



UNIVERSITY *of the*
WESTERN CAPE

**THE ALLOCATION AND ADMINISTRATION OF LAND BY TRADITIONAL
LEADERS IN THE REPUBLIC OF SOUTH AFRICA.**

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**Mini-Thesis submitted in fulfilment of the requirements for the LLM Degree, in the
Faculty of Law, University of the Western Cape**

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Contents

ACKNOWLEDGMENT	4
DEDICATION	4
PLAGIARISM DECLARATION	5
ABSTRACT	6
KEYWORDS.....	7
LIST OF ABBREVIATIONS	8
1. CHAPTER 1	9
Introduction and background to the study by outlining the purposes and objectives of the study.....	9
1.1 INTRODUCTION AND BACKGROUND	9
RESEARCH QUESTION	13
1.2 LITERATURE REVIEW	14
1.3 SIGNIFICANCE OF THE STUDY	18
1.4 METHODOLOGY	19
1.5 CHAPTER OUTLINE.....	19
1.5.1 Chapter 1.....	19
1.5.2 Chapter 2.....	20
1.5.3 Chapter 3.....	20
1.5.4 Chapter 4.....	21
2 CHAPTER 2	22
A brief history of the roles, functions and powers of traditional leaders in South Africa with respect to the allocation and administration of land.....	22
2.1 PRE-COLONIAL PERIOD	22
2.2 COLONIAL PERIOD	23
2.3 APARTHEID PERIOD	26
2.4 CONCLUSION.....	28
3 CHAPTER 3	30
Comparison of post-apartheid roles and functions by traditional leaders in South Africa, Ghana, Botswana and Zimbabwe in relation to the allocation and administration of land	30
3.1 INTRODUCTION	30
3.2 SOUTH AFRICA	31
3.3 GHANA	38
3.4 BOTSWANA.....	41
3.5 ZIMBABWE.....	43
3.6 CONCLUSION.....	45
4 CHAPTER 4	48

4.2	Concluding remarks.....	50
5	Bibliography	52
5.1	Bills.....	52
5.2	Books	52
5.3	Cases.....	52
5.4	Constitutions	53
5.5	Legislations.....	53
5.6	Journal Articles.....	54
5.7	Online Articles.....	55
5.8	Online News Articles.....	57
5.9	Other	57
5.10	Reports.....	57
5.11	Government Publications.....	58
5.12	Theses	58

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DEDICATION

To all the Kings, Queens, Chiefs, headmen and warriors who fell fighting and defending the land, I salute you. I dedicate this research paper to my mother Miss Y Mtengwane. She has been both an Academia friend and a staunch supporter of mine in this academic journey. She herself, a lover of education, I salute you aah maMgebe! I further dedicate this research paper to my nieces and nephews (Melathi, Milisa, Chumani, Siyanda, Amila, Luniko, Iyana & Lande). Not forgetting my little cousins (Libazise and Luthembe) who are still upcoming scholars. With this work, I wish they draw inspiration and motivation for them to better their lives and their communities with education. The sky is not the limit.

PLAGIARISM DECLARATION

I, **Akhiwe Mtengwane**, declare that the research paper title: **The Allocation and Administration of Land by Traditional Leaders in the Republic of South Africa**, is my own work and that it has not been submitted for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed by Akhiwe Mtengwane

September 2021

Signed by Supervisor:

Signed by Co-supervisor:

ABSTRACT

Land allocation and administration is a crucial role for traditional leaders, because it has remained one of the few *de facto* powers and sources of influence still available to them in their areas of jurisdictions.¹ This role has been played by traditional leaders from time immemorial. Furthermore, the Constitution of the Republic of South Africa recognises the existence of traditional leaders.² Moreover, the Constitution seeks to integrate the institution of traditional leadership by expecting national legislation to be put in place so that the roles of traditional leaders are known in society.³ However, roles with regard to the allocation and administration of land by traditional leaders have not been promulgated in legislation. Therefore, this research will look at the issues of land allocation and administration by traditional leadership in the democratic dispensation.

¹ See McIntosh A, Sibanda S, Vaughan A, Xaba T 'Traditional authorities and land reform in South Africa: Lessons from KwaZulu Natal' (1996) 13 *Development Southern Africa* 339 340.

² See section 211 of the Constitution of the Republic of South Africa, 1996.

³ See section 212 of the Constitution of the Republic of South Africa, 1996.

KEYWORDS

Administration of land

Allocation of land

Apartheid period

Chieftaincy

Colonial period

Democracy

Democratic dispensation

Institution of traditional leaders

Land

Pre-colonial period

Traditional leadership

LIST OF ABBREVIATIONS

ALA - Administration of Lands Act

CLA - Communal Land Act

CLARA - Communal Land Rights Act

CLTB - Communal Land Tenure Bill

CONTRALESA - Congress of Traditional Leaders of South Africa

TLGFA - Traditional Governance and Framework Act

TLA - Traditional Leaders Act

TLA - Tribal Land Act

TKSLA - Traditional and Khoi-San Leadership Act

SSLP - Stool and Skin Land and Property

1. CHAPTER 1

Introduction and background to the study by outlining the purposes and objectives of the study.

1.1 INTRODUCTION AND BACKGROUND

Land allocation and administration is a crucial role for traditional leaders, because it has remained one of the few *de facto* powers and sources of influence still available to them in their areas of jurisdictions.⁴ An area of jurisdiction means “an area defined for kingship or queen ship council, principal traditional council, traditional council and traditional sub-council”.⁵ Further, in this research traditional leaders include Kings, Queens, chiefs and headmen.⁶ This allocation and administration of land could be for residential and economic development purposes.⁷ However, the Diagnostic Report on Land Reform in South Africa submits that the roles and powers of traditional leaders in relation to land are highly contested.⁸ Buthelezi and Yeni assert that, this contestation over land and authority in the countryside has been brewing for several years.⁹

Ntsebeza argues that “a legacy of the colonial and apartheid periods is that most land in the rural areas of the former Bantustans is owned by the state and Development Trust, and administered and managed by government-created tribal authorities”.¹⁰ As a result of the Development Trust Act, Pienaar agrees that most rural land is owned by the state.¹¹ Furthermore, the Constitution of the Republic of South Africa succinctly states that laws applicable before 1996 continue to be in force unless such laws are repealed or amended.¹²

⁴ See McIntosh A, Sibanda S, Vaughan A, Xaba T ‘Traditional authorities and land reform in South Africa: Lessons from KwaZulu Natal’ (1996) 13 *Development Southern Africa* 340.

⁵ See section 1 of the Traditional and Khoi-San Leadership Act 3 of 2019

⁶ See section 1 the Traditional Leadership and Governance Framework Act 41 of 2003.

⁷ See Dubazane M & Nel V ‘The Relationship of Traditional Leaders and The Municipal Council Concerning Land Use Management in Nkandla Local Municipality’ (2016) 15 *African Journal of Indigenous Knowledge Systems* 222 225.

⁸ See Institute for Poverty, Land and Agrarian Studies *Diagnostic Report on Land Reform in South Africa* (2016) 76.

⁹ See Buthelezi M & Yeni S ‘Traditional Leadership in South Africa: Pitfalls and Prospects’ available at [https://www.nelsonmandela.org/uploads/files/Land law and leadership - paper 1.pdf](https://www.nelsonmandela.org/uploads/files/Land%20law%20and%20leadership%20-%20paper%201.pdf) (Accessed 20 March 2020) 14.

¹⁰ See Ntsebeza L ‘Democratic Decentralization and Traditional Authority: Dilemmas of Land Administration in Rural South Africa’ (2004) 16 *European Journal of Development Research* 66 68.

¹¹ See Pienaar J M *Land Reform* (2014) 459.

¹² See section 2 in Schedule 6 of the Constitution of the Republic of South Africa, 1996.

Therefore, if these laws of colonialism and apartheid dealing with the control of land are left unattended, they have the potential of creating confusion about who has the power to allocate and administer land in rural areas.

The White Paper on South African Land Policy drafted in 1997, specifically entrust the national and provincial government with the responsibility of allocating and administering land.¹³ The same White Paper recognises that traditional leadership and all three spheres of government have functions that require land administration.¹⁴ Unfortunately, the White Paper does not elucidate what functions are to be played by each of these different institutions and most importantly which land is to be administered by traditional leaders.

In recognising traditional leaders in the democratic dispensation, the Interim Constitution of 1993, in section 181(1) stated that “a traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority”.¹⁵ Therefore, the Interim Constitution gave hope to traditional leaders that they will have a role to play in post-apartheid South Africa, although allocation and administration of land was not mentioned.

The final Constitution of the Republic of South Africa also recognises the institution of traditional leadership, but its statuses and roles are subject only to the Constitution.¹⁶ Furthermore, the Constitution stipulates that national legislation may be put in place to deal with the roles of traditional leaders in matters that affect communities at a local level.¹⁷ Therefore, the Constitution mandates Parliament to enact statutes that will deal with roles and functions of traditional leaders in the new South Africa.

According to Ntsebeza, the Interim and the final Constitution does not address the roles, functions and powers traditional leaders may exercise with regard to the allocation of land and its administration in the countryside.¹⁸ The White Paper on Leadership and Governance published in 2003 on the other hand, notes that the institution of traditional authorities can play

¹³ See White Paper on South African Land Policy of 1997 37.

¹⁴ See White Paper on South African Land Policy of 1997 38.

¹⁵ See section 181(1) of the Interim Constitution of the Republic of South Africa Act 200 of 1993.

¹⁶ See section 211 of the Constitution of the Republic of South Africa, 1996.

¹⁷ See section 212(1) of the Constitution of the Republic of South Africa, 1996.

¹⁸ See Ntsebeza L ‘Democratic Decentralization and Traditional Authority: Dilemmas of Land Administration in Rural South Africa’ (2004) 16 *European Journal of Development Research* 66 68.

a critical role in bettering the quality of life for the people in areas under their domain.¹⁹ Furthermore, the same White Paper identifies land administration and agriculture as roles and functions for traditional leaders.²⁰

Contrary to the above, when the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) was promulgated there was no role or function to be played by the institution of traditional leadership with regard to land administration as promised by its White Paper. Section 19 of the TLGFA provides that traditional leaders can perform functions provided for in terms of customary law and customs of the traditional community concerned.²¹ Consequently, the provision does not provide for the allocation and administration of land by the institution of traditional leaders. However, in some rural areas it is customary and custom for a traditional leader to allocate and administer land.²²

On the 20th of November 2019, President Cyril Ramaphosa assented to a new law called the Traditional and Khoi-San Leadership Act 3 of 2019 (TKSLA). The Act was promulgated to provide for the recognition of traditional leadership, Khoi-San communities, functions and roles of such authorities in those communities.²³ The difference between the TLGFA and the TKSLA is that, the TKSLA makes a specific reference to the recognition to the Khoi-San communities. Section 15 of the TKSLA is headed functions and resources of traditional and Khoi-San leaders.

Accordingly, the provision mentioned above envisages that “a traditional or Khoi-San leader performs the functions provided for in terms of customary law and customs of the traditional or Khoi-San community concerned, and in terms of any applicable national or provincial legislation”.²⁴ This section is a mirror image of section 19 of the TLGFA. However, it does not touch on the issue of land allocation and administration by the hereditary institution.

It is no doubt that land is a very emotive topic in South Africa.²⁵ In trying to correct the injustices of land dispossession and forced removals of the gruesome past, the government has

¹⁹ See White Paper on Traditional Leadership and Governance (2003) 23.

²⁰ See White Paper on Traditional Leadership and Governance (2003) 36.

²¹ See the Traditional Leadership and Governance Framework Act 41 of 2003.

²² See *Bhala Traditional Council v Dumezweni and Others* (3486/2018) [2020] ZAECMHC 17 (3 June 2020) at para 9. Para 9 illustrates how land is demarcated and allocated in Bhala Traditional Community in Flagstaff Eastern Cape.

²³ See Traditional and Khoi-San Leadership Act 3 of 2019.

²⁴ See section 15(1)(b) of the Traditional and Khoi-San Leadership Act 3 of 2019.

²⁵ See Branson N Land, Law and Traditional Leadership in South Africa (2017) available at https://www.researchgate.net/publication/316104812_Land_Law_and_Traditional_Leadership_in_South_Africa#fullTextFileContent (Accessed 31 March 2020)

embarked on a constitutional journey to foster conditions that will enable citizens to gain land on an equitable basis within its available resources and thus take other reasonable and legislative measures to ensure that the land is accessible to all.²⁶ Furthermore, the Constitution in section 25(6) secures the tenure of those who have insecure tenure of land as a result of past discriminatory and unjust laws.²⁷

It is well-known that there are conflicting views on who owns the land in the communal rural areas and thereby having authority to allocate and administer it.²⁸ Is it the government? Or is it traditional leaders or is it the people who live in such communal rural land? In trying to clarify that misunderstanding, Deputy President David Mabuza articulated that “issues around the security of tenure often flows from misunderstandings that land is owned by traditional leaders, this is a false view. It is the people who own the land, traditional leaders are only the custodians of people’s land”.²⁹ Indeed, traditional leaders are custodians of people’s land.

Ntsebeza opines that “the process of establishing legislation to clarify land allocation procedures in post-1994 rural South Africa have borne no fruit”.³⁰ For example, the Communal Land Rights Act 11 of 2004 which sought to give traditional leaders power to allocate and administer land communal land was found to be invalid in the case of *Tongoane v Minister for Agriculture and Land Affairs*.³¹ Pienaar underlines that the Act was found to be invalid and inconsistent with the Constitution only on procedural grounds.³²

The government introduced a Communal Land Tenure Bill in 2017 (CLTB). The Bill seeks to afford a choice on the administration of communal land.³³ Chapter 8 of the Bill deals with land administration. According to section 28(1)(a) of the CLTB, a community by way of resolution of not less than 60 per cent of households can elect its land to be administered by a traditional council.³⁴ Furthermore, an institution responsible for the management of land can also allocate

²⁶ See section 25(5) of the Constitution of the Republic of South Africa, 1996.

²⁷ See section 26(6) of the Constitution of the Republic of South Africa, 1996.

²⁸ See Oomen B *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (2005) 76.

²⁹ See Omarjee L ‘Land reform will happen, and MPs will be there for the journey’ available at <https://m.fin24.com/Economy/land-reform-will-happen-and-mps-will-be-there-for-the-journey-mabuza-2018-05-29> (accessed 31 March 2020)

³⁰ See Ntsebeza L ‘Democratic Decentralization and Traditional Authority: Dilemmas of Land Administration in Rural South Africa’ (2004) 16 *European Journal of Development Research* 66 71.

³¹ See *Tongoane v Minister for Agriculture and Land Affairs and Others* (CCT 100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

³² See Pienaar J M *Land Reform* (2014) 467.

³³ See Communal Land Tenure Bill 2017.

³⁴ See section 28(1)(a) of the Communal Land Tenure Bill 2017.

land for residential and commercial purposes in accordance with community rules and ensuring women access to land.³⁵ However, the Bill has not yet been signed into a law.

With conflicting views and lack of clarity on the issues of land and the role of traditional leaders in allocating and administering land, this research seeks to investigate the roles, powers and functions, of traditional leaders regarding allocation and administration of land in their areas of jurisdictions. There is an overlap of powers between the institution of traditional leaders and that of elected officials in relation to the allocation and administration of land in communal rural areas. Furthermore, this research will also explore factors that cause delays in the formulation of legislation that will deal with land allocation procedures and land administration by traditional leaders not to bear fruits in the post-1994 rural South Africa.

Accordingly, the research will look at the brief history of traditional leaders and their relationship with land in general. This brief history will start from pre-colonial times. Thereafter, it will examine their roles, functions and powers that were given to them in relation to land after dispossession. By outlining the history of traditional leaders and land, the research will establish whether traditional leaders do have a legitimate authority to allocate and administer land on behalf of the people living under the king or chiefs' jurisdiction.

Thereafter, the research will explore the roles and powers given to traditional leaders in post-1994 in relation to the allocation of land and administration of such land in their areas of jurisdiction. In this dissertation, it will be shown whether the government is giving traditional leaders an active role with regards to the allocation and administration of land in areas under their control.

RESEARCH QUESTION

The main research question is whether the institution of traditional leadership should be bestowed with powers to allocate and administer land by legislation?

³⁵ See section 29(1)(b) of the Communal Land Tenure Bill 2017.

1.2 LITERATURE REVIEW

According to Oomen “the legal recognition of culture, tribe and chieftdom was achieved through hundreds of laws, regulations, and bye-laws dealing with all aspects of life”.³⁶ One would assume that all aspects of life include the allocation and administration of land for people in the area under their jurisdiction. With that said, available literature reveals that there are two schools of thought relating to the recognition of traditional leadership.³⁷ Pienaar identifies these two schools of thought as traditionalists who advocate for the continued protection of rights and interests of traditional leaders and modernists who on the other hand are for democratic reform.³⁸ However, the literature reveals further that some argue for shared governance where the institution of traditional leadership can work with the multiparty democracy.³⁹

For traditionalists, the argument is that the institution of chieftaincy has a variety of responsibilities amongst the people which includes but is not limited to land tenure, succession in property, local justice, and implementation of customary law.⁴⁰ Furthermore, Chief Phatekile Holomisa maintains that “while on paper the institution has no meaningful powers, and relevant legislation merely refer to its role and functions, in reality traditional leaders wield enormous power and the people increasingly lookup to them for leadership on socio-economic, and political issues”.⁴¹ Therefore, clarity on the roles and functions of traditional leaders ought to be addressed for the sake of uniformity in governance.

Koenane argues that “the institution of traditional leadership is still valuable in South Africa and can contribute positively to the development of South African society at large and rural communities in particular”.⁴² The foreword of the White Paper on Traditional Leadership and Governance concurs with Koenane when Nthai submits that, many South Africans have confidence in the hereditary institution as a central figure in extending and enriching democratic governance in the countryside.⁴³ The foreword goes further and state that the

³⁶ See Oomen B *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (2005) 16.

³⁷ See Iya P ‘Challenges and Prospects for Traditional Leadership in Africa: Towards Innovative Ideas to Enhance African Values Among the Youth in South Africa’ (2014) 29 *Southern African Public Law* 260 260.

³⁸ See Pienaar JM *Land Reform* (2014) 465.

³⁹ See Ntsebeza L *Democracy Compromised: Chiefs and the Politics of land in South Africa* (2005) 24.

⁴⁰ See Iya P ‘Challenges and Prospects for Traditional Leadership in Africa: Towards Innovative Ideas to Enhance African Values Among the Youth in South Africa’ (2014) 29 *Southern African Public Law* 260 278.

⁴¹ See Holomisa P *A Double-edged Sword* 3ed (2011) XXV.

⁴² See Koenane M L J ‘The Role and Significance of Traditional Leadership in the Governance of Modern Democratic South Africa’ (2017) 1 available at <https://doi.org/10.1080/09744053.2017.1399563> (accessed 13 May 2020)

⁴³ See White Paper on Traditional Leadership and Governance of 2003 3.

institution of chieftaincy in the countryside has the role of combating homelessness, poverty, illiteracy, and the advancement of noble governance.⁴⁴

For modernists on the other hand, democracy encompasses representation and participation in decision making and in traditional leadership, leaders are born not elected, women and unmarried men are excluded from decision-making and as a result should be rejected.⁴⁵ Furthermore, Ntsebeza submits that “there are those who argue that dismantling the institution of traditional leadership, especially viewed from its role in the colonial period, is a pre-condition for democratic transformation in Africa”.⁴⁶ Clearly, those who want to dismantle the institution of chieftaincy do not see the relevance of the institution in the democratic dispensation. Therefore, for modernists traditional leadership should be abolished because traditional leaders are not elected by the people and participation in the decision making is for selected few, then it can never be transformed and thus it cannot be accepted.

The Land and Accountability Research Centre notes in its report that, in the modern years there have been contemporary debates that seek to highlight the incongruence in the understandings of who owns the land in rural areas.⁴⁷ Accordingly, Iya posits that since the advent of democracy in South Africa, traditional leadership, landownership and democracy has been a fiery subject matter.⁴⁸ Some academics contend that the hereditary institutions derive their power “from their control of the land allocation process, rather than their popularity amongst their subjects”.⁴⁹ As a result, people living in the countryside are left with insecure land tenure and as such are exposed to vulnerability.⁵⁰

Rural activists such as Ntungwa and Ncapayi are of the view that “the recognition and the unclear role of traditional leadership intensifies a national question, especially at the present moment where South Africa is engaging in land ownership matters and custodianship of the land”.⁵¹ Therefore, clarity on the definite roles and functions of the indigenous institution on ownership and custodianship of land need to be addressed. Further, it is submitted that the

⁴⁴ See White Paper on Traditional Leadership and Governance of 2003 3.

⁴⁵ See Iya P ‘Challenges and Prospects for Traditional Leadership in Africa: Towards Innovative Ideas to Enhance African Values Among the Youth in South Africa’ (2014) 29 *Southern African Public Law* 260 273

⁴⁶ See Ntsebeza L *Democracy Compromised: Chiefs and the politics of the land in South Africa* (2005) 24.

⁴⁷ See Land and Accountability Research Centre ‘Rural Land Justice’ (2016) *People’s Law Journal* 1 3.

⁴⁸ See Iya P ‘Challenges and Prospects for Traditional Leadership in Africa: Towards Innovative Ideas to Enhance African Values Among the Youth in South Africa’ (2014) 29 *Southern African Public Law* 260 272.

⁴⁹ See Ntsebeza L *Democracy Compromised: Chiefs and the politics of the land in South Africa* (2005) 22.

⁵⁰ See Land and Accountability Research Centre ‘Rural Land Justice’ (2016) *People’s Law Journal* 1 3.

⁵¹ See Ncapayi L & Ntungwa ‘Land Reform – A critique of Traditional leadership’ available at <http://aidc.org.za/land-reform-a-critique-of-traditional-leadership/> (accessed 12 April 2020).

existing legal frameworks do not cater for the roles and functions of traditional leaders in issues surrounding land and its management.⁵²

Bennet, Ainslie and Davis believe that in the Eastern Cape province, traditional authorities still exercise absolute power over the allocation of land and often use this authority as a reinforcement of their positions in rural communities.⁵³ The same authors refer to Ntsebeza who argues that the continued power of traditional leaders in relation to the administration of land in rural parts of the country remains highly opposed.⁵⁴ The Department of Rural Development and Land Reform in 2014 published a Communal Land Tenure Policy and proposed “for royal households and traditional councils to play a meaningful role in land ownership and administration in the former homelands”.⁵⁵ Therefore, this indicates that the government is considering or willing to give ownership and administration of land to traditional leaders and thereby having authority to allocate and administer such land.

Some academics are of the opinion that a concession that upholds a role for traditional leaders in the allocation of land must be made by the government, while instruments for combating corruption and enhancing accountability on the other side are to be introduced.⁵⁶ It is submitted by Bank and Mabheba that inhabitants in various villages strongly support customary authorities in having a significant role and function in the management and allocation of land.⁵⁷ There could be many reasons for these preference by villagers. Accordingly, one of the reasons advanced by a villager interviewed by Ntsebeza was that “with chiefs and headmen it takes a few days to get what you want, whereas with rural councillors it takes months, and even then you end up not succeeding”.⁵⁸ Therefore, the sentiments passed by the villager proves that

⁵² See Dubazane M & Nel V ‘The Relationship of Traditional Leaders and The Municipal Council Concerning Land Use Management in Nkandla Local Municipality’ (2016) 15 *African Journal of Indigenous Knowledge Systems* 222 230.

⁵³ See Bennet J Ainslie A & Davis J ‘Contested Institutions? Traditional Leaders and Land Access and Control in Communal Areas of Eastern Cape Province, South Africa’ (2013) 32 available at <https://www.sciencedirect.com/science/article/abs/pii/S02648377132001998> (Accessed 12 April 2020).

⁵⁴ See Bennet J Ainslie A & Davis J ‘Contested Institutions? Traditional Leaders and Land Access and Control in Communal Areas of Eastern Cape Province, South Africa’ (2013) 32 27 - 38 available at <https://www.sciencedirect.com/science/article/abs/pii/S02648377132001998> (Accessed 12 April 2020).

⁵⁵ See Land and Accountability Research Centre ‘Rural Land Justice’ (2016) *People’s Law Journal* 1 11.

⁵⁶ See Bank L & Mabheba C ‘After the Communal Land Rights Act? Land, Power and Development in Rural South Africa’ (2011) 41 *Africanus Journal of Development Studies* 95 108 available at <https://journals.co.za/content/canus/41/3/EJC173366> (Accessed 12 April 2020).

⁵⁷ See Bank L & Mabheba C ‘After the Communal Land Rights Act? Land, Power and Development in Rural South Africa’ (2011) 41 *Africanus Journal of Development Studies* 95 108 available at <https://journals.co.za/content/canus/41/3/EJC173366> (Accessed 12 April 2020).

⁵⁸ See Ntsebeza L *Democracy Compromised: Chiefs and the politics of the land in South Africa* (2005) 13.

people in the rural areas regard traditional leaders as much more efficient than the government officials.

Dubazane and Nel ascertain that “the significance and importance of land allocation and hence control over land to the institution of traditional leadership would imply that it is unlikely that they would easily give up these functions”.⁵⁹ Therefore, if this latter submission proves to be correct then roles and functions with regards to allocation and administration of land by traditional authorities ought to be investigated and addressed because with or without legislation traditional leaders intend to continue allocating and demarcating land to the people.

Bizana-Tutu argues that allocation and distribution of land is customarily the role of traditional leaders in areas under their domain.⁶⁰ This allocation of land is mainly for residential, grazing and cultivation purposes.⁶¹ However, literature reveals that, innumerable traditional authorities across the country believe that the laws of today explicitly take away their principal role and function which is to allocate land to their people.⁶²

According to Ntsebeza “the recognition of the powers of traditional leaders has a number of far-reaching implications for control over land allocation, democratic local government and gender equity”.⁶³ Furthermore, it is argued that the Communal Land Rights Act enacted in 2004 which sought to secure the rights of people living in rural areas undermined the land rights of those living in such areas by giving traditional authorities significant power over control, occupation and administration of communal land.⁶⁴

It is clear from the literature that there are dissenting views on the recognition of unelected traditional leaders in a democratic dispensation characterized with elected representatives,⁶⁵ and more especially on the issue of control over land. Although to recognise and give traditional leaders the roles and functions to play in society is said to be contradictory to the fundamental

⁵⁹ See Dubazane M & Nel V ‘The Relationship of Traditional Leaders and The Municipal Council Concerning Land Use Management in Nkandla Local Municipality’ (2016) 15 *African Journal of Indigenous Knowledge Systems* 222 232.

⁶⁰ See Bizana-Tutu D *Traditional Leaders in South Africa: Yesterday, Today and Tomorrow* (unpublished LLM thesis, University of the Western Cape, 2008) 35.

⁶¹ See Bizana-Tutu D *Traditional Leaders in South Africa: Yesterday, Today and Tomorrow* (unpublished LLM thesis, University of the Western Cape, 2008) 35.

⁶² See Dubazane M & Nel V ‘The Relationship of Traditional Leaders and The Municipal Council Concerning Land Use Management in Nkandla Local Municipality’ (2016) 15 *African Journal of Indigenous Knowledge Systems* 222 224.

⁶³ See Ntsebeza L ‘Land tenure reform in South Africa: An Example from The Eastern Cape Province’ (1999) available at <https://pubs.iied.org/7400IIED/> (Accessed 22 April 2020)

⁶⁴ See Land and Accountability Research Centre ‘Rural Land Justice’ (2016) *People’s Law Journal* 50.

⁶⁵ See Mokgoro Y ‘Traditional Authority and Democracy in the Interim South Africa’ (1996) 3 *Review of Constitutional Studies* 64.

principles of our democracy,⁶⁶ other academic authors are in favour of the protection of the hereditary institution under the current socio-political circumstances in South Africa.

Literature has indicated that there are those who are against traditional leaders and those who are proponents of the institution. However, it seems that little research is done on the legal implications of the allocation and administration of land by traditional leaders in areas under their domain. Furthermore, research shows that traditional leaders are of the view that they own the land on behalf of the people and as such have the authority to allocate and administer land for residential purposes.⁶⁷

Oomen writes that these clashes between customary authorities and democratically elected officials, often over land delays the delivery of services such as houses, water and electricity.⁶⁸ Furthermore, the same author advances that “the lack of clarity around land and governance resulted in delays in development, because it was not clear to potential investors with whom to negotiate: central government, local government or traditional leaders”.⁶⁹ This contribution, therefore, will try to clarify the roles, powers and functions of the traditional leaders in relation to the allocation and administration of land in South Africa. As a result of this contribution, the right to a secure land tenure, right to access houses, water and electricity might be realised as envisaged in the Constitution by people in rural areas.

1.3 SIGNIFICANCE OF THE STUDY

This research paper is significant because, in some provinces of the country traditional leaders are still highly appraised by community members and continue to play a meaningful role in allocating land in areas under their domain. For example, in the province of KwaZulu Natal land is legally vested in traditional authorities under the controversial Ingonyama Trust Act 3KZ of 1994.⁷⁰ However, Iya points out that numerous traditional leaders argue that the Constitution affords wider powers and privileges to municipal councils.⁷¹ In other provinces like the Eastern Cape, there are tensions between traditional leaders and municipal officials as

⁶⁶ See Ntsebeza L ‘Land tenure reform in South Africa: An Example from The Eastern Cape Province’ (1999) available at <https://pubs.iied.org/7400IIED/> (Accessed 22 April 2020)

⁶⁷ See Oomen B *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (2005) 76.

⁶⁸ See Oomen B *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (2005) 86.

⁶⁹ See Oomen B *Chiefs in South Africa: Law, Power & Culture in the Post-Apartheid Era* (2005) 76.

⁷⁰ See Dubazane M & Nel V ‘The Relationship of Traditional Leaders and The Municipal Council Concerning Land Use Management in Nkandla Local Municipality’ (2016) 15 *African Journal of Indigenous Knowledge Systems* 222 225.

⁷¹ See Iya P ‘Challenges and Prospects for Traditional Leadership in Africa: Towards Innovative Ideas to Enhance African Values Among the Youth in South Africa’ (2014) 29 *Southern African Public Law* 260 273.

to who can allocate and administer land in areas that observe traditional leadership and customs. Accordingly, people living in the countryside are being put in a perilous situation and might not access their right to housing, water and electricity.

Consequently, because of the aforementioned clashes, people from the rural communities may be evicted by the municipalities from the land that was allocated by traditional leaders because such land was (according to the municipality) not for residential purposes but for economic development. Furthermore, municipalities at times stop traditional leaders from giving people land because most of the land is state-owned in the rural areas and towns. This then causes tension between the traditional leader and municipal councilors as both parties want to show who has the most authority.⁷² Moreover, it seems as if little research is done on the legal implications concerning the allocation and administration of land by traditional leaders in areas under their domain. Furthermore, people who are allocated land in rural areas by traditional leaders have no formal documentation that can prove that indeed such a person can use and alienate the land as he or she deems fit.⁷³ Therefore, the research paper will contribute to literature about the legal implications in the allocation and administration of land by traditional leaders in the democratic dispensation.

1.4 METHODOLOGY

For this research paper, a desktop study will be conducted for the paper to be completed. The sources that will be utilised for this paper will be legislation, books, journal articles, media sources (relevant to the study) and case law applicable to the relevant question. Government policies in relation to traditional leaders (where applicable) with regards to the allocation land and administration will also be looked at. Furthermore, other relevant African journals discussing the topic of the roles of traditional leaders with regards to land allocation and administration by scholars from Ghana, Botswana and Zimbabwe will be used.

1.5 CHAPTER OUTLINE

1.5.1 Chapter 1 – Overview of the study

⁷² See Mathonsi N and Sithole S ‘The incompatibility of traditional leadership and democratic experimentation in South Africa’ (2017) 9 *African Journal of Public Affairs* 35 35.

⁷³ See Bank L & Mabhena C ‘After the Communal Land Rights Act? Land, Power and Development in Rural South Africa’ (2011) 41 *Africanus Journal of Development Studies* 95108 available at <https://journals.co.za/content/canus/41/3/EJC173366> (Accessed 12 April 2020) .

This chapter provides an introduction and background to the study by outlining the purposes and objectives of the study and gives a holistic outline of how these objectives are to be met.

1.5.2 Chapter 2 – A brief history of traditional leaders South Africa

Part one of this chapter will discuss a brief history of traditional leaders in South Africa in relation to land. This brief history will go back to pre-colonial times, followed by conquest, wars and land dispossession. This is done so as to examine the roles that traditional leaders played during those dark and brutal times of dispossession.

Part two of this chapter, will explore the laws that were applied to the roles, powers and functions of traditional leaders before the 1996 Constitution took effect. This is done to examine whether there were any legislative powers given to the traditional leaders to allocate and administer land in their areas of jurisdiction.

1.5.3 Chapter 3 – Comparison of post-apartheid roles and functions by traditional leaders in South Africa, Ghana, Botswana and Zimbabwe in relation to the allocation and administration of land

In part one of this chapter, the roles, functions and powers of traditional leaders post-1994 will be discussed. The roles and functions discussed in this chapter will establish whether the democratic government trusts traditional leaders with land issues, by giving traditional leaders powers to allocate and administer land in areas under their domain. Furthermore, this chapter will reveal whether the democratic government has limited roles, functions and powers of traditional leaders. The rationale for the government to limit such roles will also be examined in this chapter.

The second part of this chapter will be brief and inter alia conduct a comparative analysis on the roles, functions and powers of traditional authorities concerning the allocation and administration of land. The results of the analysis in this chapter will be used as examples if no solution is found in South African law on these functions. Furthermore, it will look at the roles, functions and powers of traditional authorities concerning the allocation of and administration of land from other democratic African countries like Ghana, Botswana and Zimbabwe. This is done to see how other African states deal with these tensions between traditional leaders and municipal officials in the allocation of land and its administration.

1.5.4 Chapter 4 –Recommendations and Conclusion

This chapter draws the conclusion from the preceding chapters and make recommendations. Thereafter, a conclusion will be reached at to answer the question of the study.

2 CHAPTER 2

A brief history of the roles, functions and powers of traditional leaders in South Africa with respect to the allocation and administration of land

2.1 PRE-COLONIAL PERIOD

According to Rugege, “in pre-colonial Africa, African societies were ruled by Kings and supported by a hierarchy of chiefs and councillors or advisors, who were either their close relatives or selected from their communities”.⁷⁴ For purposes of this research, pre-colonial times predate the year 1652. It is said that traditional leaders in the pre-colonial period exercised executive, administrative and judicial functions for those who fell under their jurisdiction.⁷⁵ Furthermore, Former President Jacob Zuma argues that traditional leadership has been the foundation of our African societies as far back as memory itself.⁷⁶ Mojalefa supports Rugege and Zuma by further articulating that the institution of traditional leadership is the oldest system of governance in Africa.⁷⁷

In South Africa, the first land clash was recorded in 1488 in the Cape,⁷⁸ which at that time was inhabited by the Khoikhoi and San people. Khunou argues that traditional leaders controlled the land and were regarded as custodians of that particular land on behalf of the people.⁷⁹ This land, the argument continues, was thereafter allocated to those who pledged allegiance to the traditional leader in question and the land would be distributed for residential, cropping, and cultivating purposes.⁸⁰ Khunou submits that, through this allocation and administration of land,

⁷⁴ See Rugege S ‘Traditional leadership and its future role in local governance’ (2003) *Law, Democracy & Development* 171 172.

⁷⁵ See Ncube B D *The Role of Traditional Leadership in Democratic Governance* (unpublished LLM thesis, University of Free State, 2017) 2. See also Khunou S F ‘Traditional leadership and independent Bantustans of South Africa: Some milestones of transformative constitutionalism beyond apartheid’ (2009) 12 *Potchefstroom Electronic Law Journal* 81 82.

⁷⁶ See Holomisa P A *Double Edged Sword* 3ed (2011) xv. See also Mathonsi N and Sithole S ‘The incompatibility of traditional leadership and democratic experimentation in South Africa’ (2017) 9 *African Journal of Public Affairs* 35 35.

⁷⁷ See Mojalefe L J K ‘The role and significance of traditional leadership in the governance of modern democratic South Africa’ (2017) *Africa Review* 1 available at <https://doi.org/10.1080/09744053.2017.1399563> (Accessed 3 March 2021).

⁷⁸ See Laband J *The Land Wars: The Dispossession of the Khoisan and AmaXhosa in the Cape Colony* (2020) 7.

⁷⁹ See Khunou S F *The Legal History of Traditional Leaders in South Africa, Botswana and Lesotho* (unpublished LLD thesis, North-West University, 2006) 17.

⁸⁰ See Khunou S F *The legal history of traditional leaders in South Africa, Botswana and Lesotho* (unpublished LLD thesis, North-West University, 2006) 17.

traditional leaders were able to accumulate wealth, which was then later shared with those who were destitute in the village.⁸¹ Holomisa concurs with Khunou and posits that indeed palaces of traditional leaders were places where everyone would go for protection in times of difficulties.⁸²

In the pre-colonial era, chiefs controlled everything. According to Beinart, once a homestead had been established, the immediate control over allocation of land was assigned to the senior men of the homestead.⁸³ Beinart seems to suggest that in pre-colonial times, traditional leaders did not centralise their power of allocating land to their people under their jurisdiction, but rather assigned senior men with this task in consultation with traditional leaders. It appears that those who distributed land to the people would get more arable lands than the common villagers even though there was no shortage of land.⁸⁴

History shows that in pre-colonial times, traditional leaders would accumulate land through invasions of land held by weaker tribes and that they would conquer that particular land to be theirs, soldiers and people.⁸⁵ Mabunda refers to Nelson who argues that the “pre-colonial conception of chiefdom consisted of a mobile group, with no fixed or permanent territorial boundaries, that followed a particular chief”.⁸⁶ Therefore, chiefs were moving freely, from one place to another in search of arable lands and weaker tribes were consequently conquered by stronger chiefdoms.

2.2 COLONIAL PERIOD

On 6 April 1652, Jan van Riebeeck arrived in the Cape.⁸⁷ According to Sparks “it started with the planting of a bitter almond hedge and all sorts of fast-growing brambles and thorn bushes during the first European settlement in the Cape, intending to keep the new settlers and the local inhabitants apart”.⁸⁸ Consequently, the plantation of the fast-growing brambles and thorn bushes was followed by a major disruption in land, indigenous laws, customs, culture and ways of living for aboriginals of the Cape and other territories. During those land distractions, from

⁸¹ See Khuno S F *The legal history of traditional leaders in South Africa, Botswana and Lesotho* (unpublished LLD thesis, North-West University, 2006) 29.

⁸² See Holomisa P A *Double Edged Sword* 3ed (2011) 53.

⁸³ See Beinart W *The Political Economy of Pondoland 1860 to 1930* (1982) 126.

⁸⁴ See Beinart W *The Political Economy of Pondoland 1860 to 1930* (1982) 127.

⁸⁵ See Beinart W *The Political Economy of Pondoland 1860 to 1930* (1982) 11.

⁸⁶ See Mabunda D Q *An analysis the role of traditional leadership policing* (unpublished Doctor of Literature and Philosophy in Political Science, University of South Africa. 2017) 67.

⁸⁷ See <https://www.sahistory.org.za/article/colonial-conquest-and-resistance-pre-1900> (Accessed in 06 October 2020).

⁸⁸ See Sparks A *The Mind of South Africa* (1990) xv. See also Pienaar J M *Land reform* (2014) 53.

1659 to 1660 another war erupted between the Khoi people and the Dutch settlers.⁸⁹ History depicts that in the early days of colonisation, land deprivation and involuntary labour were the themes of the day.⁹⁰ It is clear that the colonial government wanted to limit the means of production of the majority of the black people by forcefully taking land from their traditional leaders.

According to Huston, Sausi, Pophlwa and Dumisa “Wars of Dispossession or The Hundred Years War (1779-1880), was led by African traditional leaders”.⁹¹ AmaXhosa chiefdoms led by the likes of King Sandile ka Ngqika fought from 1779 to 1878 to defend their ancestral land from aggressive invasion by the colonialists.⁹² King Sekhukhune I of the Bapedi was killed in 1879.⁹³ King Bhambata ka Mancinza of the Zulu kingdom was killed in 1906.⁹⁴ All these Kings were killed because of their resistance to land dispossession and atrocities committed by the colonialists. Holomisa further argues that traditional leaders were the commanders in chief in the wars of dispossession.⁹⁵

The first Act that was promulgated by the Cape Colony government for the purpose of controlling and changing ownership of land by natives was the Glen Grey Act 25 of 1894.⁹⁶ According to the Glen Grey Act, the governor had wide-ranging powers with regard to the allotment and allocation of land.⁹⁷ One of the many powers that the governor had was to appoint and dismiss those who should have a seat in the land board, including the discretion of appointing a headman for a duration of a year, subject to extension.⁹⁸ The Act was therefore the first law to have a direct impact on what was once the duties and roles of traditional authorities, which included allocating land to the people.

According to Suttner “over 60 chiefs, clergymen, lawyers, teachers, clerks, interpreters, small building contractors, labour agents and workers assembled in Bloemfontein to establish the

⁸⁹ See Laband J *The Land Wars: The Dispossession of the Khoisan and AmaXhosa in the Cape Colony* (2020) 2.

⁹⁰ See Ngcukaitobi T *The Land is Ours* (2018) 4.

⁹¹ See Huston G Sausi K Phophlwa N & Dumisa S ‘Documenting the legacy of the South African Liberation struggle: The national liberation heritage route: unsung heroes and heroines of the liberation struggle project’ available at <https://www.researchgate.net/publications/273491275>. (Accessed in 19 October 2020). See also Southgate R and Kropiwnicki Z ‘Containing the chiefs: The ANC and Traditional Leaders in the Eastern Cape, South Africa’ (2003) 37 *Canadian Journal of African Studies* 48 50.

⁹² See Laband J *The Land Wars: The Dispossession of the Khoisan and AmaXhosa in the Cape Colony* (2020) 2.

⁹³ See Ngcukaitobi T *Land Matters: South Africa’s Failed Land Reforms and the Road Ahead* (2021) 3.

⁹⁴ See Ngcukaitobi T *Land Matters: South Africa’s Failed Land Reforms and the Road Ahead* (2021) 2.

⁹⁵ See Holomisa P A *Double Edged Sword* 3ed (2011) 56.

⁹⁶ See Ntsebeza L *Democracy Compromised: Chiefs and the Politics of Land in South Africa* (2005) 45.

⁹⁷ See Thompson R J *Cecil Rhodes, the Glen Gray Act, and the labour question in the politics of Cape Colony* (unpublished Master of Arts thesis, Rhodes University. 1991) 2.

⁹⁸ See Thompson R J *Cecil Rhodes, the Glen Gray Act, and the labour question in the politics of Cape Colony* (unpublished Master of Arts thesis, Rhodes University. 1991) 2.

South African Natives Congress”.⁹⁹ This South African Natives Congress is what we now know as the African National Congress. Koelble and Liphuma concur with Suttner and posit that the founding fathers of the then South African Natives Congress included a number of chiefs.¹⁰⁰ This first political organisation was formed by traditional leaders and black people to fight against the oppression of the colonizers.

As a result of the western invasion and forced British rule, customary ways of doing things were seen as backward and outdated. For instance, traditional leaders were being stripped of their authority and command by the introduction of Magistrates and Missionaries to the conquered natives.¹⁰¹ Furthermore, the introduction of Magistrates meant that most of the administrative and judicial work that was done by a traditional leader was now in the hands of a Magistrate.¹⁰² Customarily, traditional leaders are custodians of the land where they rule.¹⁰³ However, this custodianship was taken away by the introduction of new land laws.

A very significant blow to traditional leaders and their authority was the introduction of the Natives Land Act 27 of 1913, which was recommended in the Native Affairs Commission held from 1903 to 1905.¹⁰⁴ The Act was promulgated to make “further provisions in connection with the ownership and occupation of land by Natives and other persons”.¹⁰⁵ Traditional leaders also fell within the ambit of Natives and other persons in terms of the Act and no special accord was given to them. Consequently, unlike the Glen Grey Act, the 1913 Act gave the governor-general extensive powers to allocate vast tracts of land to the colonialists and only 7.3 percent of the land was reserved for the black majority of the country.¹⁰⁶

On the 29th of July 1927, the Union of South Africa assented to the Black Administration Act 38 of 1927. The Act was promulgated “to provide for the better control and management of the natives”.¹⁰⁷ Unfortunately for the institution of traditional leadership, the introduction of the

⁹⁹ See Suttner R ‘The African National Congress centenary: a long and difficult journey’ (2012) 88 *International Affairs* 720 available at www.https://academic.oup.com/ia/article/88/4/719/2326553 (Accessed 25 May 2021).

¹⁰⁰ See Koelble T A and Lipuma E ‘Traditional leaders and the culture of governance in South Africa’ (2011) 24 *International Journal of Policy, Administration, and Institutions* 5 9.

¹⁰¹ See Ngcukaitobi T *Land Matters: South Africa’s Failed Land Reforms and the Road Ahead* (2021) 59

¹⁰² See Southgate R and Kropiwnicki Z ‘Containing the chiefs: The ANC and Traditional Leaders in the Eastern Cape, South Africa’ (2003) 37 *Canadian Journal of African Studies* 48 50.

¹⁰³ See *Nokwanele Balizulu and Others v Thina Gcinisizwe Mthwa and others* (In the High Court of South Africa Eastern Cape Local Division-Mthatha Case NO:3016, /2020) para 32 and *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10 para 32.

¹⁰⁴ See Rautenbach C Bekker J C & Goolam N M I *Introduction to legal pluralism* 3ed (2010) 83.

¹⁰⁵ See Preamble of the Natives Land Act 27 of 1913.

¹⁰⁶ See O’Malley P ‘1936.Native Trust & Land Act No 18 – The O’Malley Archives’ available at <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01784.htm> (accessed 24 November 2020).

¹⁰⁷ See Preamble of the Black Administration Act 38 of 1927.

Black Administration Act stripped wide powers and privileges that were enjoyed by the institution. Accordingly, all powers that vested in the Kings, Queens, Chiefs and headmen were now accorded to the Governor-General.¹⁰⁸ Imperatively, the Governor-General was given authority to appoint and dethrone any person as chief or headman of the tribe.¹⁰⁹ Consequently, the powers and roles of chiefs and their headmen were diminished to nothing, because they no longer had control over their territories.

Harvey and Horn posit that the 1913 Land Act gave birth to the Beaumont Commission to probe whether additional land can be made available for the rural population.¹¹⁰ In the year 1936, yet another law was promulgated by the Union of South Africa. This new legislation was called the Native Trust and Land Act 18 of 1936.¹¹¹ According to the new Act, the initial 7.3 percent of the land that was set aside by the 1913 Land Act had to be stretched to at least 13 percent for Africans to use.¹¹² This additional land was the result of the recommendations made in the Beaumont Commission.¹¹³ Therefore, this meant that traditional leaders of different tribes had to share in 13 percent of the land. Traditional leaders had no say whatsoever in the implementations of the laws that took away land from them and their people.

2.3 APARTHEID PERIOD

Pienaar posits that the National Party officially embraced apartheid policies and its ideologies in 1945.¹¹⁴ The author further explains that this ideology was accepted by the ruling white elite because they believed that different races should “develop separately in accordance with God’s plan”.¹¹⁵ This indicates that the white minority justified their approach in separating the people of the Union of South Africa according to their racial and ethnic lines. Thereafter, the apartheid

¹⁰⁸ See section 1 of the Black Administration Act 38 of 1927.

¹⁰⁹ See section 7 of the Black Administration Act 38 of 1927. See also Southgate R and Kropiwnicki Z ‘Containing the chiefs: The ANC and Traditional Leaders in the Eastern Cape, South Africa’ (2003) 37 *Canadian Journal of African Studies* 48 52.

¹¹⁰ See Harvey F & Horn A ‘South African Territorial Segregation: New Data on African Farm Purchases, 1913-1936’ (2009) 50 *Journal of African History* 41 60.

¹¹¹ See Harvey F & Horn A ‘South African Territorial Segregation: New Data on African Farm Purchases, 1913-1936’ (2009) 50 *Journal of African History* 41 60.

¹¹² See O’Malley P ‘1936.Native Trust & Land Act No 18 – The O’Malley Archives’ available at <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01784.htm> (accessed 25 November 2020).

¹¹³ See Flemmer M *Sir William H. Beaumont and the Natives Land Commission, 1913-1916* (unpublished Degree of Master of Arts in History, University of Natal. 1976) 91.

¹¹⁴ See Pienaar J M *Land reform* (2014) 98. See also Southgate R and Kropiwnicki Z ‘Containing the chiefs: The ANC and Traditional Leaders in the Eastern Cape, South Africa’ (2003) 37 *Canadian Journal of African Studies* 48 54.

¹¹⁵ See Pienaar J M *Land Reform* (2014) 98.

government promulgated the Promotion of Black Self-Government Act 46 of 1959.¹¹⁶ The Act was promulgated to promote black-controlled governments in what was to be called homelands and which would be led by traditional leaders.¹¹⁷

According to Holomisa, “the apartheid governments decided to embark on a different tactic in their endeavours to finally conquer and subdue the land-hungry and freedom-thirsty owners of the land”.¹¹⁸ This novel tactic, as identified by Rautenbach, Bekker and Goolam was to make traditional leaders and their institutions central in their self-governing policies.¹¹⁹ This meant that traditional leaders were to carry out administrative, executive, and judicial functions.¹²⁰

In 1951, the Minister of Native Affairs called for the implementation of the Bantu Authorities Act 68 of 1951.¹²¹ This Act legitimatised the establishment of the homeland systems. In that, the apartheid government gave traditional leaders extensive powers in relation to the allocation and administration of land. Mathonsi and Sithole argue that “traditional leadership was utilised to entrench the apartheid policy in rural areas referred to as Bantustans”.¹²² Starting from 1963 to 1981, the creation of the Bantustans saw “independence” being given to Transkei, Bophuthatswana, Venda and Ciskei.¹²³ All these newly established Bantustans were led by traditional leaders, as such chiefs always outnumbered elected officials in Legislative Assemblies.¹²⁴ Unfortunately, traditional leaders that were against the establishment of homelands were replaced with more compliant ones.¹²⁵ For instance, chief Kaiser Matanzima was favoured over King Sabata Dalindyebo because King Dalinyebo opposed the homeland systems.¹²⁶

¹¹⁶ See Khunou S F ‘Traditional leadership and independent Bantustans of South Africa: some milestones of transformative constitutionalism beyond apartheid’ (2009) 12 *PER* 87.

¹¹⁷ See O’Malley P ‘1959. Promotion of Bantu Self-Government Act No 46’ available at <https://www.omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01828/05lv01829/06lv01899.htm/> (Accessed 26 July 2021).

¹¹⁸ See Holomisa P A *Double Edged Sword* 3ed (2011) 80.

¹¹⁹ See Rautenbach C Bekker J C & Goolam N M I *Introduction to Legal Pluralism* 3ed (2010) 153.

¹²⁰ See Bantu Authorities and Tribal Administration 68 of 1951.

¹²¹ See Geldenhuys D ‘South Africa’s black homelands: post objectives, present realities and future developments’ (1981) *The South African Institute of International Affairs* 4.

¹²² See Mathonsi N and Sithole S ‘The incompatibility of traditional leadership and democratic experimentation in South Africa’ (2017) 9 *African Journal of Public Affairs* 35 37.

¹²³ See Southgate R and Kropiwnicki Z ‘Containing the chiefs: The ANC and Traditional Leaders in the Eastern Cape, South Africa’ (2003) 37 *Canadian Journal of African Studies* 48 54.

¹²⁴ See Southgate R and Kropiwnicki Z ‘Containing the chiefs: The ANC and Traditional Leaders in the Eastern Cape, South Africa’ (2003) 37 *Canadian Journal of African Studies* 48 55.

¹²⁵ See Koelble T A and Lipuma E ‘Traditional leaders and the culture of governance in South Africa’ (2011) 24 *International Journal of Policy, Administration, and Institutions* 5 10.

¹²⁶ See Southgate R and Kropiwnicki Z ‘Containing the chiefs: The ANC and Traditional Leaders in the Eastern Cape, South Africa’ (2003) 37 *Canadian Journal of African Studies* 48 55.

A plethora of laws and proclamations were introduced by the apartheid government to fulfil the objectives of the Bantustan Authorities.¹²⁷ These laws and proclamations were centred around chiefs and headmen to carry out the policies of apartheid. Proclamation No. 110 of 1957 mandated traditional authorities to administer the occupation or cultivation of land.¹²⁸ This is what was referred to as indirect rule.¹²⁹ It is clear that the apartheid government heavily relied on traditional leaders to control the people in the rural areas. Consequently, during apartheid, some traditional leaders if not most traditional leaders lost trust from the people because they were now accountable to their apartheid masters.

When apartheid was crumbling and falling in the 1980s, change was inevitable and democratic rule was promised to the people. According to Mathonsi and Sithole, “the Congress of Traditional Leaders of South Africa (CONTRALESA) was established in 1987 in order to advocate for the interest of traditional leaders and serve as an outside Parliament opposition movement against apartheid”.¹³⁰ Therefore, it is clear that CONTRALESA was formed by chiefs who were ousted and ridiculed by the apartheid government and their homeland leaders. CONTRALESA wanted to preserve the image of the traditional institution because it was badly tainted by their cooperation with the apartheid government. In that, CONTRALESA supported the inclusion of traditional leaders in the democratic system of governance because they also participated in the liberation struggle.

2.4 CONCLUSION

It is clear from the above that traditional leaders have been in South African societies since time immemorial. Furthermore, they have always been in positions of power and regarded as the custodian of the land on behalf of their people as shown in the pre-colonial paragraph. A close reading of the literature shows further that pre-colonial traditional leadership was based on governance of the people, where traditional leaders were only accountable to their subjects and close family relatives. I have observed that in the pre-colonial period, traditional leaders

¹²⁷ See Khunou S F ‘Traditional leadership and independent Bantustans of South Africa: Some milestones of transformative constitutionalism beyond apartheid’ (2009) 12 *PER* 81 81. See Promotion of Black Self-Governing Act 46 of 1959, Self-Governing Territories Constitution Act 21 of 1971, Transkei Constitution Act 48 of 1963, The Status of Ciskei Act 110 of 1981, The Status of Bophuthatswana Act 89 of 1977 and The Status of Venda Act 107 of 1979.

¹²⁸ See section 9 of Proclamation No. 110 of 1957.

¹²⁹ See Khunou S F ‘Traditional leadership and independent Bantustans of South Africa: Some milestones of transformative constitutionalism beyond apartheid’ (2009) 12 *PER* 81 86.

¹³⁰ See Mathonsi N and Sithole S ‘The incompatibility of traditional leadership and democratic experimentation in South Africa’ (2017) 9 *African Journal of Public Affairs* 35 37.

were spiritual leaders, political leaders, army leaders and father figures to all those who were under their jurisdiction.

When colonialists came to South Africa there were no political parties that would intellectually engage and oppose the colonisers. Traditional leaders were the ones to confront the might of colonialism and its brutality. In that, traditional leaders were the first to take up spears, shields and knobkerries to fight and defend the land of their people. However, their European counterparts were more advanced in the military and conquered all the wars of dispossession. Research indicates that when the Europeans won the wars, they annexed the land as that of the Crown and started to implement the indirect rule. It is clear that the indirect rule was implemented by making traditional leaders their puppets to carry out their oppressive and discriminatory laws.

Traditional leaders survived all the atrocities and ridicule from the colonialists. The period of colonisation and conquest was the worst period for traditional leaders. More land was invaded and dispossessed through force during the colonial period. However, when the apartheid regime took power they manipulated the institution of traditional leadership for their benefit. The apartheid government inherited the Black Administrations Act 38 of 1927 from the colonial government. This Act helped them to appoint traditional leaders and dismiss them as they like. Research shows that, the apartheid government would appoint anyone as a “Paramount Chief” to fulfil their oppressive policies. Unfortunately, those who questioned apartheid policies were stripped of their powers and duties of administering and allocating land for their people.

3 CHAPTER 3

Comparison of post-apartheid roles and functions by traditional leaders in South Africa, Ghana, Botswana and Zimbabwe in relation to the allocation and administration of land

3.1 INTRODUCTION

Ainslie and Kepe argue that “traditional authorities in postcolonial Africa have frequently posed challenges for incoming democratic government”.¹³¹ This is because, as the argument advances, traditional leaders are born to be in a position of power and thus not elected by the people as democracy dictates.¹³² In this regard, when independence was gained in Africa, the relevance of traditional leaders was questioned in the new dawn of constitutional democracy and elected leaders. As a matter of fact, two schools of thought gained momentum. Pienaar identifies these two schools of thought as the traditionalists and modernists.¹³³

For the traditionalists, their point of view is that the institution of chieftaincy has a variety of responsibilities amongst the people which includes land tenure, succession in property, local justice, and implementation of customary law.¹³⁴ For instance, Koeneke who holds the traditionalist view, advocates for the institution of traditional leaders to be retained in the democratic system of governance because he believes that traditional leaders are still relevant in South Africa and can contribute meaningfully to the development of South African and in particular in the rural areas.¹³⁵ However, on the other hand, modernists argue that, in traditional leadership institutions, leaders are born and not elected. Moreover, it is argued that women and

¹³¹ See Ainslie A and Kepe T ‘Understanding the Resurgence of Traditional Authorities in Post-Apartheid South Africa’ (2016) 42 *Journal of Southern African Studies* 19.

¹³² See Ainslie A and Kepe T ‘Understanding the Resurgence of Traditional Authorities in Post-Apartheid South Africa’ (2016) 42 *Journal of Southern African Studies* 19.

¹³³ See Pienaar JM *Land Reform* (2014) 465.

¹³⁴ See Iya P ‘Challenges and Prospects for Traditional Leadership in Africa: Towards Innovative Ideas to Enhance African Values Among the Youth in South Africa’ (2014) 29 *Southern African Public Law* 260 278. See also Dlungwana M E ‘Traditional leaders and new local government in South Africa’ (2002) 1 2.

¹³⁵ See Koeneke M L J ‘The Role and Significance of Traditional Leadership in the Governance of Modern Democratic South Africa’ (2017) 1 available at <https://doi.org/10.1080/09744053.2017.1399563> (accessed 13 May 2020).

unmarried men are often excluded from decision-making bodies and as a result the institution of traditional leadership should be rejected.¹³⁶

Ntsebeza argues that “there are those who argue that dismantling the institution of traditional leadership, especially viewed from its role in the colonial period, is a pre-condition for democratic transformation in Africa”.¹³⁷ Accordingly, Ntsebeza seems to suggest that traditional leaders should be abolished because of the role they played during colonization. For Kompi, modernism disturbed customary rules, customs and beliefs, while on the other hand, it brought about fresh ideas of equity amongst its citizens, self-governance and self-identification.¹³⁸ Moreover, academic literature indicates that some argue for shared governance where the institution of traditional leadership can cooperatively work together with the democratically elected leaders.¹³⁹

With all that is said above, the purpose of this chapter is to look at the laws, regulations and policies that have been implemented by the South African government to deal with the allocation and administration of land by traditional leaders in areas under their jurisdiction. Furthermore, if there are no solutions in South African law, other African countries like Ghana, Botswana and Zimbabwe will be looked at and see how allocation and administration of land by traditional leaders in their respective democratic discourse is dealt with. Moreover, this chapter will reveal which school of thought is preferred by African governments when incorporating the institution of traditional leadership in their democratic dispensation.

3.2 SOUTH AFRICA

In 1994, the Republic of South Africa adopted a new Constitution. Accordingly, Sekgala postulates that “the role of traditional leadership in a democratic South Africa has been a hot-potato since the dawn of democracy”.¹⁴⁰ Their roles and functions have been a hot-potato because, some believe that the institution of traditional leadership is undemocratic and whereas

¹³⁶ See Iya P ‘Challenges and Prospects for Traditional Leadership in Africa: Towards Innovative Ideas to Enhance African Values Among the Youth in South Africa’ (2014) 29 *Southern African Public Law* 273. See also Dlungwana M E ‘Traditional leaders and new local government in South Africa’ (2002) 1 2.

¹³⁷ See Ntsebeza L *Democracy Compromised: Chiefs and the politics of the land in South Africa* (2005) 24.

¹³⁸ See Kompi B H *The Evolution of Traditional Leadership in South Africa, 1996-2012: Traditionalism versus Modernism* (unpublished Philosophiae Doctor in the Faculty of Humanities, University of the Free State Bloemfontein, 2018) 47.

¹³⁹ See Ntsebeza L *Democracy Compromised: Chiefs and the Politics of land in South Africa* (2005) 24.

¹⁴⁰ See Sekgala M P ‘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.

some believe that it is democratic and necessary for the preservation of culture, tradition and customs.

Nonetheless, in the foreword of the White Paper on Traditional Leadership and Governance, it is recognised that traditional leaders in rural areas have the ability to combat poverty, reduce homelessness and lack of education while promoting good governance throughout South Africa.¹⁴¹ Therefore, it is with this reason that the framers of the Constitution saw it wise to recognise the institution, statuses and roles of traditional leadership, according to customary law and subject to the ethos and spirit of the Constitution.¹⁴²

The Constitution of the Republic of South Africa envisages the roles and functions to be played by traditional leaders. The Constitution states that “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”.¹⁴³ This constitutional provision assures traditional leaders that traditional authority and systems of customary law may continue to function, but are subject to applicable legislation and customs. Section 212(1) of the Constitution requires Parliament to enact national legislation that will provide for roles of traditional leadership as an institution in a democratic society.¹⁴⁴ In that regard, the National Legislature has passed innumerable laws that aim to give effect to the commands of section 212(1) of the Constitution of South Africa.¹⁴⁵

In section 212(2), the Constitution further dictates that “national legislation may provide for a role for traditional leadership as an institution at the local level on matters affecting local communities”.¹⁴⁶ As a result of this constitutional provision, legislation such as the Local Government Municipal Structures Act 117 of 1998 and Local Government Municipal Systems Act 32 of 2000 were promulgated by the first democratic government. However, none of the Acts addressed the issue of allocation and administration of land by traditional leaders. Instead, they deal with the establishment of municipalities,¹⁴⁷ and provide for the core principles,

¹⁴¹ See The White Paper on Traditional Leadership and Governance (2003) 3.

¹⁴² See section 211(1) of the Constitution of the Republic of South Africa, 1996.

¹⁴³ See section 211(2) of the Constitution of the Republic of South Africa, 1996.

¹⁴⁴ See Section 212(1) of the Constitution of the Republic of South Africa, 1996.

¹⁴⁵ See Sekgala M P ‘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. Legislation such as, Traditional Leadership and Governance Framework Act 41 of 2003, Communal Land Rights Act 11 of 2004, Traditional and Khoi-San Leadership Act 3 of 2019.

¹⁴⁶ See section 212(2) of the Constitution of the Republic of South Africa, 1996.

¹⁴⁷ See Preamble of the Local Government: Municipal Structures Act 117 of 1998.

mechanisms and processes that are necessary to enable municipalities to move towards realizing socio-economic rights promised in the Constitution.¹⁴⁸

The White Paper on Traditional Leadership and Governance indicates that “the White Paper relate primarily to the place and role of the institution of traditional leadership in the new system of governance”.¹⁴⁹ In that, the aforesaid White Paper laid the foundation for the TLGFA. The TLGFA accordingly mandates the State to protect, respect and promote the institution of traditional leadership with the objective of restoring the institution to its former glory.¹⁵⁰

In trying to restore the institution of traditional leaders, Chapter 5 of the TLGFA provides for roles and functions of traditional leaders. Accordingly, section 19 of the Act stipulates that “a traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation”.¹⁵¹ Consequently, there is no mention of allocation and administration of land by a traditional leader as a role or function by the aforesaid provision. However, one might argue that the allocation and administration of land by a traditional leader might fall within the ambit of customs practised by traditional communities involved.

Section 20 of the TLGFA provides for the guiding principles for the allocation of roles and functions of traditional leaders. The section list a variety of roles and functions that ought to be provided to traditional leaders or a traditional council.¹⁵² Importantly, section 20(1)(b) requires national government or a provincial government to provide a role to a traditional leader or traditional council that includes the administration of land, through legislative and other measures.¹⁵³ Unfortunately, for this role to come into existence, the concurrence of the Minister concerned must be obtained,¹⁵⁴ or that of a Member of the Executive Council responsible for traditional affairs in the said province.¹⁵⁵

On 20th July 2004, the Communal Land Rights Act 11 of 2004 (CLARA) was promulgated. CLARA was enacted to provide for, amongst other things “the democratic administration of communal land by communities, and to provide for the co-operative performance of municipal

¹⁴⁸ See Preamble of the Local Government: Municipal Systems Act 32 of 2000.

¹⁴⁹ See the White Paper on Traditional Leadership and Governance Notice 2336 of 2003 8.

¹⁵⁰ See the Preamble of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁵¹ See section 19 of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁵² See section 21(1)(a) –(n) of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁵³ See section 20(1)(b) of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁵⁴ See section 20(2)(a)(i) of the Traditional Leadership and Governance Framework Act 41 of 2003.

¹⁵⁵ See section 20(2)(b)(ii) of the Traditional Leadership and Governance Framework Act 41 of 2003.

functions on communal land”.¹⁵⁶ The drafters of CLARA foresaw the need to emphasise cooperativeness when the democratic municipality deals with communal land because that territory is that of traditional leaders.¹⁵⁷ As a result, section 21 (2) of CLARA gave traditional council powers and duties to administer communal land.¹⁵⁸ Consequently, in 2010 the Constitutional Court in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* declared CLARA invalid on procedural grounds.¹⁵⁹

In 2017, the government introduced a CLTB. The Bill seeks to afford a choice on communal land-dwellers regarding the administration of their communal land.¹⁶⁰ Chapter 8 of the Bill deals with the administration of land. Section 28(1)(a) of the CLTB stipulates that a community by way of resolution of not less than 60 percent of households may elect its land to be administered by a traditional council.¹⁶¹ Furthermore, an institution responsible for the management of land can also allocate land for residential and commercial purposes in accordance with community rules and ensuring women access to land.¹⁶² Unfortunately, the Bill has not yet been assented to.

The White Paper on South African Land Policy discloses that Green Paper workshops were held in order to gather different opinions and views from the general public on the future involvement of tribal authorities and chiefs in land administration.¹⁶³ This revelation by the White Paper on Land Policy might explain why the democratically elected government is reluctant in giving traditional leaders legislative authority to allocate and administer land for people under their jurisdiction. Those who argued for traditional leaders to continue with their land administrative duties, were of the opinion that chiefs should redistribute land and the state should be forbidden to hold land on behalf of black people.¹⁶⁴ Those against the involvement of traditional leaders in land administration raised bribery concerns and further argued that individuals falling under the chief’s jurisdiction must get their title deeds and not the chief.¹⁶⁵

¹⁵⁶ See the Preamble of the Communal Land Rights Act 11 of 2004.

¹⁵⁷ See *Nokwanele Balizulu and Others v Thina Gcinisizwe Mthwa and others* (In the High Court of South Africa Eastern Cape Local Division-Mthatha Case NO:3016, /2020) para 32 and *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10 para 32.

¹⁵⁸ See section 21 (2) of the Communal Land Rights Act 11 of 2004.

¹⁵⁹ See *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10 para 109.

¹⁶⁰ See Communal Land Tenure Bill 2017.

¹⁶¹ See section 28(1)(a) of the Communal Land Tenure Bill 2017.

¹⁶² See section 29(1)(b) of the Communal Land Tenure Bill 2017.

¹⁶³ See White Paper on South African Land Policy (1997) 25.

¹⁶⁴ See White Paper on South African Land Policy (1997) 25.

¹⁶⁵ See White Paper on South African Land Policy (1997) 25.

In 2019, a new law known as the Traditional and Khoi-San Leadership Act 3 of 2019 (TKSLA) was promulgated by the President. The Act is, inter alia promulgated to provide for the recognition of traditional leadership, Khoi-San communities, as well as the functions and roles of such authorities in those communities.¹⁶⁶ The new Act makes a specific reference to and acknowledges the Khoi-San communities.

Section 15 of the TKSLA is headed functions and resources of traditional and Khoi-San leaders. Accordingly, section 15 (1) of the Act provides that “a traditional or Khoi-San leader performs the functions provided for in terms of customary law and customs of the traditional or Khoi-San community concerned,¹⁶⁷and in terms of any applicable national or provincial legislation”.¹⁶⁸ This section is a mirror image of section 19 of the TLGFA, and it consequently does not touch on the issue of land allocation and administration by the hereditary institution.

It is clear that on a national level, the government is faced with challenges whenever they try to give traditional leaders their time immemorial authority of allocating and administering land. As a result, the state has not yet granted the authority for traditional leaders to allocate and administer the land. However, in the province of KwaZulu Natal, it is a different story to tell. Land in KwaZulu Natal is administered and held by a Trust under the controversial Ingonyama Trust Act 3KZ of 1994.¹⁶⁹ According to an editorial note in the Ingonyama Trust Act, the Ingonyama Trust Act has been elevated to a status of a national legislation and is inter alia administered by the Minister for Agriculture and Land Affairs.¹⁷⁰ Although the Act’s status has been elevated to that of National Act, the Act is still applicable to the province of KwaZulu Natal.

The KwaZulu Natal Ingonyama Trust Act was promulgated to “provide for the establishment of the Ingonyama Trust and for certain land to be held in trust, and to provide for matters incidental thereto”.¹⁷¹ This land that is to be held in trust by *Ingonyama* is approximately 2.8 million hectares.¹⁷² That comprises about 26.67 percent of the land in the province of KwaZulu

¹⁶⁶ See Traditional and Khoi-San Leadership Act 3 of 2019.

¹⁶⁷ See section 15(1)(a) of the Traditional and Khoi-San Leadership Act 3 of 2019.

¹⁶⁸ See section 15(1)(b) of the Traditional and Khoi-San Leadership Act 3 of 2019.

¹⁶⁹ See Dubazane M & Nel V ‘The Relationship of Traditional Leaders and The Municipal Council Concerning Land Use Management in Nkandla Local Municipality’ (2016) 15 *African Journal of Indigenous Knowledge Systems* 222 225.

¹⁷⁰ See KwaZulu-Natal Ingonyama Trust Act NO. 3KZ of 1994.

¹⁷¹ See the Preamble of the KwaZulu-Natal Ingonyama Trust Act NO. 3KZ of 1994.

¹⁷² See Centre for Law and Society ‘Land rights under the Ingonyama Trust’ *Rural Women’s Action Research Programme*(2015)availableathttps://www.cls.uct.ac.za/usr/lrg/downloads/FactsheetIngonyama_Final_Feb2015.pdf (Accessed 29 March 2021).

Natal.¹⁷³ Accordingly, *Ingonyama* is defined in section 13 of the KwaZulu Amakhosi and Iziphakanyiswa Act NO. 9 of 1990 to mean the King of the Zulus or *iSilo*.¹⁷⁴ Therefore, his Majesty the King is the custodian of vast swathes of land in the province of KwaZulu Natal.

The land held in trust by *Ingonyama* must be administered for the benefit, material welfare and social wellbeing of communities falling under the jurisdiction of *Ingonyama*.¹⁷⁵ The material welfare and social wellbeing of communities would encompass people having access to land for residential and cultivation purposes. Furthermore, the Act prohibits *Ingonyama* from leasing, alienating or otherwise disposing of any land without the consent of the traditional authority or affected community.¹⁷⁶ Therefore, this provision is meant to protect communities from being adversely affected by the unilateral decision taken by *Ingonyama* with regards to their land rights.

The Ingonyama Trust has created a lot of controversies and wide-scale criticism has been raised against the trust. Foremost amongst them, is the High-Level Panel report that was chaired by former President Kgalema Motlanthe. In that, the Panel recommended that Ingonyama Trust be subject to the Interim Protection of Informal Land Rights Act so as to protect the land rights of rural dwellers.¹⁷⁷ Further critics of the trust argue that it discriminates against women because of their gender and as a result it is unconstitutional.¹⁷⁸ The critics of the Ingonyama Trust calls for it to be abolished so that there could be equal access to land and to allow for a fair redistribution of land. Most significantly, the High Court in Pietermaritzburg declared that the Ingonyama Trust has violated the Constitution by concluding residential lease agreements with the true owners of the land as per Zulu customary law.¹⁷⁹

President Cyril Ramaphosa was asked about Ingonyama Trust and the recommendations made by the High-Level Panel. Surprisingly, the President held that “there will not be any arbitrary

¹⁷³ See Makhaye C ‘Rural women take the Ingonyama Trust to court’ *Mail & Guardian* 7 December 2020 available at <https://www.mg.co.za/news/2020-12-07-rural-women-take-the-ingonyama-trust-to-court/> (Accessed 30 March 2021).

¹⁷⁴ See section 13 of the KwaZulu Amakhosi and Iziphakanyiswa Act NO. 4 of 1990.

¹⁷⁵ See section 2(2) of the KwaZulu-Natal Ingonyama Trust Act NO. 3KZ of 1994.

¹⁷⁶ See section 2(5) of the KwaZulu-Natal Ingonyama Trust Act NO. 3KZ of 1994.

¹⁷⁷ See High Level Panel on the Assessment of key legislation and the acceleration of fundamental change (2017) available at https://www.parliament.gov.za/storage/app/media/Pages/2017/High_Level_Panel/HLP_Report/HLP_report.pdf (Accessed 30 March 2021).

¹⁷⁸ See Makhaye C ‘Rural women take the Ingonyama Trust to court’ *Mail & Guardian* 7 December 2020 available at <https://www.mg.co.za/news/2020-12-07-rural-women-take-the-ingonyama-trust-to-court/> (Accessed 30 March 2021).

¹⁷⁹ See *Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others* (12745/2018P) [2021] ZAKZPHC 42;2021.

action that will be taken on the Ingonyama Trust”.¹⁸⁰ It is clear that the current President wants to tread carefully when dealing with the Ingonyama Trust. Furthermore, the President does not want to drastically take away the powers of the Zulu King for being the custodian of swathes of land in KwaZulu Natal. Consequently, the author submits that some Kings and Queens of other provinces such as Eastern Cape, North West, Limpopo and Mpumalanga might see this as a special treatment for the Zulu Kingdom. This is because traditional leaders are not legally recognised as the custodians of land, let alone the 2.8 million hectares of land.

The above passages indicate that the democratic government values the institution of traditional leaders in South Africa. However, powers to allocate and administer land by traditional leaders are legislated by the democratic government. This is evident from numerous laws that have been passed by the government in trying to accommodate traditional leaders in a democratic system of governance. Furthermore, although traditional leaders allocate land in some rural areas, in other rural areas they continue to face legal hurdles.¹⁸¹

It is also shown in the above passages that traditional leaders are not treated the same by the government when it comes to the custodianship of the land. In the province of KwaZulu Natal traditional leaders are very much involved with land matters in areas falling under Ingonyama Trust. In that sense, traditional leaders in KwaZulu Natal can allocate and administer land without being concerned about legal ramifications that might arise at a later stage. In the rest of South Africa, there are legal hurdles between traditional leaders and some municipalities in relation to the allocation and administration of land. Further noticing that there is no legislation in place for the allocation and administration of land by traditional leaders, I will now consider other African countries such as Ghana, Botswana and Zimbabwe. The aim is to investigate and determine how they deal with the allocation and administration of land by traditional leaders during their democratic era.

¹⁸⁰ See Van Dieman E ‘Ramaphosa says no ‘arbitrary action’ on Ingonyama Trust Land, panel report still being scrutinised’ *News24* 22 August 2019 available at <https://www.news24.com/news/southafrica/ramaphosa-says-no-arbitrary-action-on-ingonyama-trust-land-panel-reprt-still-being-scrutinised-20190822> (Accessed 30 March 21).

¹⁸¹ See *King Sabata Dalinyebo Municipality v Chief Thina Mtwa and Others* (In the High Court of South Africa Eastern Cape Local Division-Mthatha Case no. 3573/2019), *King Sabata Dalinyebo Municipality v Mhlangabezi Mathube and Others* (In the High Court of South Africa Eastern Cape Local Division-Mthatha Case no. 4121/2019) and *Bhala Traditional Council v Dumezweni and Others* (3486/2018) [2020] ZAECMHC 17 (3 June 2020).

3.3 GHANA

According to Dano, “from colonial times traditional authorities in Ghana have always been involved in local governance and in various capacities. This institution has endured in Ghanaian society, is still a vibrant force, and is critical to sustainable development”.¹⁸² The sentiments passed by the author presents traditional leaders of Ghana as a formidable force to be recognised in Ghanaian society. Furthermore, the author outlines roles to be played by the Ghanaian traditional leaders, of which custodianship of land including that of natural resources is the utmost role reserved for traditional leaders.¹⁸³ Tieleman and Uitermark further argue that, although contemporary states have restricted some of the chief’s activities and roles, traditional leadership in Ghana is accorded with overwhelming powers in the issues of land.¹⁸⁴

Chapter 22 of the Republic of Ghana Constitution, deals with the institution of chieftaincy. According to Article 270(1) of the Constitution, “the institution of chieftaincy, together with its traditional councils as established by customary law and usage, is hereby guaranteed”.¹⁸⁵ The Constitution of Ghana does not merely recognise the status and roles of traditional leaders like that of South Africa, but rather guarantees its existence and further prohibits Parliament from enacting laws that will derogate or detract the honour of the institution of traditional leadership.¹⁸⁶ Ghana’s Constitution indicates that the government of Ghana acknowledges the immemorial existence of the institution of chieftaincy and want it protected from distortions.

Land in Ghana is governed statutorily and customarily.¹⁸⁷ Furthermore, Chapter 21 deals with what Ghanaians calls Stool and Skin Land and Property (SSLP). Article 267(1) of the Constitution of Ghana provides that “all stool lands in Ghana shall vest in the appropriate stool on behalf of and in trust for the subjects of the stool in accordance with customary law and usage”.¹⁸⁸ According to Tieleman and Uitermark, the position of traditional leaders as custodians of the land in Ghana was constitutionally codified after a landmark case that was

¹⁸² See Dano M ‘Traditional leadership in Ghana & Kenya’ Research Unit, Parliament of the Republic of South Africa 1.

¹⁸³ See Dano M ‘Traditional leadership in Ghana & Kenya’ Research Unit, Parliament of the Republic of South Africa 1.

¹⁸⁴ See Tieleman J and Uitermark J ‘Chiefs in the City: Traditional Authority in the Modern State’ (2019) available at <https://www.journals.sagepub.com/doi/full/10.1177/0038038518809325> (Accessed 29 April 2021).

¹⁸⁵ See Article 270(1) of the Constitution of the Republic of Ghana, 1992.

¹⁸⁶ See Article 270(2) (b) of the Constitution of the Republic of Ghana, 1992.

¹⁸⁷ See Akrofi E O and Whittal J ‘Compulsory Acquisition and Urban Land Delivery in Customary Areas in Ghana’ (2013) 2 *South African Journal of Geomatics* 281.

¹⁸⁸ See Article 267(1) of the Constitution of the Republic of Ghana, 1992.

brought by a Nigerian chief in 1921.¹⁸⁹ Importantly, the administration and development of the Stool Lands must be done in consultation with traditional authorities, including all matters relating to such land.¹⁹⁰ Therefore, that means traditional leaders must be included in the formulation of a policy framework that aims to develop the stool land.¹⁹¹

In the Administration of Lands Act of 1962 (ALA) stool land and stool is defined. The ALA explains stool lands as lands that “includes land controlled by a person for the benefit of the subjects or members of a stool, clan, company or community, and other land in the Upper and Northern Regions other than land vested in the President and accordingly “stool” means the person exercising control”.¹⁹² Hale submits that a stool signifies a male chief,¹⁹³ which is selected by the Queen Mother.¹⁹⁴ Therefore, the definition of stool land in ALA does not refer to the institution of chieftaincy or traditional leaders themselves, but rather refers to a person in control of the land for the benefit of subjects. In that, one might argue that the word “subjects” in an African context refers to the people under the jurisdiction of traditional authority.

Kumbun-Naa opines that 80 percent of the lands in Ghana is customary land stretching from rural areas and ending up to some urban areas.¹⁹⁵ The author further contends that these customary lands owned by stools are rich in natural minerals and these rich lands support the livelihood of the majority of Ghanaians and contribute meaningfully to the gross domestic products of the country.¹⁹⁶ For this and other various reasons, Kumbun-Naa proposes that the management of these customary lands must be sustainable.¹⁹⁷ In that, in Article 1 of ALA it is stipulated that “the management of stool lands shall be exercised in accordance with article 267 of the Constitution and where there is a conflict between a provision of this Act and a provision

¹⁸⁹ See Tieleman J and Uitermark J ‘Chiefs in the City: Traditional Authority in the Modern State’ (2019) available at <https://www.journals.sagepub.com/doi/full/10.1177/0038038518809325> (Accessed 29 April 2021).

¹⁹⁰ See Article 276(7) of the Constitution of the Republic of Ghana, 1992.

¹⁹¹ See Article 276(8) of the Constitution of the Republic of Ghana, 1992.

¹⁹² See Article 31 of Administration of Lands Act, 1962.

¹⁹³ See Hale C M *Asante Stools and the Matrilineage* (unpublished degree of Doctor of Philosophy in the subject of History of Art and Architecture, Harvard University Cambridge, 2013) iii.

¹⁹⁴ See Assanful V ‘The Obaahemaa’s Stool: A Symbol of Political and Religious Authority in an Akan State’ available at https://www.researchgate.net/publication/261122246_The_Obaahemaa’s_Stool_A_Symbol_of_Political_and_Religious_Authority_in_an_Akan_State (Accessed 19 January 2021).

¹⁹⁵ See Kumbun-Naa Y II ‘Customary Lands Administration and Good Governance-The State and the Traditional Rulers Interface’ (2006) 2.

¹⁹⁶ See Kumbun-Naa Y II ‘Customary Lands Administration and Good Governance-The State and the Traditional Rulers Interface’ (2006) 2-3.

¹⁹⁷ See Kumbun-Naa Y II ‘Customary Lands Administration and Good Governance-The State and the Traditional Rulers Interface’ (2006) 2.

of Chapter 21 of the Constitution the provisions of the Constitution prevails”.¹⁹⁸ Therefore, the provisions of ALA succinctly indicates that the government of Ghana trust traditional authorities as Article 267 of the Constitution of Ghana gives authority to the institution of chieftaincy the management and distribution of the stool lands.

According to Hughes, Knox and Jones-Casey “as land increases in value, the power that chiefs have over the land becomes complicated by economic interests. While some chiefs continue to act as custodians of communal lands, others have recognised the potential economic benefits of engaging in land transactions with outsiders and positioned themselves as de facto owners of communal land”.¹⁹⁹ These authors argue that some chiefs in Ghana are becoming unethical because of big fiscal gains in land transactions. As a result of these allegations of corruption against chiefs and land dealings to the elite outsiders, villagers are now losing confidence in their traditional leaders.²⁰⁰

The literature further reveals that in some cases, Ghanaians are faced with land disputes because of traditional leaders who falsely claim to own a piece of land and thus having powers to allocate such land.²⁰¹ Bugri and Yuonayel concur with what Hughes, Knox and Jones-Casey mentioned above and postulate that there are “incidence[s] of traditional authorities selling land and using the proceeds for selfish gains to neglect of their subjects”.²⁰² Furthermore, Ubink postulates that in the peri-urban areas there are land contestations as to who has the authority to allocate customary lands and who can alter farmland for residential purposes.²⁰³ Unfortunately, these mounting incidences can ultimately taint the image of traditional leaders and erode the trust that the people and the government have in traditional leaders to allocate and administer land for their subjects.

From the above discussion, it can be argued that the government of Ghana has the utmost respect for traditional authorities and trusts the institution of traditional leaders with the land of Ghana. In that, traditional leaders in Ghana are given enormous authority when it comes to

¹⁹⁸ See Article 1 of Administration of Land Act of 1962.

¹⁹⁹ See Hughes A K Knox A & Jones-Casey K ‘Customary leaders and conflicts of interest over land in Ghana’ (2011) 3.

²⁰⁰ See Hughes A K Knox A & Jones-Casey K ‘Customary leaders and conflicts of interest over land in Ghana’ (2011) 4.

²⁰¹ See Kline A Moore E Ramey E Hernandez K Ehrhard L ‘Whose Land Is It Anyway? Navigating Ghana’s Complex Land System’ (2019) 6 *Texas A&M Law Review Arguendo* 13. Available at <https://doi.org/10.3741/LR.V6.Arg.1> (Accessed 29 January 2021).

²⁰² See Bugri J T and Yuonayel E M ‘Traditional Authorities and Peri-Urban Land Management in Ghana: Evidence from Wa’ (2015) 13 *Journal of Resources Development and Management* 76.

²⁰³ See Ubink J M *In the Land of the Chiefs: Customary Law, Land Conflicts, and the Role of the State in Peri-Urban Ghana* (2008) 20.

the allocation and administration of land that falls under their jurisdiction. In Ghana 80 percent of the land is owned by traditional leadership and that immense chunk of the land is thereby governed by customary law and legislation. Therefore, that would mean it is relatively easy for the people of Ghana to acquire land from their known respective chiefs. Nonetheless, some traditional leaders are accused of using land for economic interests. It is yet to be revealed if the government of Ghana is doing anything about those accusations.

3.4 BOTSWANA

According to Dipholo, Thshishonga and Mafema, “before the advent of the protectorate rule, traditional leadership was the centre of all political life in Botswana”.²⁰⁴ However, like many other colonised African countries, this prestigious position held by traditional leaders changed when Botswana was colonized by the British. Nonetheless, when Botswana gained independence the legitimacy of traditional leadership and its institution was not compromised.²⁰⁵ This is because Rugege reasoned, the British colonialist allowed the traditional leaders of Botswana to govern their people with customary law, while ensuring that levies are paid to colonialists.²⁰⁶ White writes that, when Botswana was under British rule, tribal land was administered by traditional leaders in accordance with the rules of customary law applicable to the community.²⁰⁷

On the 30th of January 1970 and after Botswana achieved its independence, the democratically elected government promulgated a Tribal Land Act (TLA) to deal with the question of tribal land and further establish boards for such land.²⁰⁸ White postulates that “the new government adopted a policy of modernising and democratising local administration that involved reducing the powers of the chiefs by transferring their administrative duties to more democratic institutions”.²⁰⁹ The sentiments advanced by White indicate that the new government wanted

²⁰⁴ See Dipholo B K, Tshishonga N and Mafema E ‘Traditional leadership in Botswana: Opportunities and challenges for enhancing hood governance and local development’ (2011) *The Journal of African & Asian Local Government Studies* 17.

²⁰⁵ See Rugege S ‘Traditional leadership and its future role in local governance’ (2003) *Law, Democracy & Development* 195.

²⁰⁶ See Rugege S ‘Traditional leadership and its future role in local governance’ (2003) *Law, Democracy & Development* 195.

²⁰⁷ See White R ‘Tribal Land Administration in Botswana’ (2009) available at [https://researchgate.net/publication/40846119 Tribal land administration in Botswana](https://researchgate.net/publication/40846119_Tribal_land_administration_in_Botswana) (Accessed 1 February 2021).

²⁰⁸ See the Preamble of the Tribal Land Act of 1970.

²⁰⁹ See White R ‘Tribal Land Administration in Botswana’ (2009) available at [https://researchgate.net/publication/40846119 Tribal land administration in Botswana](https://researchgate.net/publication/40846119_Tribal_land_administration_in_Botswana) (Accessed 1 February 2021).

to limit the powers and administrative duties of traditional leaders in land matters. The TLA established land boards to deal with the allocation and administration of land in tribal areas.²¹⁰ Frimpong writes that the land boards consist of ex-officio members and elected members.²¹¹ In that, if the tribal land falls under a certain chief, that particular chief would be an *ex-officio* member of the board.²¹²

In Part III of the Constitution of Botswana, *Ntlo ya Dikgosi* is established. Accordingly, section 77(1) of the Constitution instructs that in Botswana there shall be no more than 35 members of *Ntlo ya Dikgosi*.²¹³ However, *Ntlo ya Dikgosi* is not defined in the Constitution but rather defined by *Bogosi* Act to mean a person so designated by the tribe and recognized as such by the Minister under section 4.²¹⁴ Furthermore, the Act further defines *Bogosi* to mean the institution of traditional leadership or the position of *Kgosi*.²¹⁵

The functions and roles to be played by *Ntlo ya Dikgosi* are laid down in section 85 of the Constitution. The functions allocated to Botswana's traditional leaders mainly concern the consideration of Bills that are referred to them and make recommendations to the Minister or the President,²¹⁶ and has nothing to do with land allocation and its administration. Furthermore, the *Bogosi* Act also provides for functions of *Dikgosi* in Part IV of the Act. In that, section 17(a) to (f) of the *Bogosi* Act lists a plethora of functions to be carried out by traditional leaders,²¹⁷ but does not include allocation and administration of land by traditional leaders.

In Botswana, it is clear that after independence was achieved, the democratically elected government extensively limited the roles and functions that traditional leaders used to enjoy. According to Holm and Botlhale, chiefs and their headmen in Botswana have once "allocated almost all economic resources such as land for grazing, crop farming and housing".²¹⁸ However, this position changed when the TLA was enacted because the government believed

²¹⁰ See section 3 of the Tribal Land Act of 1970.

²¹¹ See Frimpong K 'The Administration of Tribal Land in Botswana' (1986) 30 *Journal of African Law* 53.

²¹² See Frimpong K 'The Administration of Tribal Land in Botswana' (1986) 30 *Journal of African Law* 54.

²¹³ See section 77(1) of the Constitution of Botswana of 1996 with Amendments through 2005.

²¹⁴ See section 1 of the *Bogosi* Act of 2008.

²¹⁵ See section 1 of the *Bogosi* Act of 2008.

²¹⁶ See section 85 of the Constitution of Botswana of 1996 with the Amendments through 2005.

²¹⁷ See section 17(a)–(f) of the *Bogosi* Act of 2008.

²¹⁸ See Holm J D and Botlhale E 'Persistence and Decline of Traditional Authority in Modern Botswana Politics' (2008) 40 *Botswana Notes and Records* 74.

that the control and distribution of land by traditional leaders is unconstitutional, ineffective and does not yield to social cohesion.²¹⁹

3.5 ZIMBABWE

In 2013, Zimbabwe adopted a new amended Constitution. Chapter 15 of the Zimbabwean Constitution deals with traditional leaders. Accordingly, section 280(1) of the Constitution of Zimbabwe recognises the institution, status and roles of traditional leaders under customary law.²²⁰ Section 282 of the Constitution outlines functions to be carried out by traditional leaders in democratic Zimbabwe. Important to note in the Constitution of Zimbabwe is that traditional leaders are given authority to administer communal land and to protect the environment.²²¹ People living within the jurisdiction of those communal lands are under the authority and command of traditional leaders.²²²

The Communal Land Act 13 of 2002 (CLA 13 of 2002) defines the term communal land to “consist of land which, immediately before the 1st of February 1983, was Tribal Trust Land in terms of the Tribal Trust Land Act 6 of 1979, subject to any additions thereto or subtractions therefrom made in terms of section six”.²²³ Section 6 of the CLA 13 of 2002, which is subject to the Forest Act and the Parks and Wild Life Act 14 of 1975, gives the President powers to declare any State land part of communal land.²²⁴ The President can, after consultation with any rural district council of the affected area, declare that any land within communal land shall cease to be part of the communal land.²²⁵

The question of who does the communal land vests in, is answered in section 4 of the CLA 13 of 2002. Section 4 of the CLA provides that “communal land shall be vested in the President, who shall permit it to be occupied and used in accordance with this Act”.²²⁶ This section explains why the President has so much power over the communal lands of Zimbabwe. Nonetheless, the framers of the Constitution of Zimbabwe knew the importance of communal land to traditional leaders. This is so because, the Constitution allows traditional leaders to

²¹⁹ See Manatsha B T ‘Chiefs and the Politics of Land Reform in the North East District, Botswana, 2005-2008’ (2020) 55 *Journal of Asian and African Studies* 111-112.

²²⁰ See section 280(1) of the Constitution of Zimbabwe of 2013.

²²¹ See section 282(d) of the Constitution of Zimbabwe of 2013.

²²² See section 282(2) of the Constitution of Zimbabwe of 2013.

²²³ See section 3 of the Communal Land Act 13 of 2002.

²²⁴ See section 6(a) of the Communal Land Act 13 of 2002.

²²⁵ See section 6(b) of the Communal Land Act 13 of 2002.

²²⁶ See section 4 of the Communal Land Act 13 of 2002.

administer land in their areas of jurisdiction.²²⁷ Moreover, one of the duties that a chief performs, is amongst other things, ensuring that communal land is allocated in accordance with the CLA 13 of 2002 and the requirements for occupation and use of such lands are observed.²²⁸ However, the final say is with the President and not the traditional leaders because of the CLA.

The allocation of communal land is dealt with in Part VI of the Traditional Leaders Act 22 of 2001 (TLA 22 of 2001). Accordingly, section 26(1) of the TLA 22 of 2001 states that “no land shall be allocated in terms of this Act except with the approval of the appropriate rural district council, which shall be the administrative authority with overall control over the use and allocation of all communal land”.²²⁹ The TLA 22 of 2001 gives those who are in the rural district council authority to control the usage and allocation of communal land. According to Chigwata, the custodians of communal lands in Zimbabwe are chiefs.²³⁰ Therefore, it is for this reason that the TLA 22 of 2001, requires traditional leaders to prevent any exploitation of communal land and approve new dwellers wishing to reside within such communal land.²³¹

In Zimbabwe, the issue of communal land management appears to create uncertainty and potential overlap of roles between traditional leaders and government institutions. This is because, while the CLA 13 of 2002 suggests that rural local governments are the custodians of land within their respective jurisdictions, the TLA 22 of 2001 further suggests that chiefs have some authority over the allocation and management of rural land.²³² Therefore, with this high degree of ambiguity over the allocation and administration of communal land in Zimbabwe, Ncube opines that there is now a power struggle between democratically elected officials and unelected traditional leaders.²³³

The new Constitution in Zimbabwe recognises that traditional leaders are custodians of communal land by giving them authority to administer it. This authority is given to traditional leaders despite the CLA 13 of 2002 vesting communal land in the President. Furthermore, unlike Botswana and the Republic of South Africa, Zimbabwe explicitly gives traditional

²²⁷ See section 282(d) of the Constitution of Zimbabwe of 2013.

²²⁸ See section 5(g) of the Traditional Leaders Act 22 of 2001.

²²⁹ See section 26(1) of the Traditional Leaders Act 22 of 2001.

²³⁰ See Chigwata T ‘The role of traditional leaders in Zimbabwe: are they still relevant?’ (2016) 20 *Law Democracy & Development* 79.

²³¹ See section 5(1)(h)(i) of the Traditional Leaders Act 22 of 2001.

²³² See Chigwata T ‘The role of traditional leaders in Zimbabwe: are they still relevant?’ (2016) 20 *Law Democracy & Development* 80.

²³³ See Ncube G T ‘Crisis of communal leadership: Post-colonial local government reform and administrative conflict with traditional authorities in the communal areas of Zimbabwe, 1980-2008’ (2011) 3 *African Journal of History and Culture* 1.

leaders constitutional authority to administer communal land on behalf of their people. In Zimbabwe, traditional leaders are given innumerable responsibilities with regard to communal land's protection and preservation for present and future generations to come. Traditional leaders are not only given powers to allocate and administer communal land but also to look after the communal land and report any exploitation of the communal land to the relevant government institutions. Therefore, in Zimbabwe both the President and traditional leaders have a role to play in the allocation and administration of land.

3.6 CONCLUSION

In the above passages, it is clear that all the chosen African countries incorporated traditional leaders in their respective Constitutions. That then shows that the traditionalist model rather than the modernist model prevailed in these countries. This is so because the Republic of South Africa embraced the institution of traditional leadership in its democratic dispensation. When apartheid ended in the Republic of South Africa, many thought that traditional leaders will end with it. However, the new democratic government showed much value and respect for the institution of traditional leaders. As a result of this value and respect for traditional leaders, the drafters of the Constitution included the institution in Chapter 12 of the Constitution. Furthermore, not only its statuses were recognised, the Constitution provided that roles and functions of the institution must be realised by way of legislation.

The democratic government in the Republic of South Africa has thus realised that communal land is usually under the custodianship of a traditional leader. Nonetheless, the Communal Land Bill of 2017 has not yet been signed into law. Consequently, in some parts of the Eastern Cape traditional leaders are at loggerheads with municipalities because of allegedly allocating and administering land that belongs to the municipality. However, in the province of KwaZulu Natal land is legally vested in the King. In that, traditional leaders in KwaZulu Natal allocate and administer land for the welfare and social wellbeing of the rural dwellers. As a matter of fact, I have observed that municipalities in the province of KwaZulu Natal do not take traditional leaders to court for allocating and administering land.

I conclude that traditional leaders in the Republic of South Africa are not treated equally. The King of the Zulus has shown to be a prominent and a respected monarch above all other monarchies in the Republic of South Africa. This is so because, 2.8 million hectares of land are under the custodian of the Zulu King and whereas other monarchs have no millions of hectares to share, allocate and administer for the people under their jurisdiction. However, there

has been opposition and complaints on the Ingonyama Trust. The Pietermaritzburg High Court recently held that Trust held under the Ingonyama Trust Act 3KZ of 1994 has acted unlawfully and violated the Constitution by concluding residential leases with true owners of the land. The court went further and ordered the Trust to repay all the monies that has been paid to it by concluding such residential leases.²³⁴

After dealing with South Africa, the author looked at other democratic countries in Africa. This was done to see how other African countries deal with allocation and administration of land by traditional leaders in their democratic dispensation. In that, I have observed that traditional leaders are significant in all African cultures. As a result of their significance, traditional leaders are included and recognised by the Constitution of Ghana, Zimbabwe and Botswana. However, Ghana takes it a step further and provides for stool and skin land that vests in a traditional leader for the benefit of the people falling under its jurisdiction. Furthermore, they are given powers to allocate and administer such land by the Constitution.

In Zimbabwe, unlike Botswana and the Republic of South Africa, Zimbabwe explicitly gives traditional leaders constitutional authority to administer communal land on behalf of their people. However, in Zimbabwe, there is potential overlap of roles between traditional leaders and the President. Unfortunately, this can cause unintended confusion for people in rural areas. Therefore, in South Africa, custodianship of communal land should be in the hands of traditional leaders and not that of the President.

In Botswana, a member of the *Ntlo ya Dikgosi* is disqualified from being a member of the land board. This indicates that traditional leaders in Botswana do not have any authority over the land. As a result, allocation and administration of land is in the hands of the land boards in rural areas. Furthermore, if the tribal land falls under a certain chief, that particular chief would be an *ex-officio* member of the land board. I suggest that rural areas in South Africa should have land boards that are chaired by traditional leaders with elected members of the community to properly manage the communal land for the benefit and interest of all rural dwellers.

I submit that the government of the Republic of South Africa can look at the constitutions of Zimbabwe and Ghana and incorporate a few provisions. For instance, although there is an overlap of roles between traditional leaders and the President in Zimbabwe, it appears that traditional leaders have the constitutional authority to administer and allocate land for people

²³⁴ See *Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others* (12745/2018P) [2021] ZAKZPHC 42;2021.

in their area of jurisdiction. Moreover, in Ghana it is revealed that 80 percent of the land is owned by traditional leaders. The Ghanaian Constitution states that stool land is that of the stool and as such must be administered by the stool. Therefore, this makes it easier for those residing in rural areas to get access to land.

4 CHAPTER 4

4.1 Recommendations

It is clear that South Africa emerges from a scourge of land wars. These land wars and atrocities, as discussed in chapter 2 were perpetuated by the colonialists, in their quest to conquer all fertile land that belonged to the then natives. The horrific events of land dispossessions and forced removals of native households from their ancestral land, was first opposed by traditional leaders of the time. Almost every country in the African continent was ruled by monarchs before colonization took place and those monarchs were the first to wage war against the western invasion.²³⁵

As stated earlier in chapter 3, traditional leaders in some municipalities are faced with legal battles regarding the allocation and administration of land in their areas of jurisdiction. These legal battles are sometimes instituted by the municipal council, stopping a traditional leader from allocating and demarcating land for the people.²³⁶ Obviously, this does not sit well with traditional leaders because they strongly feel that their duty of allocating and administering land for people under their jurisdiction is being taken away from them. Traditional leaders strongly feel undermined because their forefathers were killed defending the land. Therefore, these legal woes between traditional leaders, municipal councils and, at times, defiant villagers are unnecessary and can be mitigated. These legal hurdles can be allayed by the introduction of a new land law that recognises that in South Africa there exist customary rules of allocating and administering land in the villages. For example, land in Ghana is governed customarily and statutorily. Therefore, the South African government can make use of the Ghanaian style of governing the land in communal areas.

In the province of KwaZulu Natal, the land is legally vested in the Ingonyama Trust, established by the Ingonyama Trust Act No 3KZ of 1994. The King of the Zulu Kingdom is the trustee of the Ingonyama Trust. The Zulu monarch is given authority to administer all land affairs that fall under his jurisdiction as dictated by the Ingonyama Trust Act No 3KZ of 1994. Unfortunately, in some provinces where traditional authorities are observed, there is no such

²³⁵ See Chapters 2 and 3 above.

²³⁶ See *King Sabata Dalinyebo Municipality v Chief Thina Mtwana and Others* (In the High Court of South Africa Eastern Cape Local Division-Mthatha Case no.3573/2019) and *King Sabata Dalinyebo Municipality v Mhlanagabei Mathube and Others* (In the High Court of South Africa Eastern Cape Local Division-Mthatha Case no.4121/2019).

Act like the Ingonyama Trust Act to legally vest land in the traditional leaders. As a result of the Ingonyama Trust Act, which is only applicable to the Zulu monarch, some traditional leaders might feel betrayed and forgotten by the democratic government because only the Zulu monarch has the authority to administer land affairs for the Zulu people. Therefore, it would be wise for the South African government not to be seen as treating one monarch differently over all other monarchs that exist in the country. The Ingonyama Trust Act No 3KZ of 1994 must be extended to all kingdoms in the country, to ensure that all monarchs are recognised and not undermined by the democratic government. However, when the Act gets extended, the Trust or the Board must not conclude residential leases with the true owners of the land because that has been recently declared unlawful and against the ethos of the Constitution.²³⁷

In Ghana, all stool lands vests with traditional leaders on behalf of their subjects and is dealt with in accordance with customary law and usage.²³⁸ The Constitution of Ghana explicitly vests land with the traditional authorities for the benefit of the people under their respective jurisdictions. This indicates that in Ghana it is recognised and acknowledged that you cannot separate traditional leaders and land. It shows further that Ghana is prepared to give meaningful roles and functions to be played by traditional leaders in the modern states of today. Therefore, South Africa can learn from Ghana to include traditional leaders in the matters of land falling under their jurisdictions.

In Zimbabwe, although communal land is vested with the President,²³⁹ traditional leaders are constitutionally permitted to administer land in their areas of jurisdiction.²⁴⁰ Furthermore, one of the many duties allotted to traditional leaders in Zimbabwe is ensuring that communal land is allocated and demarcated as per the commands of the CLA 13 of 2002.²⁴¹ This position taken by the Zimbabwean government shows that land is important to traditional leaders. Even though the communal land is vested with the President, traditional leaders are not left out with regard to the allocation and administration of land for people living under their jurisdiction. In that, South Africa can also incorporate a law that would allow traditional leaders to allocate and administer land in their areas of jurisdiction. Further to that, this incorporated law must vest communal land with the traditional leaders, other than the President.

²³⁷ See *Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others* (12745/2018P) [2021] ZAKZPHC 42.

²³⁸ See Article 267(1) of the Constitution of the Republic of Ghana, 1992.

²³⁹ See section 4 of the Communal Land Act 13 of 2002.

²⁴⁰ See section 282(d) of the Constitution of Zimbabwe, 2013.

²⁴¹ See section 5(g) of the Traditional Leaders Act 22 of 2001.

4.2 Concluding remarks

This research has shown how traditional leaders are connected with their land. The struggle for liberation and equal rights emanated from brutal and vicious land disposessions. After colonial governments forcefully took land from the indigenous Africans, they then pursued discriminatory and racial laws. In the African context, land is sacred in the sense that it is a means of production, and spiritually interlinked because Africans claim that the African land is that of their ancestors. The research has shown in chapter 2 that all over South Africa, traditional leaders were the first to encounter and wage wars against the colonialists. These wars were fought because traditional leaders saw that they were losing the land. The lost land by traditional leaders was used communally, in that people would plough and cultivate crops, cattle and other animals were also dependent on this land for grazing. Therefore, no land meant hunger for them.

This research has revealed that in South Africa, traditional leaders were once pillars of their communities. They were the political head, army commanders and generals, judicial head and spiritual leader to all the people under their jurisdiction. However, as the research has shown, that position changed on the arrival of the western forces. Almost all of their powers and authority was stripped by the colonial governments, and their duties were transferred to magistrates and missionaries. Nonetheless, when the apartheid regime came into effect, they realised how influential traditional leaders were and inter alia used them to indirectly rule the 'natives' for their economic benefit in the mines and farms. As a result of this indirect rule, the legitimacy and loyalty of traditional leaders were questioned by the people. Consequently, some scholars argue for the abolishment of traditional leaders because of their participation with the apartheid government. Whereas some academics are of the view that traditional leaders had to choose a better devil to preserve their existence.

The research question of this paper is whether traditional leaders should be bestowed with legislative powers to allocate and administer land?²⁴² In answering the research question, the answer is in the affirmative. Traditional leaders should be given more roles and functions concerning to land affairs in their areas of jurisdiction. People living in rural areas still approach traditional leaders for land. However, because most of the land is state-owned in the rural areas and towns, municipalities at times stop traditional leaders from giving people land as shown in

²⁴² See Chapter 1 above.

chapter 3 of this research. This then causes tension between the traditional leader and municipally elected members as both parties want to show who has the most authority. The government needs to realise that there are no traditional leaders without the land. Traditional leaders have fought and died defending the land for future generations to also have access to arable and fertile land.

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