AFRICAN HUMAN RIGHTS LAW JOURNAL

To cite: F Osman 'An examination of the recognition of communities and partnership agreements under South Africa's Traditional and Khoi-San Leadership Act' (2024) 24 *African Human Rights Law Journal* 609-631
http://dx.doi.org/10.17159/1996-2096/2024/v24n2a9

An examination of the recognition of communities and partnership agreements under South Africa's Traditional and Khoi-San Leadership Act

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Summary: *In 2021 the South African legislature enacted into force the contentious Traditional and Khoi-San Leadership Act 3 of 2019 under the guise of recognising leaders of the Khoi San, who generally are regarded as the 'first people' in South Africa. This article provides a critical analysis of key provisions in the Act: the recognition of traditional communities and the power of traditional councils to conclude partnership agreements. It reveals that the Act differentiates between the Khoi-San and other South African indigenous groups in the recognition of traditional communities. Khoi-San councils exercise jurisdiction over individuals who voluntarily affiliate to the Khoi-San community, while in other communities traditional councils are conferred jurisdiction over land and the people that live thereon. Furthermore, the Act does not address existing concerns regarding the concentration of powers in traditional councils, but rather bolsters the powers of traditional councils to conclude agreements on behalf of communities. The article argues that voluntary affiliation should be centred as a requirement for the formation of all communities and that the power to conclude partnership agreements must be reconsidered.*

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Key words: *traditional leadership; Traditional and Khoi-San Leadership Act; Khoi-San; traditional communities*

1 Introduction

In 2021, after years of deliberation and contestation,[1] the Traditional and Khoi-San Leadership Act[2] (TKLA) entered into force. However, only two years later the Constitutional Court, in a unanimous judgment in *Mogale v Speaker of the National Assembly*[3] delivered on 30 May 2023, declared the TKLA unconstitutional because Parliament had failed to facilitate public participation in the legislative process.[4] The declaration of unconstitutionality was suspended for two years to allow Parliament time to re-enact the statute in a manner consistent with the Constitution or to pass another statute in a manner consistent with the Constitution.[5] This article examines key provisions in the TKLA, with a view to contributing to the discourse on what a new and improved iteration of the Act could look like.

The article focuses on what I consider to be the critical provisions of the Act that require reconsideration: the differences in recognition of a traditional and Khoi-San community and the power of traditional councils to conclude partnership agreements on behalf of communities. First, I provide a brief overview of the recognition of customary law and traditional leadership institutions in South Africa to contextualise the critique and analysis of the current TKLA. This overview encompasses the Traditional Leadership and Governance Framework Act (TLGFA),[6] being the legislation that preceded the TKLA. I then contrast the TKLA's different approaches to recognising

1 The Draft Traditional Affairs Bill was published in 2013. It was replaced by the first iteration of the Traditional and Khoi-San Leadership Bill B23-2015 in 2015 and thus had taken six years to pass through the legislative process. For a discussion of the protests preceding the TKLA, see C Himonga & T Nhlapo *African customary law in South Africa: Post-apartheid and living law perspectives* (2023) 348. For a discussion of concerns raised during the legislative process, see X Poswa 'What happens when government fails to listen to rural voices: Constitutional Court declares Traditional and Khoisan Leadership Act unconstitutional' *Local Government Bulletin* September 2023, https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-18-issue-3-september-2023/what-happens-when-government-fails-to-listen-to-rural-voices-constitutional-court-declares-traditional-and-khoisan-leadership-act-unconstitutional (accessed 8 October 2024); Legal Resources Centre 'Constitutional Court declares the Traditional and Khoi-San Leadership Act unconstitutional' 30 May 2023, https://lrc.org.za/30-may-2023-constitutional-court-declares-the-traditional-and-khoi-san-leadership-act-unconstitutional/ (accessed 8 October 2024).

2 Act 3 of 2019 (TKLA).

3 *Mogale v Speaker of the National Assembly* (CCT 73/22) [2023] ZACC 14 (30 May 2023).

4 *Mogale* (n 3) paras 1 & 2 of the order.

5 *Mogale* (n 3) para 3 of the order.

6 Act 41 of 2003 (TLGFA).

a traditional and Khoi-San community and explain the consequences thereof. In conclusion, I analyse the controversial section 24 of the TKLA which empowers traditional councils to conclude partnership agreements on behalf of communities.

2 Historical recognition of customary law and traditional leadership institutions in South Africa

Customary law and its accompanying institutions have a checkered history in South Africa. This part examines the historical recognition of customary law and traditional leadership institutions because several of the issues associated with the TKLA discussed in this article arise from the historical treatment of customary law.

Early colonialists in South Africa ignored customary law and sought to incorporate indigenous people into a single legal order in accordance with the approach of direct rule.[7] The approach proved unfeasible, as the under-resourced state faced a large and dispersed population that continued to live according to their own laws.[8] The colonial state shifted to a policy of indirect rule, with the state recognising and using customary law and its institutions for the purposes of controlling the indigenous population.[9]

The apartheid (which means 'apartness' in Afrikaans) era, which ran from 1948 to 1994, saw a solidification of the approach of indirect rule as the state implemented its policy of segregation and separation of the population by race through a series of legislation that in some cases used traditional leadership institutions to implement its agenda.[10] The state broke up, amalgamated and, in essence, created tribes by grouping people according to language and appointing chiefs who presided over communities.[11] These state-created tribes with state-appointed traditional leaders resulted in – and continue

7 Himonga & Nhlapo (n 1) 4-5; T Bennett *Customary law in South Africa* (2004) 35.
8 Bennett (n 7) 35-36.
9 Himonga & Nhlapo (n 1) 6, 8.
10 Eg, the Immorality Act 5 of 1927 prohibited extra-marital sex between Europeans and non-Europeans and the Prohibition of Mixed Marriages Act 55 of 1949 prohibited marriages between white and non-white people. The Black Administration Act 38 of 1927 purported to regulate the lives of black individuals and regulated, among others, customary marriage, succession and the formation of tribes. The Act was described by Langa DCJ as being 'specifically crafted to fit in with notions of separation and exclusion of Africans from the people of "European" descent. The Act was part of a comprehensive exclusionary system of administration imposed on Africans;' *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 (1) SA 580 (CC) para 61.
11 Bennett (n 7) 106-111; J Ubink and others 'An exploration of legal pluralism, power and custom in South Africa. A conversation with Aninka Claassens' (2021) 53 *Journal of Legal Pluralism and Unofficial Law* 498, 502.

to give rise to – disputes regarding the legitimacy of chiefs and the state-created boundaries of communities.[12] Furthermore, chiefs were responsible for implementing state policy and were seen as state puppets.[13] In this regard, chiefs administered pass laws, controlled access to urban areas and collected fees and levies.[14] As the state conferred greater power on chiefs, their legitimacy in communities was undermined.[15] However, because chiefs were now accountable to the state, and land was no longer freely available, people could no longer secede when unhappy with a chief.[16] The loss of the possibility of secession meant the loss of the primary means by which people protested bad chiefs and held them accountable.[17] On the other hand, chiefs had very little choice in the matter. Chiefs who resisted the state agenda were stripped of their power and confined to small areas of land, while those who supported the state policy were rewarded with large areas of land[18] and power.[19] In conclusion, customary law was recognised during the pre-constitutional era to control the indigenous population rather than to recognise it as a legitimate source of law.

The state's treatment of the Khoi-San people in the pre-constitutional era is more complex. The Khoi-San, who are regarded as the 'first people' of South Africa,[20] were marginalised and overlooked as an indigenous group in South Africa's pre-constitutional history.

12 A Claassens 'Contested power and apartheid tribal boundaries: The implications of "living customary law" for indigenous accountability mechanisms' (2011) 1 *Acta Juridica* 174, 188; P Delius 'Chiefly succession and democracy in South Africa: Why history matters' (2021) 47 *Journal of Southern African Studies* 209-227. Former President Thabo Mbeki established the Commission on Traditional Leadership Disputes and Claims known as the Nhlapo Commission to investigate disputes surrounding traditional leadership and tribal boundaries; see UCT 'Nhlapo to adjudicate traditional leader disputes' *UCT News* 8 November 2004, https://www.news.uct.ac.za/article/-2004-11-08-nhlapo-to-adjudicate-traditional-leader-disputes (accessed 18 April 2023); J Peires 'History versus customary law: Commission on traditional leadership: Disputes and claims' (2014) 49 *South African Crime Quarterly* 7.
In 2012 the Kgatla Commission was established in Limpopo to investigate 568 disputes relating to traditional leadership; *News24* 'Limpopo to probe 568 traditional leadership disputes' 18 May 2012, https://www.news24.com/news24/limpopo-to-probe-568-traditional-leadership-disputes-20150430 (accessed 3 October 2024).

13 I van Kessel & B Oomen '"One chief, one vote": The revival of traditional authorities in post-apartheid South Africa' (1997) 96 *African Affairs* 561, 563.

14 Van Kessel & Oomen (n 13) 566.

15 Van Kessel & Oomen (n 13) 563.

16 Himonga & Nhlapo (n 1) 342. Before people were confined to homelands, groups regularly seceded; see Delius (n 12) 213.

17 Himonga & Nhlapo (n 1) 342.

18 Claassens (n 12) 187-188.

19 N Kukauka 'Political recognition and cultural identity of minorities: What is their meaning in the case of Khoisan in South Africa?' LLM dissertation, University of Cape Town, 2023 29.

20 D Pieterse 'The implication of the Traditional Khoisan Leadership Bill of 2015' 9, https://ijisrt.com/assets/upload/submitted_files/1570013558.pdf (accessed 18 April 2023).

Khoi-San is the collective term used to refer to the 'lighter-skinned indigenous peoples of Southern Africa',[21] namely, the Khoi Khoi and the San who were similar in language, appearance and way of life.[22] Historically, the colonial and apartheid state did not recognise the indigeneity of Khoi-San institutions.[23] The apartheid state classified the South African population according to race, and the lighter-skinned Khoi-San were classified as 'coloured' (along with others such as Malay slaves and people of a mixed race),[24] and dispersed them throughout the country.[25] Khoisan people describe this as humiliating, which resulted in them 'not being able to maintain their identity as an indigenous community with a distinct ethnic composition'.[26] In contrast, the other indigenous groups who were darker skinned were classified as 'black', relocated and confined to the homelands,[27] and had chiefs and tribal authorities established over them.[28] Thus, the notions of 'customary law', 'traditional community' and 'traditional leadership' were applied to black indigenous groups by the state in the pre-constitutional era. In contrast, the Khoi-San never had a homeland like the black indigenous groups.[29]

The advent of the Constitution marked a significant shift in the state's treatment of customary law and accompanying institutions. As a starting point, it should be noted that customary law[30] is not defined in the South African Constitution,[31] but is defined in legislation as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.[32] This raises the question of who is considered indigenous to South Africa.

21 B van Wyk 'Indigenous rights, indigenous epistemologies, and language: (Re) construction of modern Khoisan identities' (2016) 4 *Knowledge Cultures* 33, 34.
22 Kukauka (n 19); A le Fleur & L Jansen 'The Khoisan in contemporary South Africa: Challenges of recognition as an indigenous people. Country report: South Africa' August 2013 1-2, https://www.kas.de/documents/252038/253252/7_dokument_dok_pdf_35255_2.pdf/ (accessed 8 October 2024).
23 S Burnett and others 'A politics of reminding: Khoisan resurgence and environmental justice in South Africa's Sarah Baartman district' (2023) 20 *Critical Discourse Studies* 524, 527.
24 Burnett and others (n 23) 527; Kukauka (n 19) 13.
25 For a historical discussion of the Khoi-San's engagement with colonialists, which is beyond the scope of this article, see Kukauka (n 19) 8-12.
26 Le Fleur & Jansen (n 22) 2.
27 The homelands, also referred to as Bantustans and established as part of apartheid, were the areas to which the state moved the majority black population to deny them citizenship and rights in 'white' South Africa. The infrastructure of these areas was never developed. See MC Rogerson & JM Rogerson 'The Bantustans of apartheid South Africa: Transitioning from industry to tourism' (2023) 25 *Revista Română de Geografie Politică* 1-3.
28 Himonga & Nhlapo (n 1) 10-11.
29 Kukauka (n 19) 26.
30 The term 'customary law' is used interchangeably with 'indigenous law' in this article.
31 Constitution of the Republic of South Africa, 1996.
32 Recognition of Customary Marriages Act 120 of 1998, definition.

The term 'indigenous people' is contested in international law,[33] but the United Nations (UN) has provided a working definition with three features, namely, '(1) a pre-colonial presence in a particular territory; (2) a continuous cultural, linguistic and/or social distinctiveness from the surrounding population; and (3) a self-identification as "indigenous" and/or a recognition by other indigenous groups as "indigenous"'.[34]

The Working Group of Experts on Indigenous Populations/ Communities of the African Commission on Human and Peoples' Rights (African Commission) has identified criteria or characteristics for identifying an indigenous community.[35] The African Commission articulated the criteria as 'the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination'.[36] The African Court on Human and Peoples' Rights (African Court) articulated it slightly differently as follows:[37]

(1) self-identification;
(2) a special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and
(3) a state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.

Notably, the above characteristics do not require a pre-colonial presence, unlike the UN working definition set out above, which may be a contentious requirement for some indigenous groups.

33 The United Nations Declaration on the Rights of Indigenous Peoples (2007) does not define indigenous people. For a discussion of this, see D Champagne 'UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, civil, and indigenous rights' (2013) 28 *Wicazo Sa Review* 9 17. The ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries 169 (1989) provides that indigenous peoples are descendants of populations 'which inhabited a country or geographical region during its conquest or colonisation or the establishment of present state boundaries' and 'retain some or all of their own social, economic, cultural and political institutions'; see art 1(1).

34 S Lightfoot & D MacDonald 'The United Nations as both foe and friend to indigenous peoples and self-determination' in JR Avgustin (ed) *The United Nations: Friend or foe of self-determination?* (2020) 33.

35 African Commission on Human and People's Rights Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities (2005) 92-93.

36 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 150.

37 *ACHPR v Kenya, African Court of Human and Peoples' Rights* Application 6/2012, African Court of Human and Peoples' Rights, May 2017 para 105.

Neither the South African Constitution nor any South African legislation defines 'indigenous people', and this has not been an issue in law as yet. People are grouped together on the basis of language[38] and other cultural features and practices,[39] and because of the similarities between the groups, they are often discussed as a collective or in terms of the broader groups, namely, the Nguni, Tsonga/Shangaan, Sotho or Venda.[40] There accordingly is no single system of customary law in South Africa, but there are as many versions of customary law as there are indigenous communities.[41] Unfortunately, the fact that the Khoi-San continue to be labelled 'coloured' and their languages are not officially recognised languages often renders them invisible in the constitutional dispensation.[42] The marginalisation of the Khoi-San may be due to their relatively small number in relation to the total population (they are estimated to be 1 per cent[43] of South Africa's 60,4 million population) and, therefore, they may lack a political voice to ensure their recognition.[44]

Despite some debate regarding whether customary law should be recognised in a constitutional democracy, and in particular whether traditional leadership should be recognised given the hereditary and patriarchal system of succession in traditional leadership,[45] customary law is recognised as a valid system of law in South Africa. Sections 30 and 31 of the Constitution protect individual and group rights to culture, respectively, which entails the right of individuals to enjoy their culture, practise their religion, use their language, and form and maintain cultural, religious and linguistic associations. Cultural rights are usually best exercised in association with other people and, therefore, are described as associational individual rights.[46] The rights are also interpreted as recognising customary law.[47] In

38 The nine official indigenous languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu; see the Constitution sec 6(1). The languages of the Khoi-San are not recognised as official languages.
39 C Rautenbach & AE Tshivhhase 'Nature and sphere of African customary law' in C Rautenbach (ed) *Introduction to legal pluralism* (2021) 22.
40 Rautenbach & Tshivhhase (n 39) 23.
41 Himonga & Nhlapo (n 1) 23; Van Kessel & Oomen (n 13) 572-578.
42 Le Fleur & Jansen (n 22) 2.
43 IWGIA 'The indigenous world 2022: South Africa' 1 April 2022, https://www.iwgia.org/en/south-africa/4642-iw-2022-south-africa.html (accessed 8 October 2024).
44 For a discussion of how the Khoi-San negotiated for their recognition, see Le Fleur & Jansen (n 22) 2-3.
45 N Mathonsi & S Sithole 'The incompatibility of traditional leadership and democratic experimentation in South Africa' (2017) 9 *African Journal of Public Affairs* 35, 38.
46 Bennett (n 7) 86. For a discussion of culture, see O Ampofo-Anti & M Bishop 'On the limits of cultural accommodation: *KwaZulu-Natal MEC for Education v Pillay*: Part III: Reflections on themes in Justice Langa's judgments' (2015) *Acta Juridica* 463-472.
47 *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) para 24; Bennett (n 7) 88.

addition, the Constitution recognises the existence of any other rights and freedoms in customary law to the extent that they do not conflict with the Bill of Rights, and provides that in the development of customary law courts must promote the spirit, purport and objects of the Bill of Rights.[48] Furthermore, the Constitutional Court, being the apex court in South Africa, described customary law as 'an integral part of our law' and confirmed that the Constitution 'acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system … In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.'[49]

More pertinent for this article, the Constitution recognises that 'the institution, status and role of traditional leadership, according to customary law' are subject to the Constitution.[50] This provision centres customary law in the recognition of traditional leadership and recognises the role of traditional leaders without conferring upon them any functions.[51] Furthermore, the Constitution is sparse in the regulation of traditional leadership and provides that '[a] traditional authority that observes a system of customary law may function subject to any applicable legislation'.[52] It is thus envisaged that national legislation will regulate traditional leadership rather than the Constitution directly. Courts are further mandated to apply customary law subject to legislation[53] and the Constitution.[54] In the context of traditional leadership, it means that where the role or conduct of traditional leadership found in customary law conflicts with legislation, the legislation takes precedence – rendering the

48 Secs 39(2) and (3) of the Constitution. For a discussion of constitutional legal pluralism, see C Himonga 'The Constitutional Court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law' (2017) *Acta Juridica* 104-108.

49 *Alexkor Ltd v the Richtersveld Community* 2004 (5) SA 460 (CC) 480 para 51.

50 Sec 211(1) of the Constitution.

51 A role that may be ceremonial is distinguishable from a function that may carry responsibility and powers; Himonga & Nhlapo (n 1) 336-337.

52 Sec 211(2) of the Constitution.

53 For a discussion of some of the consequences of the statutory regulation of customary law, see F Osman 'The consequences of the statutory regulation of customary law: An examination of the South African customary law of succession and marriage' (2019) 22 *Potchefstroom Electronic Law Journal* 1-24.

54 Sec 211(3) Constitution. This section means that customary law must be brought into line with the Constitution. The courts have applied customary law directly by striking down customary law and indirectly by developing customary law. For a discussion of how the Constitution may apply, see W Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *South African Journal on Human Rights* 241-277. The constitutional oversight has ensured that discriminatory customary practices are not perpetuated. Eg, the court has struck down the principle of male primogeniture (*Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC)), and developed customary law to require the consent of a first wife for a subsequent customary marriage (*Mayelane v Ngwenyama* 2013 (4) SA 415 (CC)).

legislation regulating the institution of traditional leadership critical in South Africa.

The TLGFA,[55] which entered into force in 2004, was the legislation enacted to provide for, among others, the recognition, function and roles of traditional leadership.[56] Section 20 of the TLGFA listed a range of areas in which traditional leaders and councils could be given a role, which included land administration and the administration of justice. Section 28 of the TLGFA recognised pre-existing tribes, traditional leaders and tribal authorities and deemed them to be traditional communities, traditional leaders and traditional councils, respectively, to be regulated in terms of the Act.[57] This provision entrenched the tribal authority boundaries established during apartheid.[58] While this may have ensured continuity in traditional governance matters, empirical research reveals that some individuals were dissatisfied about this as they did not want to form part of a traditional community but were not given an opportunity to say so.[59] It should be noted that the recognition of a 'traditional community' was important for the purposes of the TLGFA and for identifying the traditional leadership that governed the community. Accordingly, I use the term 'traditional community' as it is used in the relevant legislation and not interchangeably with the term 'indigenous people'.

Furthermore, a comprehensive critique of the TLGFA is beyond the scope of this article, but it should be noted that it was vehemently criticised because it was seen as the linchpin for other laws that treat people as subjects of traditional leaders, as was done in the pre-constitutional era.[60] Claassens argued that locking in people was

55 Act 41 of 2003.
56 TLGFA, Preamble.
57 Secs 28(1), (3) and (4) TLGFA. The TLGFA made provision for the transformation of these institutions and provided that a third of the councillors on a traditional council should be women and 40% were to be democratically elected while 60% may be appointed by a senior traditional leader (TLGFA sec 3). In this way, councils would be more representative of communities.
58 A Claassens 'Denying ownership and equal citizenship: Continuities in the state's use of law and "custom", 1913-2013' (2014) 40 *Journal of Southern African Studies* 761, 767.
59 J Ubink & T Duda 'Traditional authority in South Africa: Reconstruction and resistance in the Eastern Cape' (2021) 47 *Journal of Southern African Studies* 191, 205.
60 Claassens (n 58) 767-769. Claassens discusses how the TLGFA along with the Communal Land Rights Act 11 of 2004 (which Act was declared unconstitutional on a technicality in *Tongoane v National Minister for Agriculture and Land Affairs* 2010 (6) SA 214 (CC)) and the Traditional Courts Bill of 2011 essentially locked people into areas where traditional leaders were the owners of land and the adjudicator of disputes. For a further discussion of this, see Ubink & Duda (n 59) 192-193. For a critique of the Traditional Courts Bill 2017, see F Osman 'Third time a charm? The Traditional Courts Bill 2017' (2018) 64 *South African Crime Quarterly* 45-53.

indicative of the state's lack of confidence in people choosing their customary identities through consensual affiliation.[61] More cynically, it may reflect the state's lack of confidence that people would voluntarily choose to be represented by a traditional leader. Claassens further criticised the TLGFA's revival of the traditional institutions and their boundaries for conflicting with the constitutional requirement that municipalities would be established throughout the country[62] to replace traditional authorities.[63]

The Act did not explicitly exclude Khoi-San leaders from recognition, but because they were not expressly recognised, it was interpreted to mean that they were not recognised in terms of the Act.[64] This is because the notions of 'customary law' and 'traditional leadership' were historically understood as applying to black indigenous groups in South Africa (and not the Khoi-San) and the Act continued the existing recognition of communities and traditional leadership.

Accordingly, the TLGFA, which was meant to recognise, regulate and transform existing traditional institutions, was not interpreted to apply to Khoi-San communities that were not historically recognised or regulated by the state. For ease of understanding, the article continues to use the notion of 'traditional community' and 'traditional leadership' to refer to the institutions associated with black indigenous groups.

3 Traditional leadership and the Khoi-San Act

The TKLA was advocated as being necessary to give long-awaited recognition to Khoi-San leadership in South Africa. Comprising 54 pages and 66 sections, the length of the TKLA is double that of the TLGFA, which makes up 20 pages and has 30 sections.[65] The substantial increase in length is due in part to the Act's approach of maintaining a distinction in the regulation of traditional and Khoi-San

61 Claassens (n 58) 769.
62 Sec 151(1) of the Constitution provides: 'The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.'
63 Claassens (n 58) 767.
64 High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change 'Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change' November 2017 424, 428, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf (accessed 8 October 2024).
65 For a general discussion of the similarities and differences between the TLGFA and TKLA, see MP Sekgala 'The role of traditional leaders in South Africa: Comparison between the Traditional and Khoi-San Leadership Bill, 2015 and the Traditional Leadership and Governance Framework Act 41 of 2003' (2018) 15 *Bangladesh e-Journal of Sociology* 80.

communities and leadership. The Traditional Khoi-San Leadership Bill was vehemently resisted by rural communities and civil society organisations because it was believed to confer disproportionate and illegitimate powers to traditional authorities over communities.[66] Most notably, the 'Stop the Bantustan Campaign' opposes the TKLA, along with other proposed legislation, for entrenching apartheid boundaries and conferring greater powers on traditional leadership.[67] In respect of land reform, the TKLA, when still a Bill, was flagged as being inconsistent with other laws governing communal land tenure and possibly irrational and unconstitutional.[68] I focus on the key differences in the Act's recognition of traditional and Khoi-San communities and the power conferred upon traditional leadership institutions to conclude partnership agreements because these provisions give rise to many of the critiques.[69]

3.1 Recognition of traditional community

Like its predecessor, the TKLA recognises existing traditional communities and leadership structures.[70] Communities and leaders recognised during the pre-constitutional era are automatically recognised based on their historical recognition.[71] This is problematic as it ignores the history of forced removals and state imposition of traditional leaders that have led to a plethora of disputes regarding the boundaries of communities and the legitimacy of traditional leaders.[72] The recognition of traditional leader that a community disputes denies people the right to define their own customary identity or affiliate with a leader of their choice.[73]

The TKLA further defines a traditional community as a traditional community recognised in terms of section 3 of the Act.[74] Section

66 S Mnwana 'Chiefs, land and distributive struggles on the Platinum Belt: A case of Bakgatla-ba-Kgafela in the North West Province, South Africa' 3-4, https://mistra.org.za/wp-content/uploads/2019/10/Sonwabile-Mnwana_Working-Paper_-Final.pdf (accessed 8 October 2024).
67 https://stopthebantustanbills.org/ (accessed 8 October 2024).
68 Presidential Advisory Panel on Land Reform and Agriculture 'Final Report of the Presidential Advisory Panel on Land Reform and Agriculture' 4 May 2019, https://static.pmg.org.za/panelreportlandreform_1.pdf (accessed 8 October 2024). The Constitutional Court in *Mogale* did not pronounce on the substance of the TKLA.
69 Sekgala provides an overview of the similarities and differences between the TLGFA and TKLA with respect to the role of traditional leadership; Sekgala (n 65) 80.
70 Section 63 TKLA. See Himonga & Nhlapo (n 1) 353.
71 High Level Panel on the Assessment of Legislation (n 64) 425.
72 See discussion above.
73 High Level Panel on the Assessment of Legislation (n 64) 423.
74 Definition of 'traditional community' in the TKLA.

3 of the Act, in turn, sets out the criteria for the recognition of a community as a 'traditional community'. Section 3(4) provides:

> (4) A community may be recognised as a traditional community if it –
> (a) has a system of traditional leadership at a senior traditional leadership level recognised by other traditional communities;
> (b) observes a system of customary law;
> (c) recognises itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities;
> (d) occupies a specific geographical area;
> (e) has an existence of distinctive cultural heritage manifestations; and
> (f) where applicable, has a number of headmenship or headwomenship.

The important requirements that warrant further discussion are that the community has a system of traditional leadership at a senior traditional level and occupies a specific geographical area.

First, as to the system of traditional leadership, the Act assumes that every traditional community has senior traditional leadership (formerly known as a 'chief').[75] However, evidence suggests that this is not the case and that many communities have flat structures where there is no chief but rather leadership in the form of an elected headman or a committee of community members.[76] For example, in the AmaHlathi community in the Eastern Cape, various villages were led by their headmen, and when the headmen lost power, the community elected village chairpersons for fixed-term periods.[77] After a resident claimed chieftaincy over the community, some residents petitioned the Eastern Cape Committee on Traditional Leadership Disputes and Claims for the disestablishment of the senior traditional leadership position, claiming that they never had a chief and that it is contrary to their custom for one to be imposed upon them.[78] The claims and disputes surrounding chieftaincy in the AmaHlathi case study reveal how the requirement that a community have a system of senior traditional leadership creates the potential for power grabs, as either community members claim to occupy these positions or a senior traditional leader from another community claims authority over the community.

75 Himonga & Nhlapo (n 1) 332, 354.
76 Himonga & Nhlapo (n 1) 347; Ubink & Duda (n 59) 195-197.
77 Ubink & Duda (n 59) 199.
78 Ubink & Duda (n 59) 199-200.

Second, the Act requires that the community occupy a specific geographical area. The requirement of the occupation of a specified geographical area is important because this geographical area is likely to constitute the jurisdictional area of the traditional leadership council that presides over the traditional community. This is because the Act contemplates that the premier of a particular province will define the area of jurisdiction of a traditional leadership council (which may be a kingship or queenship council, principal traditional council or traditional council)[79] and the geographical area occupied by the community is likely to be the jurisdiction of a traditional leadership council. The traditional council accordingly exercises jurisdiction over an area of land. People thus fall under the jurisdiction of a council because of where they live, regardless of whether they voluntarily affiliate with the traditional leader and their council. This is problematic because, as was discussed earlier, the colonial and apartheid history of forced removals and relocations means that individuals may live in areas where they reject the legitimacy and authority of the presiding traditional leader or council, or the community's boundary. This imposition of traditional leadership on people without their consent may infringe on the right to culture, self-identification, and association with the traditional authorities of their choice, the very rights interpreted to confer a right to live according to customary law.[80]

In essence, the TKLA continues the TLGFA's model, and the problems of recognising existing communities and their boundaries. This is disappointing because, at its heart, customary law is defined as a system of voluntary affiliation,[81] as evinced by the notion of *inkosi yinkosi ngabantu* – a chief is a chief by the people.[82] This principle alludes to the idea that a chief's power, authority and legitimacy derive from the people who recognise him as such.[83] It was the colonial and apartheid state that distorted this understanding of traditional leadership and gave chiefs a state-enforced jurisdiction over land, regardless of whether the inhabitants of the area recognised the authority and legitimacy of the chief,[84] and which is continued under the TKLA.

The consequences of locking people in are exacerbated by the current socio-economic conditions, which do not allow people to move away (as they did before they were locked into the

79 Sec 16(5)(a) TKLA.
80 See discussion above on the historical recognition of customary law.
81 Himonga & Nhlapo (n 1) 229-230.
82 Himonga & Nhlapo (n 1) 341.
83 Himonga & Nhlapo (n 1) 341.
84 See discussion above on the historical recognition of customary law.

homelands)[85] if they are unhappy with traditional leadership. South Africans living in the former homelands under traditional leadership often are the poorest and most vulnerable in South Africa. For example, in the Eastern Cape province,[86] mostly constituted of the areas of the former homelands of Transkei and Ciskei, infrastructure (such as roads, water and telecommunications) was never developed and the province remains one of the most underdeveloped in the country.[87] The state has failed dismally to provide access to basic services such as sanitation and water in the province.[88] The province has one of the highest unemployment rates in the country, at 32,2 per cent and an expanded unemployment rate of 43,6 per cent.[89] It is also considered to be one of the most dangerous in South Africa with the highest murder rate in the country.[90] These socio-economic constraints mean that individuals cannot simply move away if dissatisfied with the traditional leadership.

Furthermore, secession as a means of holding traditional leadership accountable was also rendered difficult under the TLGFA. For example, the North West High Court in *Pilane v Pilane* interdicted a village from meeting to discuss secession plans where they were unhappy with the broader traditional leadership.[91] While the Constitutional Court overturned the judgment, the saga revealed that secession may no longer be a viable means of holding traditional leaders accountable.

The complexity of enforcing accountability mechanisms compounds the above concerns. Schedule 1 to the TKLA contains a code of conduct for members of traditional councils.[92] The code is

85 Delius (n 12) 213.

86 In 2016 the Eastern Cape province was the third most populous province in the country with a population of almost 7 million people, 86% of which were black South Africans; Statistics South Africa 'Provincial profile: Eastern Cape community survey 2016' 2018 7, 15, http://cs2016.statssa.gov.za/wp-content/uploads/2018/07/EasternCape.pdf (accessed 24 October 2018); Statistics South Africa 'Quarterly labour force survey. Quarter 1: 2017' https://www.statssa.gov.za/publications/P0211/P02111stQuarter2017.pdf (accessed 19 April 2023).

87 For a general discussion of the rural area in South Africa, see C Himonga & E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015) 16-18.

88 Pit toilets are still the norm at 1 500 schools in the province where schools often cannot provide students with a useable toilet during the schooling day; see M Sizani 'Stinking, broken, overflowing: These are the pit toilets Eastern Cape learners are expected to use at school' GroundUP 15 October 2021, https://www.groundup.org.za/article/stinking-broken-overflowing-these-are-pit-toilets-eastern-cape-learners-are-supposed-use-school/ (accessed 11 October 2024).

89 Statistics South Africa 'Quarterly labour force survey' (n 86).

90 Staff writer 'These are the most violent areas in South Africa' *BusinessTech* 23 November 2022, https://businesstech.co.za/news/government/645545/these-are-the-most-violent-areas-in-south-africa/ (accessed 19 April 2023).

91 *Pilane v Pilane* (263/2010) [2011] ZANWHC 80 (30 June 2011). See discussion in Claassens (n 58) 775. The judgment was overturned in the Constitutional Court in *Pilane v Pilane* 2013 (4) BCLR 431 (CC).

92 Schedule 1 TKLA.

broad and covers the declaration of personal interests, the prohibition of using the position for personal gain, and the solicitation of gifts and favours.[93] Furthermore, section 9(1)(b) of the TKLA provides for the withdrawal of recognition of a traditional leadership position where an individual has been removed from office in terms of the code of conduct or has transgressed customary law or customs on a ground that warrants withdrawal of recognition. Thus, traditional leadership, in theory, may be held accountable under the Act. However, reality has proved otherwise, as exemplified in *Pilane* mentioned above. Mr Nyalala Molefe Pilane was the senior traditional leader or *kgosi* of the Bakgatla-ba-Kgafela community located in the North-West province.[94] For years before his removal, *Kgosi* Pilane had been embroiled in controversy amidst claims that he exploited his position of chieftancy to benefit from lucrative mining deals while the community remained impoverished.[95] There were numerous attempts to remove *Kgosi* Pilane from office and demands for an audit of the financial accounts, which proved futile.[96] Even after an internal audit detailing reckless and extravagant expenditure for his own benefit with minimal funds flowing to the community, there was no accountability and he retained his position.[97] While *Kgosi* Pilane was subsequently removed from his position, the controversy underscores the difficulty in holding traditional leaders accountable.

Balancing the recognition of traditional communities and respecting customary law in a constitutional democracy is complex. It involves acknowledging traditional communities and customary law practices while respecting people's rights to choose their leaders. In this balancing exercise, the current legal position errs in favour of traditional leadership at the expense of people's rights to elect their leaders. This, I submit, is untenable because it potentially infringes on rights to culture and self-identification by locking people into traditional communities and leadership without their consent. Concerns about this are compounded by the fact that moving away, secession and holding traditional leaders accountable is difficult or near impossible. Accordingly, the TKLA must allow people to express their affiliation to a leader, rather than impose a traditional leader on them. Fortunately, here the Act provides a possible alternative in how it recognises a Khoi-San community, and is discussed below.

93 Secs 5, 6, 7 & 8 of Schedule 1 TKLA.
94 *Pilane v Pilane* 2013 (4) BCLR 431 (CC) para 2.
95 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* 612-613.
96 Capps & Mnwana (n 95) 613; A Claassens & B Matlala 'Platinum, poverty and princes in post-apartheid South Africa: New laws, old repertoires' in GM Khadiagala and others (eds) *New South African Review 4* (2014) 125.
97 Claassens & Matlala (n 96) 125-126.

3.2 Recognition of the Khoi-San community

The recognition of a Khoi-San community conflicts starkly with that described above. A Khoi-San community is defined as a Khoi-San community recognised in terms of section 5 of the Act.[98] Section 5(1)(a) of the TKLA in turn provides that a community may apply to be recognised as Khoi-San community if it –

(i) has a history of self-identification by members of the community concerned, as belonging to a unique community distinct from all other communities;
(ii) observes distinctive established Khoi-San customary law and customs;
(iii) is subject to a system of hereditary or elected Khoi-San leadership with structures exercising authority in terms of customary law and customs of that community;
(iv) has an existence of distinctive cultural heritage manifestations;
(v) has a proven history of existence of the community from a particular point in time up to the present; and
(vi) occupies a specific geographical area or various geographical areas together with other non-community members.

The Act further provides that an application for the recognition of a community as a Khoi-San community must be accompanied by, among others, an application for the recognition of the position of a senior Khoi-San leader of that community and a list of all community members, which includes their names, surnames, identification numbers and signatures acknowledging their association with the community.[99]

From the statutory provisions, it is apparent that the recognition of both a traditional community and Khoi-San community requires a history of self-identification as a traditional community distinct from other communities. As stated previously, section 3(4)(c) of the TKLA requires that a traditional community, among others, 'recognises itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities'. This is similar to the requirements for the recognition of a Khoi-San community which in section 5(1)(a)(i) requires that the Khoi-San community 'has a history of self-identification by members of the community concerned, as belonging to a unique community distinct from all other communities'. This difference, however, is that the TKLA's recognition of a Khoi-San community is centred on community members self-identifying as part of the community. In respect of

98 Definition of 'Khoi-San community' in the TKLA.
99 Secs 5(1)(b)-(d) TKLA.

Khoi-San communities, the Act goes beyond requiring a history of self-identification by community members for recognition as a community. An application for the recognition of a community as a Khoi-San community must be accompanied by a list of members, along with their details, acknowledging their association with the community.[100]

Furthermore, the recognition of a Khoi-San community envisages that the community may be porous and, while they may occupy a specific geographical area, they may also occupy various areas with other non-community members.[101] The implication is clear that the community is defined by the individuals who voluntarily identify as part of the community (not by the area of land) and not everyone living within the geographical area may be a community member. Thus, individuals are not classified as belonging to a Khoi-San community simply because they live in a particular area. There must be an explicit voluntary association with the community. As the people define the community – and not an area of land – the Act provides that the Khoi-San council exercises jurisdiction over only such members who have voluntarily affiliated with the community.[102]

In contrast, the recognition of a traditional community does not require a list of community members who, through signature, acknowledge their association with the community. The risk is clear: Some individuals may form part of a community and fall under the jurisdiction of a traditional leader even where they do not voluntarily affiliate with the community or leader. If individuals reside in a community where there is a general history of self-identification as a traditional community, individuals will be subsumed into the community.

From the above it is clear that the state has adopted unmistakably different approaches to the recognition of traditional and Khoi-San communities, which difference itself is not problematic. The problem lies in the rationale and impact of the differentiation. It may be that the distinction in recognition is based on continuity. As discussed previously, black indigenous groups were historically confined to the homelands and had chiefs placed over them who exercised jurisdiction over the area of land and all people on the land. The TLGFA, and now the TKLA, continue this recognition of jurisdiction over the land. Khoi-San communities, however, were never allocated distinct areas of land and Khoi-San leaders never exercised jurisdiction

100 Secs 5(1)(a)(i) and 5(1)(b)(ii) of the Act.
101 Secs 5(1)(a)()(vi) of the Act.
102 Sec 18(4) TLKA.

over land. To confer jurisdiction over land on Khoi-San leaders would first require them to be given areas of land. This would be complex and would open a Pandora's box. The state has shied away from conferring land rights and jurisdiction to the Khoi-San, who as the first people may have large land claims.[103] The TKLA thus continues the existing model of recognition.

However, could the state do better than reproduce the pre-constitutional era's approach to recognising traditional communities? Could the recognition of a traditional community be based on voluntary affiliation, as is done with a Khoi-San community? Importantly, this would accord with the customary law understanding that a community is formed through voluntary affiliation, as was discussed in the historical recognition of customary law. It would furthermore treat traditional leaders and Khoi-San leaders equally. Finally, it addresses a monumental critique currently levelled against the regulation of traditional leadership in South Africa: It is a system imposed on citizens in South Africa's rural areas without them having a choice.[104] Voluntary affiliation requires individuals to choose to participate in the system, and it avoids the imposition of the system based on an individual's geographical location – a remnant of the apartheid era spatial policies. Voluntary affiliation, of course, has difficulties – for example, it may be administratively onerous to keep up-to-date records of individuals who affiliate to a traditional leader – and may need improvement, but it, nonetheless, demonstrates that voluntary affiliation remains a plausible solution, and while there may be room for improvement in how the system is managed, recognising a traditional community should be based on voluntary affiliation.

3.3 Section 24 partnership agreements

Section 24 of the TKLA allows traditional and Khoi-San councils to enter into partnership agreements with municipalities, government departments and any other person, body or institution. This is a new section not found in the TLGFA and a broadening of the original position that envisaged partnerships between councils and municipalities, being state institutions.[105] The powers of traditional councils have seemingly been broadened to conclude partnership

103 In this regard, the initial date for land restitution claims in the Land Restitution Act 22 of 1994 was set at 1913, a date that many Khoi-San claimed was after they had been dispossessed of their land.

104 A Claassens & G Budlender 'Transformative constitutionalism and customary law' (2013) 6 *Constitutional Court Review* 75, 82.

105 Clause 24 Traditional Affairs Bill.

agreements with private entities. These agreements may be popular with mining companies, who are required to engage with the traditional leader and council (and not the entire community or rights holders within the community) before commencing operations within a community.[106] This is advantageous to the company as the community may have varied and differentiated interests that cannot be reconciled with those of the company. The section assumes that traditional leaders speak for and act in the best interests of citizens in rural areas when they may favour their own interests and those of the company.[107] The TKLA requires that a partnership agreement be beneficial to the community, clearly detail the responsibilities of parties and the termination of the agreement and be subject to prior consultation with the relevant community where a majority of the community members present at the consultation support the partnership or agreement.[108]

The provisions appear to directly address previous criticisms that empowered councils to conclude agreements on behalf of communities without their consultation and consent.[109] The TKLA, in a welcomed amendment, now explicitly requires the council to conduct a prior consultation with the community and a majority of the community members present at the consultation to make a decision in support of the partnership or agreement, which presumably means consent to the agreement. Unfortunately, the section remains problematic. Section 24 requires a consultation with the relevant community represented by the council, and a majority of the community members present at the consultation must support the decision. In a glaring omission, the section does not stipulate who from the community must be consulted. Must it be all or a majority of the members of the community? Will consultation with a minority of the community or merely the traditional council members suffice? Is the gender, age and general representativity of the consulted community members relevant? What about representativity on views? If the council consults only with members aligned with their views, does it satisfy the requirement for consultation?

More distressing is the fact that the section does not appreciate the nuanced nature of customary land rights. The council must

106 D Huizenga 'Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC) in Xolobeni, South Africa' (2019) 6 *Extractive Industries and Society* 715.
107 Huizenga (n 106) 715.
108 Sec 24(3) TKLA.
109 Parliament 'Report: Stakeholders inputs and public hearings: Traditional and Khoi-San Leadership Bill, [B23-2015]' 30 August 2017, https://pmg.org.za/committee-meeting/24909/ (accessed 19 April 2023).

consult with the represented community broadly, but there is no acknowledgment that there may be different rights holders in a community. For example, consider a scenario where a company wants to commence mining operations within a community. The proposed mining may have varied consequences. It may require some people to vacate their homes and relocate elsewhere, contaminate the water supply of some residents, bring employment to some men and have no impact on others. The legislation does not cater for these differentiated interests and accord them weight in the consultation process. What happens if the council consults only with those who benefit or are not impacted by the mining? Should their support for the agreement mean that the requirements of the section have been satisfied, despite those who stand to lose their homes not being consulted or refusing to support it? The blunt requirement of consultation and support ignores the different nature of rights and the varied impact an agreement may have on rights holders. Surely, affected rights holders must be involved in the process and their interests weighed more heavily. Rather, the provision allows for the expeditious conclusion of agreements between traditional councils and companies at the risk of individual rights.

Furthermore, section 24 of the TKLA may conflict with other legislation. The power conferred upon traditional councils to conclude agreements such as the sale of land without the consent of rights holders in terms of section 24 of the TKLA conflicts with the Interim Protection of Informal Land Rights Act (IPILRA).[110] The IPILRA was enacted to give effect to the constitutional right to legally secure tenure or comparable redress.[111] It provides that subject to law, 'no person may be deprived of any informal right to land without his or her consent'.[112] An informal land right is defined to include the use, occupation and access to land in terms of customary law. Where land is held on a communal basis, a person may 'be deprived of such land or right in land in accordance with the custom and usage of that community',[113] which is

> deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given

110 The Interim Protection of Land Rights Act 31 of 1996 (IPILRA).
111 Sec 25(6) of the Constitution provides: '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.'
112 Sec 2(1) IPILRA.
113 Sec 2(2) IPILRA.

sufficient notice, and in which they have bad a reasonable opportunity to participate.[114]

The IPILRA thus provides much stronger protection to land right holders than the TKLA. First, it explicitly requires the rights holder's consent before a deprivation of an informal land right may occur. Where land is held on a communal basis it acknowledges the differentiated nature of rights – requiring any decision to dispose of rights to be made by a majority of the holders of such rights present at the meeting. This differs from the TKLA which does not specify that the council must consult with the affected rights holders. It begs the question of whether IPILRA or the TKLA will take precedence in determining who must be consulted before an alienation of rights can occur.

The Constitutional Court in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* confirmed the strength of IPILRA's rights conferred in the context of granting mining rights.[115] The Constitutional Court held that the Mineral and Petroleum Resources Development Act (MPRDA),[116] which only requires communities to be consulted in the granting of mining rights, does not trump IPILRA, and the full and informed consent of communities is required for a mining right to be granted in terms of the MPRDA.[117] The TKLA threatens the rights conferred by IPILRA once again and the defence of land tenure will fall to the courts. The issue will be whether the TKLA trumps IPILRA and allows the sale of land without the safeguards of IPILRA. This is particularly concerning given that IPILRA was only meant to provide temporary protection for land rights. Its provisions may not be extended once the Communal Land Tenure Policy (meant to be the permanent policy regulating customary land holding) is enacted. The feared consequence is that the Communal Land Tenure Policy and the TKLA may, as in the pre-constitutional era, allow land dispossession without an individual's consent.

114 Sec 2(2) IPILRA.
115 *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC).
116 Act 28 of 2002.
117 *Maledu* (n 115); *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP). A full discussion of the case is beyond the scope of the article, but see TM Tlale 'Conflicting levels of engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A closer look at the Xolobeni Community Dispute' (2020) 23 *Potchefstroom Electronic Law Journal* 1.

4 Conclusion

The apartheid state's artificial categorisation of individuals according to race resulted in the differentiated treatment of South Africa's indigenous population. Black South Africans were systematically dispossessed of their land and confined to the homelands, and were controlled through, among others, traditional leaders and the (oft-distorted) application of customary law. The lighter-skinned Khoi-San were classified as 'coloured' and dispersed throughout the country without recognising their indigeneity. The TKLA was advocated to give long overdue recognition to Khoi-San communities and leaders.

This article examines the TKLA's different approaches to recognising traditional communities and Khoi-San communities and the power to enter into partnership agreements. It reveals that self-identification is centred in recognising Khoi-San communities, with the TKLA requiring community members to confirm by signature their affiliation to a Khoi-San community. This would have been welcomed in the recognition of other communities, given the disputes regarding the legitimacy of traditional leaders and the boundaries of communities. It would ensure that individuals are not subsumed into communities with which they do not affiliate. Furthermore, the requirements for the identification as a community, such as the existence of a senior traditional leader and conferring upon a traditional council jurisdiction over land and those who live on it, are not from customary law. Many communities did not have senior traditional leadership and, thus, the requirements are at odds with customary law. Thus, the TKLA presents a peculiar anomaly of recognising traditional communities contrary to customary understandings of the formation of communities and then confers on traditional leaders the power to enter into partnership agreements on behalf of communities in terms of section 24 of the TKLA.

Section 24 of the TKLA raises alarm bells as its requirements for consultation with a community are ambiguous. It does not specify who in the community must be consulted before the conclusion of an agreement. More specifically, contrary to IPILRA, the TKLA does not specify that rights holders must be consulted before alienating rights. This is alarming and dangerous as vulnerable citizens may have the land sold without their consent.

As Parliament is meant to re-enact the TKLA in a manner consistent with the Constitution or to pass another statute in a manner consistent with the Constitution, it is hoped that the re-enactment or new Act will address these substantive concerns. Centring self-identification

by requiring individuals to expressly affiliate with a community in the recognition of a traditional community will allow citizens to express their constitutional rights of cultural association and accord with customary law notions for the identification of a community. It will ensure that individuals are not locked into a traditional leadership they dispute. Finally, section 24 of the TKLA should be amended to explicitly require consultation with rights holders before the conclusion of partnership agreements and mirror the protections conferred in IPILRA. These changes would hopefully address the most significant substantive concerns regarding the TKLA and signal the state's intent to protect the rights of its most vulnerable citizens.