is golden: The lack of direction on compensation for expropriation in the 2011 Green Paper on Land Reform' (2014) 17 *Potchefstroom Electronic Law Journal* 805. See also E Lahiff 'Willing buyer, willing seller: South Africa's failed experiment in market-led agrarian reform: Trajectories and contestations' (2007) 28 *Third World Quarterly* 1577. 'One of the reasons why land reform failed is that the farms are too big to make it suitable for new entrants to the agricultural sector. Farmers seem to be hesitant to sell off only small portions of land, and there seems to be resistance against the Subdivision of Agricultural Land Act 70 of 1970.'

44 Engelbrecht (n 20) [extracts]: '[The] institutionalised self-enrichment at the material disadvantage of all South Africans … It stems from the party's ideological limitations. Privilege, of some black and white people, capital, in the hands of some black and white people, and corruption, perpetuated by some black and white people, did not just one morning appear from nowhere – they are all human creations and colour blind … The ANC has systematically colonised the country depriving all South Africans of its material wealth … In this process, the ANC's bourgeois elite's new-found "wealth" was "purchased at a dehumanising cost", meaning at the expense of everyone else in society.'

consent of the community.[45] The result is conflict with the state's role as trustee, in terms of which the state must protect natural resources for both present and future generations. The state must act as steward in the public interest and cannot directly or indirectly dispose of or alienate natural resources held in its trust. The public trustee role of the state with regard to land implies an overarching, holistic, facilitative, developmental role, and not the interventionist and prescriptive state custodianship approach identified in recent land reform laws and policies.[46] Through state custodianship land policies, traditional leaders have been granted powers that essentially are an extension of the state's authority (indirect rule).[47] These extensive powers in the hands of traditional leaders strengthen the state's custodial governance and that of the traditional leaders over communal land, allowing for the disposal of communal land and related resources through various types of agreements without obtaining the prior informed consent of, or being accountable to, the community.[48]

The combined effect of the TLGFA, TKLA and TCB (traditional custodianship laws) is the centralisation of control over communal land and its resources in the hands of traditional authorities, who are simultaneously subject to and agents of the state. This makes it possible to deprive community members of their benefits in land and resources should they be found to be in contravention of their version of customary law or custom, as a possible means of competing for resources.[49] These traditional custodianship laws foster

45 D Mailula 'Customary (communal) land tenure in South Africa: Did *Tongoane* overlook or avoid the core issue?' (2011) 4 *Constitutional Court Review* 80.

46 Pope (n 5) 341. 'The Minister's statutory power to prescribe "standard rules" makes the land administration system one of public administration rather than community-based ... [T]he basis of indigenous land rights is changed to the extent that the self-regulating aspects of a well-functioning social organisation are undermined. The flexible and socially transformative character of indigenous land law becomes calcified and linked to the inevitably slow pace possible with legislative changes.'

47 P Delius 'Contested terrain: Land rights and chiefly power in historical perspective' in Claassens & Cousins (n 17) 237.

48 Presidential Report (n 4) 479. 'Land owned collectively through title deeds held by Traditional Councils, Trusts and Communal Property Associations is highly susceptible to abuse by leaders of these collectives, who claim ownership when their role should be that of trusteeship or custodianship on behalf of the members of the collective.' See also Claassens & Matlala (n 16) 113-135.

49 S Roberts 'Law and dispute processes' in T Ingold (ed) *Companion encyclopedia of anthropology: Humanity, culture and social life* (1994) 972; T Thipe 'Defining boundaries: Gender and property rights in South Africa's Traditional Courts Bill' (2013) 2 *Laws* 510. See also secs 10(2)(i), 11(c), 11(8)-(11) & 20(c) of the TCB. Read together, the TCB provisions force people to use the traditional courts, blocking the use of magistrate's courts, and enable traditional leaders to unilaterally interpret custom. Sec 20(c) makes it a criminal offence for people not to appear before a traditional leader if called, while sec 10(2)(i) allows traditional leaders to issue an order 'depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom. Customary entitlements include land and community membership'.

an indifference to the self-determination of the very community members who are to benefit from the land – an attitude that makes one think of the kind of 'trusteeship' employed during the apartheid regime. Furthermore, traditional custodianship laws only give lip service to gender equity in the transition from colonial-apartheid traditional authorities to traditional councils. The statutes do little to compel the transformation of traditional authority structures that are innately patriarchal and exclusionary towards women. By not making gender representation compulsory without exception, these laws fail to safeguard the unique position of women in rural areas, leaving their security of tenure vulnerable to patriarchal structures,[50] and then go even further by limiting their ability to seek recourse outside of the same patriarchal structures to defend their rights.[51]

As an asset, land takes on added importance, since customary institutions may either permit or deny women access and rights, thereby permitting or denying them their livelihoods. Women's rights are also uncertain by customary institutions' own interests in their pursuit of power and authority, making claims on land that are similar to or compete with claims made by women.[52]

This approach negates the realities of women living in rural areas and the multiple roles they play in society, including their occupation of and farming on agricultural land. Security of land tenure affords one the legal and practical ability to defend one's ownership,

50 Thipe (n 49) 483-510. In denying women control over land, traditional leaders not only assert their existing authority, but also (re)declare land as a solely masculine entitlement. In this way, traditional leaders are able to consolidate their institutional power as well as the power associated with gendered identities. S Marks 'Patriotism, patriarchy and purity: Natal and the politics of Zulu ethnic consciousness' in L Vail (ed) *The creation of tribalism in Southern Africa* (1989) 215-234; sec 3(b) of the TLGFA. While the law requires at least 30% or a third women representation on traditional councils, the drafters have left the wording open to interpretation. This makes women's accession to traditional councils uncertain because the provision in the act allows for the premier to establish a lower threshold if insufficient women are available to participate.

51 Custom Contested 'Traditional Courts Bill', https://www.customcontested.co.za/laws-and-policies/traditional-courts-bill-tcb/ (accessed 20 August 2022). On 2 December 2020 the TCB was passed by a plenary of the National Council of Provinces (NCOP) – the version passed by the NCOP did not provide for opting out that gives people the choice of where to take their matters, between traditional courts and magistrates' courts. The Traditional Courts Bill had a long legislative history spanning more than 10 years since the introduction of the first version of the Bill in 2008. Attempts to pass the initial version and subsequent versions of the Bill were all met with strong public outcry, especially from rural communities and rural women concerned with what the Bill will mean for them and how it distorts customary law. Although an improved version of the Bill that included the opt-out clause was introduced to Parliament during 2017, this provision was removed by the Portfolio Committee in 2018. The new Traditional Courts Act 9 of 2022 almost entirely removes reference to the consensual and voluntary nature of customary law and creates a parallel legal system for rural citizens in South Africa, compared to people living in urban areas.

52 Weeks (n 19) 145.

occupation, use of and access to land from interference.[53] This includes the right to access courts of one's own choosing.[54] Laws and policies must seek to do more than merely regulate formalistically, without proper regard for the unique circumstances of the lives that are being affected, and should not assume that laws and policies affect everyone in the same way. Following such a neoliberal notion of equality based on sameness would be a setback to constitutional jurisprudence and would fail to achieve substantive equality for marginalised groups such as women. According to Albertyn, this is precisely why transformative substantive equality is concerned with complex, structural, intersectional and relational inequalities. At a broad level, these relate to structures of capitalism[55] and patriarchy that create and reproduce inequalities that affect particular groups and individuals.[56]

It is the responsibility of the legislature to promote the socio-economic and political participation of women in South Africa's laws and policies. This is done by advancing the spirit, purport and objects of the Constitution and its democratic principles.[57] This is yet another shift in land policy away from earlier socialist policies, which understood that land reform intrinsically included elements such as gender equity as one of the contributing factors to its success.[58] It also points to the recurring theme of disconnect or disassociation between recent land reform laws and policies and the lived realities of rural individual and communal land holders exercising their land rights in accordance with customary law.

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53 T Weinberg 'Overcoming the legacy of the Land Act requires a government that is less paternalistic, more accountable to rural people' (2013) 70 *Journal of the Helen Suzman Foundation* 30.

54 Sec 34 Constitution. 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

55 AJ van der Walt 'Government interventionism and sustainable development: The case of South Africa' (2015) 8 *African Journal of Public Affairs* 37. 'In this regard Kropotkin and Woodcock … argue that government intervention is a prominent feature of capitalism. According to them, nowhere has the system of "non-intervention of the state" ever existed. Everywhere the state has been, and still is, the main pillar and the creator, direct and indirect, of capitalism and its powers over the masses. The state has always interfered in the economic life in favour of the capitalist exploiter. Kropotkin and Woodcock … further insist that even in a truly *laissez-faire* capitalist system, the state would still be protecting capitalist property rights as well as hierarchical social relationships.'

56 C Albertyn 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 465. 'Substantive equality should not only focus on substantive outcomes and concrete effects but also on the "structures, processes, relationships and norms" that reproduce hierarchy, marginalisation, exclusion and inequality in everyday life (context).'

57 *Rahube v Rahube* 2019 (2) SA 54 (CC) para 2.

58 JM Pienaar 'Restitutionary road: Reflecting on good governance and the role of the Land Claims Court' (2011) 14 *Potchefstroom Electronic Law Journal* 30-34; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's the law of property* (2006) 593.

Therefore, this disconnect has implications for the stewardship ethic, particularly for African countries that place social justice at the core of the stewardship ethic expected from their governments. As such, their (stewardship) ethical systems should naturally include a keen understanding of the mutual normative constitution of individuals who operate within a shared conception of ethical life, which is vastly different from the unilateral imposition of ideologies through laws and policy. The former translates into shared conceptions of the appropriate allocation of rights and obligations,[59] while the latter may struggle to achieve social cohesion which, in turn, could impair inclusive economic development.

3 Conclusion

By enacting the Constitution, the South African nation has committed to property reforms to bring about equitable access to all the country's natural resources, and land is expressly included in this public interest.[60] This primary commitment is clear from the prescript that no provision in the property clause may impede the state from taking legislative and other measures to achieve land, water and related reforms to redress the results of past racial discrimination.[61] This is qualified by the understanding that any limitation on existing property rights to achieve redistribution can only take place in terms of a law of general application, and the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[62]

In addition, the Constitution demands that the exercise of administrative and, consequently, regulatory powers by the state be lawful, reasonable and procedurally fair.[63] These constraints within which state regulation is intended to operate are necessary to hold the state accountable for arbitrary actions and decisions that are

59 Atkinson (n 28) 77.
60 Sec 25(4)(a) Constitution.
61 Sec 25(8) Constitution. See also Mostert & Lei (n 8) 398, who state that sec 25(8) 'enables the state to deviate from those aspects in the property clause which protect vested individual property interests where land and related reform initiatives may be hampered by their protection'.
62 Sec 36(1) Constitution (Bill of Rights limitation test).
63 Secs 33(1)-(3) Constitution. '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote efficient administration.'

contrary to the fiduciary duties of public trusteeship, while also safeguarding the stewardship ethic.

However, Parliament and the legislature should be careful not to enact regulatory laws and policies that can be used to circumvent constitutional constraints and protections by creating separate spaces for the exercise and adjudication of socio-economic justice, outside of, and to the exclusion of, constitutional protections. This article explores the detrimental implications of a statutory communal land tenure rights system that does not recognise the developmental nature of living customary law. It further highlights the confusion and potential for abuse that land tenure statutes create when the roles of traditional leaders are given primacy above the role of the community that they were elected to serve. This leads to disempowering outcomes that are impractical and untenable. The article examines the political ideologies and misinterpretations of constitutional objectives and how these influences can derail tenure reforms with dire implications for the socio-economic well-being and inclusive economic growth in these communities. The article emphasises the recurring theme of disconnect or disassociation between recent land reform laws and policies and the lived realities of rural individuals and communal land holders who should be the principal authors of their land tenure rights, but are excluded from the formulation and decision-making processes. A regulatory approach of what amounts to state custodianship over communal land tenure structures simply is inappropriate in its current form, as it leads to disempowering outcomes and life-long dependency on the state; the threat of dispossession and thus insecure tenure; the misinterpretation of constitutional objectives as discussed; and remains far too susceptible to political and ideological abuse.

It is recommended that any attempt at sustainable land tenure reform must recognise the importance of community engagement in the legislative and policy formulation of their land tenure rights. The reality is that informal land tenure rights are exercised and lived on a daily basis. These rights, therefore, are already in operation and established and in existence. These existing informal land tenure rights must be comprehensively understood, protected and acknowledged in law.