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IMPACT OF TRADITIONAL GOVERNANCE LAW'S ON COMMUNITIES RIGHTS TO PARTICIPATE IN MINERAL APPROVAL PROCESSES

By

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And finally, to myself, you did it girl!

ABSTRACT

The growth of mining situated in traditional communities, and the traditional governance laws has left those most affected by mineral operations behind. This paper illustrates that the mining laws and customary land rights in South Africa provide the right to meaningful engagement and consent in mineral approval processes to local communities. However, as this research explains, the ability for local communities to exercise these rights is limited given the enactment of the Traditional Leadership Khoi-San Act which enables traditional leadership structures to unilaterally consent on the local communities behalf. The research analyses the implication of this by focusing on the Amadiba people (Umgungundlovu mining community in Xolobeni in particular) in the Eastern Cape as case a study. This case study involves the local community against a proposal for open cast mining on their land and withholding consent under customary law, while traditional leaders in support of the application thereby providing consent under traditional governance laws. The analysis showcases the key determinants within traditional authorities when local community are exercising participation rights, and the fundamental role of customary law. This research explores the relationship between traditional governance legal frameworks and customary law through examining the jurisprudence and the subsequent codification of customary laws. The findings reveal the emphasis of democratisation of traditional governance and *Ubuntu* as foundational principles of customary law. This interpretation empowers local communities to participation rights even where traditional governance laws depart or limits this empowerment. This research demonstrates a misalignment between traditional governance laws and customary laws has far-reaching implications for the local communities to participate in mineral approvals processes, and the broader operability of the mineral licensing.

LIST OF ACRONYMS

ACC	Amadiba Crisis Committee
ANCP	Australian National Contact Point
Bengwenyama Minerals	Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (4) SA 113 (CC)
DMRE	Department of Mineral Resources and Energy
EAP	Environmental Assessment Practitioner
EIA	Environmental Impact Assessment
EIA Regulations	Environmental Impact Assessment Regulations, 2014
FPIC	Free, Prior, and Informed Consent
HLP	High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change
IAP's	Interested and Affected Parties
IPILRA	Interim Protection of Informal Land Rights Act
Maledu	Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited 2019 (2) SA 1 (CC).
Minister	Minister of Mineral Resources and Energy
MPRDA	Minerals Petroleum and Resources Development Act 28 of 2002
NEMA	National Environmental Management Act 107 of 1998.
PAIA	Promotion of Access to Information Act 2 of 2000
Pilane	Pilane v Pilane 2013 (4) BCLR 431 (CC).
SAHRC	South African Human Rights Commission
SAMRAD	South African Mineral Resources Administration System
SLO	Social License to Operate
TEM	Transworld Energy and Mineral Resources (SA) Pty Ltd
TKLA	Traditional and Khoi-San Leadership Act 3 of 2019
TLGFA	Traditional Leadership and Governance Framework Act 23 of 2009

KEYWORDS

Consent

Custom

Democratisation

Living customary law

Meaningful engagement

Mineral approvals

Traditional Governance

Traditional Khoi-San and Leadership Act

Ubuntu

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CHAPTER 1:
INTRODUCTION

1.1. Background to the research problem

More than 18 million South Africans live on land that falls within the jurisdiction of traditional authorities. [1] These traditional authorities are in geographic boundaries of the former homelands and house the countries mineable minerals. [2] The valuable deposits of platinum, chrome, vanadium, titanium, coal and iron ore in the former homelands has accelerated mining in the areas exponentially. [3] Correspondingly, is the codification of customary law to inform the traditional governance processes that set the framework for traditional communities and mining operations to co-exist.[4]

Ideally, codified traditional governance reflects customary law principles which govern traditional communities' daily lives.[5] The post-apartheid traditional governance framework begins with the Traditional Leadership and Governance Framework Act (TLGFA). [6] The TLGFA was the principle legislation empowering formal recognition of traditional authorities and institutionalisation of traditional leadership. [7] As a result, traditional authorities housing mineral resources relied on the TLGFA to provide legitimacy, and recognition[8] of their participation rights[9] in mineral approval processes.

[1] A. Claassens & C. O'Regan, "Citizenship and Accountability: Customary Law and Traditional Leadership under South Africa's Democratic Constitution", 47 *Journal of Southern African Studies* (2021), at 157-160; J. Pickering, & T. Nyapisi, *A community left in the dark: the case of Mapela: Conversations around transparency and accountability in South Africa's extractive sector*, (Open Society Foundation for South Africa, 2017). Available at In Good Company.pdf (uct.ac.za) (last accessed 22 October 2022), at 27-35.

[2] Claassens & O'Regan (2021), *supra* n.1, at 157.
[3] *Ibid.*
[4] *Ibid.*
[5] G. Budlender & A. Claassens, "Transformative Constitutionalism and Customary Law", 6 *Constitutional Court Review* (2013), at 75.
[6] Act 41 of 2003 as amended by Act 23 of 2009.
[7] Preamble of the TLGFA.
[8] Chapters 2, 3 & 5 of the TLGFA.
[9] For ease of reference, throughout this study, the term participation rights will refer to consent, engagement and consultation rights. It is noted that each of the mentioned processes are different and where relevant a clear distinction will be made in the study. The term participation rights refers to the commonality of *participation* within the exercise of the engagement, consultation and consent rights of local communities.

The TLGFA enabled traditional leaders to be seen as legally recognised representatives of communities.[10] The literature illustrates that this created a centralised form of engagement with traditional leaders empowered to negotiate and provide consent without engaging with the local communities most affected.[11]

This engagement practice has had detrimental impacts for local communities. Rich data from Constitutional Court judgments[12] and investigative reports[13] indicates that traditional leaders in mining communities created systemic and cultural barriers of exclusion of local community concerns and decisions over mining development.[14] By relying on traditional governance laws to form 'traditional and local elite' status for certain members of the community,[15] traditional leaders often present themselves as 'custodians of communities' and therefore are often the only ones involved in the consultations and negotiations with mining companies.[16]

This form of engagement led to high levels of abuse by traditional leaders[17] in addition to significantly undermining the credibility, legitimacy, and efficiency of the community consultation processes required within the licensing phase of mineral approvals.[18] The lack of local communities' ability to exercise their participation rights weakens transparency and accountability systems, which crucially undercuts

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[10] S. Mnwana, "When Custom Divides 'Community': Legal Battles over Platinum in North West Province" in W. Beinart, R. Kingwill and G. Capps (*eds*), *Land, Law and Chiefs in Rural South Africa Contested Histories and Current Struggles,* (NYU Press, 2021), at 35 – 66.

[11] *Ibid;* see also, A. Manson, "Mining and 'Traditional Communities' in South Africa's 'Platinum Belt': Contestation over Land, Leadership and Assets in North West Province", 39 *Journal of Southern African Studies* (2013), 409-411; L. Leonard, "Traditional Leadership, Community Participation and Mining Development in South Africa: The Case of Fuleni, Saint Lucia, KwaZulu-Natal", 86 *Land Use Policy* (2019), at 290-291.

[12] *Pilane v Pilane* 2013 (4) BCLR 431 (CC); *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* 2015 (6) SA 32 (CC); *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2018 (CC) 41.

[13] Public Protector of South Africa Report No. 5 of 2017/2018, "Allegations of maladministration in the Bapo ba Mogale Administration", ISBN: 978-1-928-366-26-3, (*Bapo ba Mogale Public Protector Report*); Commission into Traditional Succession Disputes and Claims: Bakgatla ba Kgafela Traditional Community, Final Report, Baloyi SC, Mahumani. 20 August 2019, (*Baloyi Report*).

[14] Leonard (2019), at 290.

[15] *Ibid.*

[16] South African Human Rights Commission, *National Hearing on the Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa*, (SAHRC, 2016). Available at SAHRC Mining communities report FINAL.pdf (last accessed 22 October 2022), at 62-63; N. Oliver, C. Williams and P. Badenhorst,
"Competing Preferent Community Prospecting Rights: A Nonchalant Custodian?", 20 *Potchefstroom Electronic Law Journal* (2017), at 29-31.

[17] *Ibid;* see also *supra* n.13.

[18]Transparency International, *Combatting Corruption in Mining Approvals,*(Transparency International, 2017). Available at: Combatting Corruption in Mining Approvals:… - Transparency.org (last accessed 20 October 2022), at pg78-80.

opportunities for meaningful consultation with mining right applicants on key issues as the most affected by the proposed mining projects.[19]

The newly enacted Traditional and Khoi-San Leadership Act (TKLA)[20] entrenches this form of engagement by providing traditional councils with procedural rights to consent on behalf of communities.[21] To a certain extent one could argue that the TKLA provides an unambiguous process of engagement that is long overdue, by legislating what has been happening in practice, which is mining right applicants consulting with recognised traditional leaders.[22]

However, the TKLA is highly criticised,[23] even for the Khoi-San traditional authorities the legislature purports to strengthen with the enactment.[24] The central theme of the criticism is that these procedural powers are at the expense of good governance by weakening the consultation, consent, and avenues for accountability of those most affected by mining projects.[25] Scholar Claassens argues that the TKLA effectively gives traditional leaders control over communal land which raises direct conflicts with the Bill of Rights contained in the Constitution.[26]

The power for traditional council to consent on behalf of communities has a significant impact on the participation requirement of interest and affected persons within the mineral approvals processes elucidated by the Mineral and Petroleum

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[19] *Ibid.*

[20] Act 3 of 2019

[21] Section 24(2) of the TKLA reads: *Kingship or queenship councils, principal traditional councils, traditional*
councils, Khoi-San councils and traditional sub-councils may enter into partnerships
and agreements with each other, and with—
(a) municipalities;
(b) government departments; and
(c) any other person, body or institution.
(3) Any partnership or agreement entered into by any of the councils contemplated in
subsection (2) must be in writing and, notwithstanding the provisions of any other law.

[22] A. Claassens, "Mining magnates and traditional leaders: the role of law in elevating elite interests and deepening exclusion 2002-2018", in M. Buthelezi, D. Skosana, and B. Vale (*eds*), *Traditional Leaders in a Democracy: Resources, Respect and Resistance,* (Mapungubwe Institute for Strategic Reflection, 2018).

[23] Claassens & O'Regan (2021), *supra* n. 1, at 165-166; Mnwana (2021), *supra* n.10, at 35-41; Claassens (2018), *supra* n.22, at 14-17; State shows its contempt for rural people with Traditional Khoi-San Leadership Act - The Mail & Guardian (mg.co.za) (last accessed 22 October 2022); Traditional and Khoi-San Leadership Act 'brings back ap... (dailymaverick.co.za) (last accessed 22 October 2022); Why the TKLA remains a fundamental threat to land rights | Custom Contested (last accessed 22 October 2022)

[24] *Supra* n.23; see also Khoi-San Leadership Act 'writes SA's first indigenous people out of history' – Grocott's Mail (ru.ac.za) (last accessed 22 October 2022).

[25] *Supra,* n 23.

[26] Claassens (2018), *supra* n. 22, at 18.

Resources Development Act [27] (MPRDA). Additionally, this provision may circumvent land right holders right to consent derived from the Interim Protection of Informal Land Rights Act (IPLRA),[28] and the Environmental Impact Assessment Regulations.[29] This potential conflict brings traditional governance and levels of participation within traditional communities themselves into sharp focus.

1.2. Research Aims and Objectives

1.2.1. Aim

This research study aims to examine the veracity to which traditional governance laws — and the interplay within traditional authorities — impact the participation rights of local communities in mineral approval processes.

1.2.2. Objectives

To achieve the above aim, the study will rely on the achievement of certain objectives, with the latter addressed consecutively in the substantive chapters of the study. These objectives include:

- unpacking the participation rights afforded to local communities in mineral approval processes within traditional authorities.
- demonstrating the extent to which these rights can or are exercised within traditional authority structures by analysing customary law and traditional governance laws.
- examining the key relationship determinants between traditional leaders and local communities with a focus on the Umgungundlovu traditional community.

1.3. Research Questions:

1.3.1. Primary Research Question

The primary question this study raises and responds to is whether the TKLA and current interpretations of customary law are fit for purpose by being well structured and formulated to provide for the adequate exercise of participation rights of local mining communities.

[27] Act No. 28 of 2002 (MPRDA).

[28] Act 31 of 1996 (IPLRA) s2(1); *Baleni v Minister of Mineral Resources 2019 2 SA 453* (GP) (*Baleni 1*)

[29] Amendments to The Environmental Impact Assessment Regulations, 2014 No 326 No. 40772 Chapter 6 regulation 39 (1).

1.3.2. Secondary Research Questions

Several considerations and subordinate questions underlie the primary research question. As such, three subordinate questions will be consequently addressed in the substantive chapters. These include:

- What are the participation rights of local communities in the licensing stage of mining projects?
- How do the TKLA and customary law protect, and allow for the exercise of participation rights of local communities?
- What are the challenges between local communities and traditional leaders?

1.4. Research Methodology

1.4.1. Methodology

The research undertakes an explorative approach to the primary research question. This involves a collection of secondary qualitative and quantitative data, and a legal desktop analysis is used to analyse the data. Further to the research strategy, the Umgungundlovu community in Xolobeni Eastern Cape is examined as a case study in order to contextualise and understand determinants to the exercise of rights within traditional authorities by local communities.

1.4.2. Justification for case study selection

To assess the extent participation rights are exercised in traditional authorities by local communities, the Umgungundlovu traditional community is selected as part of the research strategy, and with consideration of the methodology mentioned above.

The Umgungundlovu community is one of a small group of villages falling under the Amadiba traditional authority which opposed mining operations and subsequently approached the high court in to seek an interdict to a prospecting right by an Australian mining company, Transworld Energy (TEM).[30] In the *Baleni v Minister of Mineral Resources* (*Baleni 1*) [31] the community argued that according to their intricate decision-making processes and customs, consent to the mining operations could not be granted even if the majority of the community members agreed to such operations.[32] Approval for the project required the negatively affected members to negotiate with the applicant and based on IPLRA's consent to the proposed operations.[33]

[30] *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP).

[31] Herein after the case will be referred to Baleni 1.

[32] Baleni 1 para 15.

[33] *Ibid*.

Flowing from the same set of facts was a second matter — *Baleni v Regional Manager: Eastern Cape Department of Mineral Resources* (*Baleni 2*)[34] — in which the Xolobeni community approached the high court in order to be furnished with a copy of the mining right application after both the Department of Mineral Resources and Energy (DMRE) and TEM refused access.[35]

Analysis of both judgments is selected for this research as the context fits into the research aims of the study by; providing data and literature on the interplay between traditional authorities and local communities, and the extent to which the community exercised their participation rights during the approvals stage of the mining value chain. Importantly, the community provides a solid basis to examine the exercise of participation rights from two sources of law, statutes (MPRDA & IPLRA) and customary law and the impact thereof.

1.4.3. Parameters

While South African law recognizes customary law as 'living' changing law directed by practice within communities,[36] this study examines customary law and/or practices that have been documented. Though the study utilises a wide variety of sources, it must be noted that recommendations or reference of best practices that may flow from this research must be considered within the context of the given local community.

1.4.4. Limitations

Given that during this study the TKLA is a few months into operation and its application is a developing area of law, where appropriate the study focuses on past practice and implementation of the TLGFA.

1.5. Relevance of the study

Community consultation is a challenging issue in mining regimes across the world, irrespective of their stage of economic development, political context, geographic region, or the size and maturity of their mining sectors.[37] In South Africa the state of knowledge on consultation anchors on the recognition of participation rights of local communities.[38] The court judgments of *Maledu v Itereleng Bakgatla Mineral*

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[34] *Baleni v Regional Manager: Eastern Cape Department of Mineral Resources* [2020] 4 All SA 374 (GP). Herein after the case will be referred to as Baleni 2.

[35] Baleni 2 para 15.

[36] *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC); *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC); *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC); *Pilane vs Pilane* 2013 (4) BCLR 431 (CC); *Bakgatla-Ba-Kgafela Communal Property Association* 2015 (6) SA 32 (CC).

[37] R. Davis, & D. Franks, *Costs of Company-Community Conflict in the Extractive Sector' Corporate Social Responsibility Initiative,* (Cambridge, MA: Harvard Kennedy School, 2014). Available at: Costs_of_Conflict_Davis-Franks.pdf (uq.edu.au) (last accesses 22 October 2022), at 15 – 21.

[38] *Supra* n.5. See also Claassens & O'Regan (2021), *supra* n.1, at 157; Mnwana (2021), *supra* n.10, at 35-41; Manson (2013), *supra* n. 11, at 409-411.

Resources (Pty) Limited 2019 2 SA 1 (CC), and *Baleni v Minister of Mineral Resources 2019 2 SA 453 (GP)* shifted the legal and academic discourse from the right to meaningful engagement toward the recognition of the right to consent of local communities during mineral approvals processes.[39]

However, the enactment of the TKLA enables traditional authorities to provide consent on behalf of local communities.[40] The TKLA as the primary traditional governance framework has a direct impact on the governance and decision-making legitimacy of local communities.[41] Therefore, the applicably of the TKLA against the MPRDA, IPLRA and customary law is timely and relevant.

Further, the literature on good governance within traditional authorities and protection of rights provides critical theoretical foundation to examine the exercise of participation rights within communities themselves. Therefore, research of this nature can contribute to discussions that examine the legal considerations of participation rights of those most affected by mining operations in traditional communities, and understanding the vulnerabilities that may arise from the interaction between traditional leaders, local communities, mining companies and government.

[39] Y. Meyer, "Baleni v Minister of Mineral Resources 2019 2 SA 453 (GP): Paving the Way for Formal Protection of Informal Land Rights", 23 *Potchefstroom Electronic Law Journal* (2020), at 2-11.
[40] *Supra* n. 21.
[41] Preamble of the TKLA.

1.6. Chapter Overview

The study will commence in Chapter 2 by providing a legal analysis of the mineral approval processes relevant to the exercise of community participation rights. This chapter interrogates the interplay of 'meaningful engagement' derived from the MPRDA, and 'consent' under customary law and IPILRA.

Having established the participation rights framework, Chapter 3 will contextualise community participation rights in mineral approvals by ascertaining the manner in which traditional governance and customary law influence decision-making processes. This will include analysing the extent to which theses sources of law protect and enable the exercise of participation rights.

Chapter 4 will discuss the key legislative and relationship determinants in traditional communities that influence community participation, and ultimately its impact on approvals processes. The chapter will unpack the effect of the determinants by analysing the Umgungundlovu community as a case study.

CHAPTER 2:
MEANINGFUL ENGAGEMENT AND CONSENT

2.1. Introduction

According to the Fraser Institute, the ease of doing business in the South African mining sector has been poor over the last few years.[42] In 2020, the investment attractiveness of the sector ranked 40 out of 76, and 56 out of 76 on the policy perception index.[43] Noticeably illustrating that regulatory uncertainty is having a direct effect on exploration investment.[44] Leading mining lawyers state that a significant contributor to this state of affairs is the lack of an operating, open and online electronic mining cadastral system which is vital to gaining investor confidence.[45]

The South African Mineral Resources Administration (SAMRAD) system, which is intended to perform as the online information repository regarding; licensing, which assets are available, rights awarded to applicants or pending approval etc. has never operated as intended.[46] The result is a significant backlog in mineral applications. In early 2021 the DMRE announced that it had a backlog of 235 mining right applications and 2 485 prospecting rights - from a total backlog of 5 326 applications of various types.[47]

The participation enquiry is a key aspect of the application process. Therefore, the state of the licencing processes of the sector and the exercise of affected communities' right to consent and meaningfully engage in the process are inseparable. This is not to suggest that the underlying reason behind the backlog is the participation requirement in approvals. Rather, the management of the backlog i.e. approval or refusal of the right will require applicants to grapple with the changed content of the participation enquiry which is settled by the jurisprudence, to require consent from communities.[48]

The consent standard found in IPLRA differently from meaningful engagement contemplates an agreement.[49] Whereas the meaningful engagement standard found

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[42] Fraser Institute, *Annual Survey of Mining Companies.* Available at: Fraser Institute Annual Survey of Mining Companies 2020 (last accessed 11 October 2022).

[43] *Ibid.*

[44] *Ibid*.

[45] A MINING MAKE-OVER IN PROGRESS? | Africa notes (hsfnotes.com) (last accessed 11 October 2022).

[46] *Ibid.*

[47] Mining Journal, *R20B Worth of Project Stalled Amid License Backlog.* Available at: R20B worth of projects stalled amid licence backlog: MCSA - Mining Journal (mining-journal.com) (last accessed 10 October 2022). Although it is noted that on 11 January 2022 the DMRE informed the portfolio committee that 1011 prospecting right applications and 207 mining right applications were finalised - see Question to the Minister of Mineral Resources and Energy - NW2857 | PMG (last accessed 10 October 2022).

[48] *Baleni* 1, at para 83-84.

[49] *Maledu*, at para 105-106; Baleni 1, at para 76.

in the MPRDA entails a process of seeking consensus which may not result in an agreement[50] – it, therefore, cannot be analysed as the same right.

As a result, this chapter unpacks the theoretical foundation of the participation rights of local communities within mineral approval processes. Accordingly, Section 2.2 discusses meaningful engagement found in the MPRDA legislative framework. Section 2.3. examines the consent criterion found in IPLIRA and traditional customs. Section 2.4. will following on this by considering the international instruments that provide standard setting parameters of consent for local community participation rights. The concluding section of this chapter sets out the nature and extent of consent for local communities' vis-a-vie meaningful engagement in approval processes, and the potential impact for traditional communities.

2.2. Mineral Petroleum and Resources Development Act – MPRDA

Prior to the MPRDA, a landowner had ownership of minerals beneath their land unless and until such rights were transferred to another party. [51] While transferring mineral rights also included the ability to use the owner's land for mining purposes, if the mineral had not been ceded, the owner could retain both the mineral and the land above. [52]

The MPRDA changed this position and established that 'mineral resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans'.[53] This shift was part of the transformational steps of the mineral sector driven by the legislature to address the inequitable access to mineral wealth that inevitably flowed from South Africa's racial gap around land and mineral ownership of the apartheid government.[54]

This equalising purpose is recognised in the preamble and chapter 2 of the MPRDA which set out the fundamental principles.[55] This is the backdrop against which the operative provisions of the MPRDA must be interpreted.[56] Accordingly, the granting of mineral rights is further guided by the Broad-Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry transformative framework, to enable

[50] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC), at para 65.

[51] Minerals Act 50 of 1991.

[52] *Ibid.*

[53] Section 3(1) of the MPRDA.

[54] *Baleni* 1, at para 40; *Agri South Africa v Minister for Minerals and Energy* (2013) ZACC 9, at para 1; G Budlender & A Claassens (2013), *supra* n.5; see also J.Pickering & J. Ubrink, "Shaping Legal and Institutional Pluralism: Land Rights, Access to Justice and Citizenship in South Africa", 36 *South African Journal on Human Rights* (2020), at 178-180.

[55] Chapter 2 of the MPRDA.

[56] Section 4 of the MPRDA.

historically disadvantaged South Africans to enter into and benefit from the mining industry and mineral resources.[57]

2.2.1. Mining Application Process

The MPRDA governs the entire mining approvals regime. Namely, the MPRDA stipulates that the state, through the Minister of Mineral Resources and Energy (Minister), is the custodian and regulator of all minerals found in the Republic.[58] Therefore, the DMRE and the Minister is the primary institution that determines whether, by whom, and under what conditions to permit exploration or mining activities.

This section unpacks the salient provisions of the licensing process relevant to interested and affected parties (IAPs) — in particular, traditional communities — as stakeholders with procedural rights to be consulted, be granted access to information, and to participate in decision-making processes.

As a starting point, the MPRDA defines community as:

> *"… a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, whereas a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community."*[59]

This definition includes communities who own their land but also applies to a far wider group who only have a lesser right or interest in the land. Therefore, these communities must be consulted as IAPs in terms of section 10 and section 22 discussed below.

a) Section 22 and section 10 notice

The procedure for filing a mining rights application is outlined in Section 22 of the MPRDA. The application is addressed to the office of the Regional Manager in whose region the land is situated.[60] She must accept the application and notify the applicant

[57] Broad Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry, 2018. (The Mining Charter). The Mining Charter is not law but a formal policy document which sets a framework, targets and timetable that guide the Minister when considering an application for a mining right to ensure that the MPRDA objectives of redressing historical, socio-economic inequalities and to ensure broad based and meaningful participation of black persons in the mining and minerals industry is fulfilled. See section 23(1)(h), and section 100 (2) (a) of the MPRDA. See also *Minerals Council of South Africa v Minister of Mineral Resources and Energy* 4 All SA 836 (GP).

[58] Section 3 of the MPRDA.

[59] "Community", as defined in chapter 1 of the MPRDA.

[60] Section 22 (1) (a) (b) (c) of the MPRDA.

in writing whether it meets the basic criteria and if successful[61] the applicant must undertake an environmental impact assessment (EIA) and notify and discuss it with IAPs.[62] The applicant must submit the consultation outcomes as per the standard directives of the consultation guidelines[63] and the EIA report to the Regional Manager. The Regional Manager must then submit the reports to the Minister for review within 14 days of receiving them.[64]

The section 10 notice of the MPRDA mandates the Regional Manager to publicise the mineral application and invite IAPs to make their opinions regarding the application within 30 days from the date of the notice. If someone opposes the mining right being granted, the Regional Manager must refer the objection to the Regional Mining Development and Environmental Committee (RMDEC) to consider the objections and to advise the Minister thereon.[65]

The MPRDA requires mineral right applicants to notify and consult with the landowner, lawful occupier and affected persons when applying for a reconnaissance permit[66], prospecting rights[67], mining rights[68] and mining permits[69]. Above all, when granting a mining right where the application relates to the land occupied by a community, section 23(2A) confers on the Minister the power to impose such "… conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community."

Consequently, section 23(2A) enables elevated standards of engagement beyond those envisaged in section 22 and section 10. This is particularly relevant for traditional communities as the governance processes of communities are informed by culture

[61] Section 22 (2) of the MPRDA: The Regional Manager must, within 14 days of receipt of the application, accept an application for a mining right if – (a) the requirements contemplated in subsection (1) are met; (b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land; and (c) no prior application for a prospecting right, mining right or mining permit or retention permit, has been accepted for the same mineral and land and which remains to be granted or refused. (3) If the application does not comply with the requirements of this section, the Regional Manager must notify the applicant in writing within 14 days of the receipt of the application.

[62] Section 22 (4) (a (b) of the MPRDA.

[63] Guideline for Consultation with Communities and Interested and Affected Parties as Required in Terms of Sections 10(1)(B),16(4)(B), 22(4)(B), 27(5)(B) and 39 of the Mineral and Petroleum Resources Development Act (Act 28 of 2002).

[64] Section 3 of the MPRDA. Although environmental authorisation applications are not governed by the MPRDA, but by the National Environmental Management Act 107 of 1998 (NEMA), the Minister of Mineral Resources is responsible for considering such applications, see MPRDA sec 38A.

[65] Section 10(2) of the MPRDA.

[66] Section 74(4)(a) of the MPRDA.

[67] Section 16(4)(b) of the MPRDA.

[68] Section 22(4) (b) of the MPRDA.

[69] Section 27(5)(a) of the MPRDA.

and special association with the land.[70] This provision recognises traditional governance processes may apply to which communities and individuals, even within the same traditional authority may have distinct participation rights in approvals processes. As a result, section 23(2A) ensures a value-laden, meaningful engagement process for applicants which may otherwise be lost in the mechanical process outlined above.[71]

b) Case-Law

The requirement of ensuring consultation is meaningful is substantiated by the case of *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (Bengwenyama)[72] In this matter the Constitutional Court considered a review by a community that had not been consulted as required by the MPRDA prior to the award of a prospecting right on their land. Justice Froneman held that merely informing the community of the application and ascertaining whether or not the community objected did not comply with the Act's requirement for consultation.[73] He described the nature and purpose of consultation is to 'provide sufficient details to the landowners or occupiers to enable them to make informed decisions'.[74]

The Baleni 2 judgment reinforces the duty to meaningful consultation by expanding the obligations to notify under section 22 and section 10 respectively. The court held that a copy of applications made in terms of section 22 of the MPRDA must be furnished to IAPs on request — subject to the DMRE redacting the mining right applicant's commercially-sensitive information.[75]

In Baleni 2, the affected Umgungundlovu community sought to obtain a copy of the mineral right application via the applicant Transworld Energy and Mineral Resources (SA) Pty Ltd (TEM), and its Environmental Assessment Practitioner (EAP), and subsequently the DMRE.[76] After months of trying to obtain the documents through exhaustive correspondence with TEM and DMRE, the community was later notified by the Regional Manager that the application was approved in terms of MPRDA and NEMA and advised the community to request a copy of the application from TEM.[77]

However, TEM's legal representatives advised the applicants that their request did not form part of their approvals requirements under the MPRDA.[78] TEM further advised

[70] GM. Wachira, "Indigenous peoples' rights to land and natural resources" in S. Dersso (*ed*) *Perspectives on the rights of minorities and indigenous peoples in Africa,* (Pretoria University Law Press, 2010), at 297.

[71] *Baleni* 1, at para 74-76.

[72] *Bengwenyama*, *supra* n.50.

[73] *Bengwenyama*, at para 68.

[74] *Bengwenyama*, at para 65.

[75] *Baleni 2,* at para 117.

[76] *Baleni 2,* para 15.

[77] *Idem,* para 15.4.

[78] *Idem,* para 15.4,15.5

the applicants to request the mineral right application from the relevant DMRE and that such information could be requested in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA).[79] The community approached the High Court to compel disclosure of the application documents, and to prohibit the Regional Manager from awarding the mining right to TEM until the application has been furnished to the community.[80]

Makhubele J held that a community affected by proposed mining operations cannot engage in meaningful consultations, or lodge informed objections to mining activities, without access to the information contained in a mining right application.[81] Further, that while the MPRDA does not entitle the community to the information contained in a mining right application, 'meaningful consultation entails a discussion of ideas on an equal footing, taking into consideration the pros and cons of each course and making concessions where necessary'.[82] For this reason, the manner in which the community should obtain a copy of a mining right should not be restricted to the request processes in terms of PAIA, since 'the community should deal directly with the issues that will ultimately determine the fate of the mining right application'.*[83]*

Baleni 2 emphasises the importance of transparency as a key determinant to meaningful consultation for communities to advance their participation rights. The ineffective SAMRAD system does not enable access to relevant information related to mineral right applications, therefore, this judgment manages the potential information asymmetries which may otherwise limit the exercise of community rights and prejudice those most affected.

2.2.2. MPRDA Regulations

To fully appreciate the participation rights afforded to local communities it is important to consider the relevant provisions of the Mineral and Petroleum Resources Development Regulations (MPRDA Regulations),[84] which flesh out the MPRDA section 10 and section 22 approvals procedures. The 2020 MPRDA Regulation amendments include definitional elements of 'meaningful consultation' and 'interest and affected persons' (IAPs) which have a significant impact on how participation rights are exercised and who has the right to engage in the approvals process.

a) Meaningful Consultation

The term 'meaningful consultation' was not previously defined in the MPRDA or MPRDA Regulations. A definition was inserted into the draft amendments regulations

[79] *Ibid.*

[80] *Baleni 2*, at para 6.

[81] *Baleni 2,* para 84

[82] *Baleni 2,* para 89 – 92.

[83] *Ibid*.

[84] Chapter 2 of the Amended Regulations to Mineral and Petroleum Resources Development Regulations, 2020. (MPRDA Regulations).

which referred to how engagement with participation right holders in the consultation process should take place.[85] The MPRDA Regulations kept the manner in which engagement should take place under the term of 'meaningful consultation' which requires the applicant to facilitate in good faith the participation of the landowner, lawful occupier or IAP, in such a manner that reasonable opportunity is given to provide comment by the landowner.[86]

Regulation 3A provides that meaningful consultation is to be carried out in terms of the Environmental Impact Assessment Regulations, 2014 (EIA Regulations)[87] which sets out the process for public participation for environmental approvals. This change is necessary to reflect the 'One Environmental System' in which NEMA governs EIAs in the application process. [88] The MPRDA expressly states that the results of the participation process must be included in the environmental reports.[89] Since NEMA governs these reports, it seems prudent that the NEMA public participation process should apply.

Accordingly, it is important to note the amendments to the EIA Regulations[90] move away from consultation and requires mining applicants to seek written consent from landowners, or persons in control of the land, in order to receive an environmental authorisation and comply with MPRDA.[91] Therefore, applications submitted on or after 11 June 2021 will have to obtain consent before applying for environmental authorisation to comply with approvals processes. [92] This amendment creates a heightened standard for mineral applicants with critical implications for traditional communities which will be further discussed in the next chapter.[93]

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[85] Chapter 2 of the Draft Amendments to the Mineral and Petroleum Resources Development Regulations, 2019 (draft Amendment Regulations).

[86] Regulations 3A of the MPRDA.

[87] Regulations 39-44 of the Government Notice R982 in Government Gazette 38282 dated 4 December 2014.

[88] The One Environmental System (OES) is an important component of the MPRDA which provides that: Any person who wishes to apply to the Minister for a mining right, prospecting right or mining permit must simultaneously apply for an environmental authorisation and must lodge the application at the office of the Regional Manager. See Government on rollout of "One Environmental System" | South African Government (www.gov.za) (accessed 12 January 2022).

[89] Section 22 (4)(b) of the MPRDA.

[90] Amendments to the Environmental Impact Assessment Regulations, Listing Notice 1, Listing Notice 2 and Listing Notice 3 of the Environmental Impact Assessment Regulations, 2014 for Activities Identified in terms of section 24(2) and 24 D of the National Environmental Management Act, 1998 published under Government Notice 517 in Government Gazette 44701 of 11 June 2021.

[91] *Idem*, at regulation 16(1)(b) - unless the exemption in regulation 39(2) applies, if an applicant for an environmental authorisation is not the owner or person in control of the land on which the activity is to be undertaken, the applicant must, before applying for an environmental authorisation in respect of such activity, obtain the written consent of the landowner or person in control of the land.

[92] *Idem*, at clause 31(1).

[93] See *infra* chapter 3.,at 30; and chapter 4.,at 43.

Neither the regulations nor NEMA and MPRDA flesh out the criteria that applicants must adhere to in attaining written consent. The underlying rationale of the amendment is seemingly intended to be aligned with the Baleni 1 and Maledu[94] judgments in which consent by holders of informal land rights and traditional communities is held to be the appropriate requirement prior to awarding mineral rights.[95] However, the jurisprudence is only in relation to consent as a result of section 2(4) of IPILRA which requires majority consensus.[96]

The vulnerability within traditional communities is the legislative design of the TKLA which allows for traditional leaders to consent on behalf of communities. Section 2(4) of IPLIRA manages this differently by setting a consent criterion with a majority consensus of land right holders.[97] If the intention is to bring the EIA amendment in line with IPLIRA then the amendment fails to do so. Without consent criteria, this EIA amendment conflates the understanding of *consensus* decision-making (which seeks agreement before finalising a decision), with *consent* decision-making, which does not require agreement to finalise a decision.[98]

Although similar, this distinction is particularly important for traditional communities. The *consent* decision making process enables a top-down decision-making process by an individual which moves away from living customary law principles of *ubuntu* and collective governance.[99] Therefore, the EIA Regulations carry the risk of undercutting IPILRA which espouses majority consensus found in customary law.

b) Interested and Affected Persons

The MPRDA Regulations have widened the definition of IAPs. The 2004 Regulations definition of IAPs referred to "… natural or juristic persons or an association of persons with a direct interest in the proposed or existing operation or who may be affected by the proposed or existing operation".[100] The Draft Amendments expanded upon this definition to include "… host communities, landowners (both traditional and title deed owners), traditional authorities, land claimants, lawful land occupiers, holders of informal rights, any person (including on adjacent and non-adjacent properties) whose socio-economic conditions may be directly affected by the proposed prospecting or

[94] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC). (*Maledu*).

[95] Cliffe Dekker Hofmeyr - Is the obligation to obtain landowner consent for environmental authorisation for mining activities a death knell for mining in South Africa? (accessed 12 January 2022).

[96] *Baleni 1*, at para 81; *Maledu*, at para 106.

[97] See *infra* chapter 3., at 30.

[98] K. Horn-Miller, "What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke's Community Decision Making Process", 18 *Review of Constitutional Studies* (2013), at 116-118.

[99] See *infra,* subsection 3.2.1., at 33.

[100] Mineral and Petroleum Resources Development Regulations, 2004 (2004 Regulations).

mining operation".[101] The 2020 Regulations further expanded the IAP's definition including a newly defined term of 'mine community'.

The 'mine community' refers to "… communities where mining takes place, major labour sending areas or adjacent communities within a local municipality, metropolitan municipality or district municipality".[102] It also includes government institutions such as the Department of Co-operative Governance and Traditional Affairs, as well as public interest institutions such as civil society.[103]

This definition creates implementation issues as it is not aligned with the definition of 'community' in the MPRDA,[104] nor with the definition of 'host community' in the Mining Charter.[105] The intention to be inclusive with a broad variety of stakeholders with an uncertain consent framework will directly impact the operability of mineral approval processes as the obligations placed on applicants are not clear.

2.3. Interim Protection of Informal Land Rights Act of 1996 (IPILRA)

The IPILRA governs the customary land tenure system and was initially introduced as a temporary measure to protect customary land rights.[106] The Act gives effect to sections 25(6) and 25(9) of the Constitution and protects people against the deprivation of their land rights. This is achieved through section 2(1) of IPILRA which states that "… no person may be deprived of any informal right to land without his or her consent". This is a crucial right for communities and cements their participation rights in mineral processes.

IPILRA sets a criterion for obtaining consent that is centred on traditional customs and usage. Section 2(4) requires decisions concerning deprivation of informal rights to land to be consistent with the traditional custom of the community, with the majority of the land right holders present or represented at a meeting convened for the purposes of discussing land disposal. Therefore, the right holders must be given sufficient notice and be provided with a reasonable opportunity to participate in the decision-making

[101] This includes the Local Municipality and the relevant government departments, agencies and institutions responsible for the various aspects of the environment and for infrastructure which may be affected by the proposed project.

[102] MPRDA Regulations.

[103] Inclusive of Department of Human Settlements, Water and Sanitation, and the definition of civil society is not included.

[104] See *infra* subsection 2.2.1., at 19.

[105]The Mining Charter, *supra* n. 57 - host community refers to 'a community/ies in the local, district, metropolitan municipality or traditional authority within which the mining area as defined in the MPRDA is located.'

[106] Parliament is yet to introduce the permanent and comprehensive legislation therefore IPILRA has been renewed annually since 1996. See section 5(2) of the IPILRA

process.[107] This process is akin to the meaningful engagement process of the MPRDA with the exception being the weighted right to consent.

This raises the question of whether the MPRDA must be applied subject to the IPILRA, and whether the consent requirement is a prerequisite in all mineral right applications on communal land. The *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* (Maledu) judgment answers the latter question by emphasising that the MPRDA must be read in conjunction with the IPILRA to balance the benefits of mining against the Constitutional rights of those affected by the mining.[108]

The former question is more appropriately answered by the Baleni 1 case (detailed case discussion in chapter 4),[109] where the applicant sought a declaratory order to the effect that the Minister was not permitted to grant mining rights on tribal land without the consent of the tribal authority.[110] The declaratory order sought to make compliance with the IPILRA compulsory, which the court upheld.[111] The court held that the Minister must obtain the full and informed consent of the community, and that the granting of mineral rights without compliance with IPILRA is unlawful.[112]

2.4. International Instruments

International best practice supports a consent prerequisite of informal land rights holders in mineral approvals — free, prior, and informed consent (FPIC). FPIC is a specific and detailed standard of obtaining consent which includes a continuous form of engagement that must be free (un-coerced), prior (before any development occurs), and informed (communities must have access to all information necessary to make an informed decision).[113]

Cases brought before the courts by communities in mineral-rich states have demonstrated how natural resource extraction has the potential to exploit host communities and, as a result, FPIC is part of mining rights holders' obligations.[114] Internationally, FPIC is recognised through the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[115] and has been incorporated into foreign

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[107] Section 2(4) of the IPILRA.

[108] *Maledu*, at para 105 – 106.

[109] See *infra* Section 4.3., at 45.

[110] *Baleni 1,* para 83-84

[111] *Ibid.*

[112] *Ibid.*

[113] 'IFC Performance Standards On Environmental and Social Sustainability, 2012 IFC_Performance_Standards.pdf 47 – 52' (accessed 26 February 2022); 'Equator Principles Guidance Note On Evaluating Projects with Affected Indigenous Peoples, 2020 Guidance Note: Evaluating Projects with Affected Indigenous Peoples (equator-principles.com) 9 – 13' (accessed 26 February 2022).

[114] *Ibid*.

[115] Article 32 (2) of The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

jurisdictions' mining legislation.[116] FPIC is notably seen as part of investment standards from financial institutions,[117] and further endorsed by international industry bodies, such as the International Council for Mining and Metals (ICMM), as the standard for good industry practice of mining companies.[118]

In South Africa, FPIC is not part of the legislative framework, however, South Africa has ratified binding international treaties which support communities' right to FPIC to any development that may affect them.[119] Additionally, although the specific FPIC standard is not expressly incorporated in South African law, as illustrated above, the objectives of FPIC are found in the collective assessment of legislation and the judicial treatment of the term meaningful consultation.

2.4.1. Veto, consent, and the 'right to say no'

FPIC is often synonymously used with the concept of veto.[120] However, FPIC and veto are grounded in two different notions. The FPIC in the UNDRIP or the ILO Convention 169 does not mention the term veto and does not give an indigenous group or an individual a right to veto. The literature explains FPIC as based on a process guaranteeing bottom-up participation where consent or withholding consent is the goal of this process.[121] The outcome might be an agreement between several parties, the full agreement to a project as well as the rejection of a mining operation.[122] Equally, withheld consent can lead to a re-negotiation of a project or a different company

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[116]Constitution of Colombia, (1991). Available at: Colombia_2005.pdf (constituteproject.org) (accessed 19 October 2022), article 70; See also Greater Community Council of the Popular Peasant Organisation of the Alto Atrato; Judgment T-766/15 Fourth Chamber of Review of the Constitutional Court, Colombia para 269.

[117] *Supra* n 113.

[118] The Good Practice Guide: Indigenous Peoples and Mining, produced by the International Council for Mining and Metals (ICMM) as part of the Sustainable Development Framework: ICMM Principles. http://www.icmm.com/en-gb/about-us/member-requirements/position-statements/indigenous-peoples (accessed 26 February 2022).

[119] The Convention on the Elimination of All Forms of Racial Discrimination see General Recommendation XXIII on the Rights of Indigenous Peoples (1997) at para 4(d); International Covenant on Economic Social and Cultural Rights see General Comment No 21 E/C.12/GC/21 (21 December 2009) para 36; The International Covenant on Civil and Political Rights art 27; The African Charter on Human and People's Rights art 21.

[120] Microsoft Word - Veto-and-Consent-Significant-differences-Joffe-2017.doc (quakerservice.ca) (accessed 27 February 2022).

[121] P. Tamang, "An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices", 9 *Australian Indigenous Law Reporter* (2005) at 114; P, Hanna and F, Vanclay, "Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent", 31 Impact Assessment and Project Appraisal (2013), at 146; W. Wicomb, "Free Prior and Informed Consent in Africa: Challenges and Opportunities," unpublished article written for Heinrich Boll Stiftung (2015) at 2; M. Papillon and T. Rodon, "Proponent-Indigenous agreements and the implementation of the right to Free, Prior and Informed Consent in Canada", 62 *Environmental Assessment Review* (2017), at 216.

[122] Ibid, Wicomb (2015) *supra* n. 121 at 1.

receiving consent at a later moment in time.[123] Conversely, a veto is a one-time and one-sided right where parties are against each other and one wins over the other in a yes or no decision process.[124]

Closely related to misunderstanding the difference between FPIC and veto, is the 'right to say no'. Civil society organisations and mine-affected communities in South Africa and across various mineral-rich jurisdictions have mobilised for FPIC implementation under the #Right2SayNo campaign.[125] Similarly, the campaign does not refer to a right to veto but rather consent rooted in mutual decision and negotiation where companies and governments respect a withheld consent by a community.

2.5. Conclusion

The objective of this chapter was to examine the nature of the participatory rights afforded to local communities within traditional authorities during mineral licensing processes. The jurisprudence illustrates that consent, meaningful consultation and access to information are the rights that communities must be able to exercise during approvals processes. The Constitutional protection of these rights is achieved through the MPRDA requirement of meaningful engagement,[126] and the consent standard required from IPILRA.[127]

This protection is not without critical implementation shortfalls as the amendments to the MPRDA creates tensions when reading it with IPILRA and applying customary law. Further, the MPRDA and the EIA regulations provides a vast net of stakeholders as IAPs which makes it irreconcilable with IPILRA.

The heightened right to consent by local communities during approvals requires a balance between the exploitation of natural resources and the needs of people and local communities. Having determined that the IPILRA is informed by customary law and sets a clear criterion regarding who and how communities must exercise their right to consent in approvals, this criterion must be considered a valuable model for achieving said balance.

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[123] A. Buxton & E. Wilson, *FPIC and the Extractive Industries. A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects*, (International Institute for Environment and Development, 2013). Available at: FPIC.INFO | FPIC and the Extractive Industries: A guide to applying the spirit of FPIC to industrial projects (last accessed 10 October 2022), at 36 -39.

[124] *Ibid*.

[125] We want the Right to say NO! - AIDC | Alternative Information & Development Centre (accessed 27 February 2022); The Right to Say No: Insights and Experiences of the Global Struggle against Mining - CATAPA vzw (accessed 27 February 2022).

[126] *Bengwenyama* para 65-68; *Baleni 2*, para 91; *Maledu*, para 95 – 97.

[127] *Baleni 1* para 81.

The next chapter will contextualise community participation rights by discussing traditional governance and customary law influence on local communities decision making process and ability to consent during approval processes.

CHAPTER 3:
TRADITIONAL GOVERNANCE AND CUSTOMARY LAW

3.1. Introduction

As was discussed in Chapter 2 of this study, customary law and traditional governance laws ideally must have the same foundational principles to enable local communities to consent during approvals.[128]

However, the President's Expert Advisory Panel on Land Reform and Agriculture concluded that the TKLA together with various traditional governance laws is '… irrational and possibly unconstitutional'.[129] Further, '… these laws individually and collectively entrench the Bantustans by removing the right to equal citizenship in a unitary state, violating the principle of free, prior and informed consent, and reinforcing the powers of traditional authorities over customary and family land and resource rights.'[130]

The literature highlights a divergence between customary law and traditional governance laws that links to the historical context of South Africa.[131] The legally recognised powers of traditional leaders during the apartheid and colonial eras created a system of state authority over the succession of traditional leaders and the establishment of paramount or supreme chiefs,[132] the latter who had unfettered powers to implement customary law as they saw fit.[133] This form of state-authorised appointments of traditional leaders, and top-down decision-making processes continue to be the present-day system of *codified* traditional governance, contrary to *living* customary law.[134]

This chapter details the dichotomy between the legislative framework and the Constitutional Court's understanding of customary law, and its implication for local communities in mining approvals processes. Accordingly, Section 3.2 contextualises the source and operability of customary law as defined by the jurisprudence. Section

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[128] See *infra* chapter 2., at 17.

[129] *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture,* (2019) Available at: Final Report of the Presidential Advisory Panel on Land Reform and Agriculture | South African Government (www.gov.za) (last accessed 22 February 2022), at 97-98

[130] *Ibid.*

[131] Claassens (2018) *supra* n. 23, at 1-10; S. Mnwana & G. Capps, "No chief ever bought a piece of land!' Struggles over property, community and mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province", Working Paper 3 *Society, Work & Development Institute* (2015); Claassens & O'Regan (2021) *supra* n. 1, at 158-160; Mnwana (2021) *supra* n. 10, at 35 – 66.

[132] Claassens & O'Regan (2021), *supra* n.1, at 158-160.

[133] *Ibid.* The customary laws were enacted to the extent that the laws adhere to 'the general principles of humanity recognised throughout the whole civilised world' see Natal Ordinance 3 of 1849.

[134] G. Budlender, "Constitution Court Judgements, Customary Law and Democratisation in South Africa", in W. Beinart, R. Kingwill & G. Capps (eds), *Land, Law and Chiefs in Rural South Africa,* (Wits University Press, 2021), at 21-34.

3.3 provides a critical analysis of the TKLA unpacking the salient provisions for the exercise of participatory rights of local communities in mineral approvals and alignment with customary law. Section 3.4. will following on this by considering the interplay between TKLA and IPLRA. The concluding section of the chapter summarises the customary law interpretations which protect and allow for local communities to participate in mineral approvals.

3.2. Customary Law

The statutory definition of customary law is found in the Recognition of Customary Marriages Act[135]and defined as "… the customs and usages traditionally observed among the indigenous African peoples of South Africa and form part of the culture of those peoples."[136] As such, what has the status of 'custom' and what amounts to 'customary law' will depend on how traditional communities themselves perceive these questions, and on how they function as traditional communities.

The Constitutional Court recognises this flexibility as *living customary law* and held it to be integral to customary law codification.[137] While this flexibility allows for a relevant contextual interpretation of customs and practice,[138] the codification of customary practices into law equally carries the risk of significant gaps between the statutory provisions and the living customary law that governs behaviours and decision-making. [139] For this reason, the *Pilane vs Pilane (*Pilane) [140] judgment guides determining the applicable law as the court held;

> *"… customary law is an independent source of law recognised by the Constitution. It is not defined by statute, nor does it gain its authority from the statute. If legislation recognises and regulates certain customary structures, it does not by default eliminate all the other customary structures. Those structures continue to exist and operate in terms of customary law."*[141]

Therefore, the *Pilane* judgment offers communities governed by customary law a Constitutionally protected avenue to still exercise their customary right when or if a misalignment with statute occurs.

The language of the academic literature further categorises customary law into 'official' and 'living customary law'.[142] Generally, scholars regard official customary law as the

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[135] Act 120 of 1998.

[136] *Idem,* at section 1(ii).

[137] *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC), at para 87; *Gongqose v Minister of Agriculture, Forestry and Fisheries* (1340/16 &287/17) [2018].

[138] Budlender (2021), *supra* n.135, at 19.

[139] *Ibid*; G. Budlender & A. Claassens (2013), *supra* n. 5, at 75-104.

[140] *Pilane v Pilane* 2013 (4) BCLR 431 (CC).

[141] *Pilane,* at para 44.

[142] C. Himonga & C. Bosch, "The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?", 117 *South African Law Journal* (2000), at 319; T. Bennett, "'Official' v 'Living' Customary Law: Dilemmas of Description and Recognition' in A Claassens & B

version perceived by observers outside the community in which the concerned norms are observed.[143] This category embraces the customary law upheld in court judgments, textbooks, and codifications.[144] In contrast, living customary law is regarded as the norms that regulate people's daily lives which may be contrary to the views of outsiders.[145]

It is worth noting that while this categorisation is valid, the vast nature of the jurisprudence relating to customary law,[146] land and mining[147] and traditional leadership[148] by the Constitutional Court illustrates that in terms of traditional governance, the emphasis of official customary law on one hand and living customary law on the other has become superfluous.

The apex court has admitted local practice as evidence of customary law and has even gone so far as to take a critical approach to apply precedents of old judgments to customary law matters, preferring to gather information on established customs taking place in the community concerned.[149] However, this is not absolute, particularly in matters where evidence is unclear or conflicts. In this case regardless of the intentions of the court to cast a wide net to determine practice, the judgment can alter what is regarded as 'living' customary law.[150]

Cousins (*eds*) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act,* (Ohio University Press, 2008), at 138-153; J. Bekker & GJ. van Niekerk, "Broadening the Divide between Official and Living Customary Law", 73 *Journal of Contemporary Roman-Dutch Law* (2010), at 679 – 689.

[143] TW. Bennett, "Re-Introducing African Customary Law to The South African Legal System", 57 *American Journal of Comparative Law* (2009), at 1-31; G. Woodman, "Legal Pluralism in Africa: The Implication of State Recognition of Customary Laws Illustrated from the Field of Land Law", in H. Mostert & T. Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (Juta Cape Town, 2012), at 36.

[144] *Ibid.*

[145] R. Ozoemena, "Living Customary Law: A Truly Transformative Tool", 6 *Constitutional Court Review* (2014), at 151 – 155.

[146] *Moseneke vs Master of the High Court* 2001 (2) SA 18 (CC); *Bhe supra* n. 137; *Gumede vs President of the RSA 2009* (3) SA 152 (CC); *Pilane supra* n. 140; *Mayelane vs Ngwenyama* 2013 (4) SA 415 (CC); *Ramuhovhi vs President of the RSA* 2018 (2) SA 1 (CC).

[147] *Alexkor*, *supra* n.36; *Department of Land Affairs vs Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (10) BCLR 1027 (CC); *Bengwenyama, supra* n. 50; *Maledu, supra* n 94.

[148] *Premier of KwaZulu-Natal vs President RSA* [1995] ZACC 10; *In re: KwaZuluNatal Amakhosi and Iziphakanyiswa Amendment Bill 1995* 1996 (4) SA 653 (CC); *Shilubana vs Nwamitwa* 2008 (9) BCLR 914 (CC); *Sigcau vs President of the RSA* 2013 (9) BCLR 1091 (CC); *Bapedi Marota Mamone vs Commission on Traditional Leadership Disputes and Claims* 2015 (3) BCLR 268 (CC); *Sigcau v Minister of Cooperative Governance and Traditional Affairs* 2018 (12) BCLR 1525 (CC); *Mkhize NO vs Premier of the Province of KwaZulu-Natal* 2019 (3) BCLR 360 (CC).

[149] Budlender (2021), *supra* n.134, at 25.

[150] *Mayelane*, *supra* n.148; *Bafokeng Private Land Buyers Association v Royal Bafokeng Nation* 2016 JDR 1108 (NWM).

However, as the approach of the courts is centred on developing the practice on the ground against principles of the Constitution,[151] and the large volume of matters that are litigated by communities for recognition of their customary participatory practices,[152] there is established principles of traditional governance based on living customary law which is already well defined in the jurisprudence.

3.2.1. Locating customary law

For the purposes of this study, emphasis is placed on the important premise that custom is a legally recognised source of land and participatory rights,[153] to which the traditional governance laws must find expression.[154] Put differently, the TKLA provisions must regulate and protect the customary rights of any given traditional community. Therefore, where customary law necessitates the participation and consent of communities in matters that will affect them or their land rights, the TKLA must allow for and protect that specific right.

The question is therefore not whether the customary law right exists, but rather how it is expressed and protected to enable community participation in mineral approval processes, and who is entitled to these rights.

a) Democratisation of traditional governance

The Constitutional Court in accepting that customary law is not static favour a view of customary law that accords with democratic principles[155] which are then measured against the rights and protections of the Constitution.[156] Therefore, the democratisation of traditional governance informs the court's recognition of customary rights.[157]

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[151] *Bhe, supra* n 137, at para 46.

[152]Natural Justice, *Blood, Sweat and Tears Community Redress Strategies and their Effectiveness in Mitigating the Impacts of Extractives and Related Infrastructure Projects in South Africa: 2008-2018,* (Natural Justice, 2018). Available at: Blood, Sweat and Tears (naturaljustice.org) , at 59-69 (last accessed 10 February 2022).

[153] *Gongqose v Minister of Agriculture, Forestry and Fisheries* (1340/16 &287/17) [2018] ZASCA 87; *Alexkor*, *supra* n.36.

[154] Chapter 12 of The Constitution of the Republic of South Africa, 1996.

[155]Budlender (2021), *supra* n. 135 at 23 – 29. Budlender's 10 principles from the jurisprudence of the Constitutional Court for interpretation of customary law.

[156] Section 31(2) of the Constitution of the Republic of South Africa – 'cultural, religious and linguistic communities (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society; see also 39(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'

[157] *Supra* n.155; *Premier of the Eastern Cape v Ntamo* 2015 (6) SA 400 (ECB), at para 82.

The continued rise in community organisation for resistance to state and corporate control over resources in traditional communities has produced a clear formulation of democratic governance principles.[158] Traditional communities have successfully argued for democratic rights of communal decision-making,[159] consent,[160] and transparency[161] under the auspices of customary law rights. The jurisprudence elucidates that these rights are interlinked,[162] and form reciprocal relations within traditional communities understood as *ubuntu*.[163] *Ubuntu* is a unique concept that the courts have recognised its inherent cultural value and read into the idea of democratic traditional governance as an overarching principle of customary law.[164]

b) Conceptualisation of Ubuntu

Arguably, the extensive literature concerning the complexities of reconciling customary autonomy and community practice with Constitutional principles illustrates an understanding that the foundational values of customary law enable greater stability than individual customary laws.[165] Since foundational values motivate the ways people adapt their behaviour to socioeconomic changes — understanding the principles of customary law enables a reliable assessment of customary governance.[166] Hence the analysis of *ubuntu* and its axioms have been cited in judgments as central to traditional communities' way of life.[167]

Ubuntu is a distinctively African foundational value and encapsulates communality and the inter-dependence of the members of a community.[168] Langa DCJ categorised

[158] Natural Justice (2018), *supra* n 152.

[159] *Baleni 1*, para 79.

[160] *Ibid;* see also *Maledu,* para 72.

[161] *Baleni 2,* para 117.

[162] *Baleni 1.*

[163] J Y. Mokgoro, "Ubuntu and the law in South Africa", *Potchefstroom Electronic Law Journal* (1998), at 2-3; C. Himonga, M. Taylor & A. Pope, "Reflections on Judicial Views of Ubuntu" 16 *Potchefstroom Electronic Law Journal* (2013), at 373; *Bhe supra* n. 137 at para 163.

[164] *Ibid.*

[165] B. Cousins, "Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa", in A. Claassens & B. Cousins (eds), *Land, power & custom: controversies generated by South Africa's Communal Land Rights Act,* (Ohio University Press, 2008); G. Budlender & A. Claassens (2013) *supra* n. 5, at 75–104; C. Himonga & A. Pope, "Mayelane vs Ngwenyama and Minister for Home Affairs: A Reflection on Wider Implications",1 *Acta Juridica*(2013), at 318-338; K. O'Regan, "Tradition and Modernity: Adjudicating a Constitutional Paradox", 6 *Constitutional Court Review* (2014), at 105–126; R. Ozoemena, "Living Customary Law: A Truly Transformative Tool", 6 *Constitutional Court Review* (2014), at 147–162; W. Wicomb, "The Exceptionalism and Identity of Customary Law under the Constitution", 6 *Constitutional Court Review* (2014), at 127–146.

[166] *Ibid.*

[167] *Bhe, supra* n 137, at para 163.

[168] *Ibid.*

ubuntu as a concept that "*… regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights*."[169]

It is often noted that *ubuntu* resists definition, and efforts to contain it to overly strict boundaries and technocratic concepts are misguided.[170] Unsurprisingly, scholarly debates concerning the ambit of *ubuntu* are frequently complex and highly contested.[171] For the purposes of this study, the focus is on the content given to *ubuntu* by the judiciary, how it has been implemented in the application of customary law, and the purpose it is serving for the exercise of participatory rights.

Therefore, the starting point in this understanding is two notable maxims in African culture inextricably linked to *ubuntu* — '*motho ke motho ka batho'* (Setswana) or '*umuntu ngumuntu ngabatu*' (Xhosa)[172] which translates to 'a person is a person through other persons.' Put differently, we are who we are because of other people and successful co-existence.[173] It is an ideology that emphasises the interconnectedness of a people, and the responsibility that flows from that connection.[174] The second maxim is '*kgosi ke kgosi ka morafe'* (Setswana) meaning 'a king is a king by virtue of the people'; in other words, the validation and decisions of a king is the will of the people.[175]

The above maxims illustrate *ubuntu* as a foundational customary law principle that is compatible with democratic principles of governance and highlights how traditional systems of governance accommodate principles of transparency, accountability, and consultation in their own unique way.[176] *Ubuntu* is an inherently normative notion to which its application is as a Constitutional value, and its definitional elements context-dependent.[177] Therefore, it can be concluded that *ubuntu* is the yardstick against which statutory provisions of traditional governance must be measured against.

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[169] *Bhe, supra* n.137, at para 163.

[170] Mokgoro (1998), *supra* n.163, at 30 – 32.

[171] C. Himonga *et al* (2013), *supra* n.163, at 384. See also I. Kroetze, "Doing Things with Values II: The Case of Ubuntu", 13 *Stellenbosch Law Review* (2002); T. Metz, "Ubuntu as a moral theory and human rights in South Africa", 11 *African Human Rights Law Journal* (2011) 534; P. Onyango, "Quest for African Jurisprudence", in *African Customary Law: An Introduction* (Law Africa Publishing, 2013), at 113-114; D. Kuwali, "Decoding Afrocentrism: Decolonizing Legal Theory", in O. Onazi (*eds*), *African Legal Theory and Contemporary Problems* (Springer, 2014), at 85.

[172] JY Mokgoro (1998) *supra,* n.163, at 2; T. Metz & J. Gaie, "The African ethic of ubuntu/botho", 39 *Journal of Moral Education* (2010), at 274-276; *S v Makwanyane* SA 391(CC) paras 237, 263, 308; *Bhe supra* n.137 at para 163.

[173] *Ibid.*

[174] *Ibid.*

[175] *Bafokeng Land Buyers Association v Royal Bafokeng Nation* (CIV APP 3/17) (2018) (5) SA 566 at para 44.

[176] *Ibid*.

[177] *Ibid*.

3.3. Traditional Khoi-San and Leadership Act

The TKLA is the single statute that regulates traditional governance and, therefore, is critical to regulating the relationships within traditional communities, as well as between government and mineral rights applicants. The TKLA is not without controversy or significant scholarly critique.[178] However, this study seeks to unpack the salient provisions of the act, which concern the extent to which the provisions safeguard the exercise of the participatory rights elucidated by the MPRDA and IPILRA, and the Act's interplay with customary law.

3.3.1. TKLA Background

As a starting point, the findings and testimonies of the High-Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) should be considered. The HLP drew on extensive public hearings from community members within traditional authorities to finalise substantive recommendations for traditional governance laws and rural governance.[179] Briefly, the HLP was a parliamentary directive that appointed former president Kgalema Motlanthe to chair a thirteen-member panel to review post-apartheid legislation.[180] To fulfil this mandate, the HLP took a participatory approach and held numerous, widely publicised public hearings in all nine provinces of the country.[181]

Traditional governance laws were included in the review process under the problem statement: "Have post-1994 traditional leadership laws been working well?"[182] For the purposes of this study, the focus is on the communities' testimonies concerning the TLFGA and TKLA.

During the HLP hearings, traditional communities voiced their concerns with the then TKLB,[183] emphasising that the Bill excludes community members from decision-making processes, and if made into law it will significantly affect them by centralising decision-making authority to traditional leaders.[184] Similar testimonies of the TLGFA enabling unaccountable traditional leaders undermining customary law and limitation to exercise of participation rights in countless written submissions.[185]

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[178] See *infra* Section 1.1., at 9.

[179] *Report of the High-Level Panel on The Assessment of Key Legislation And The Acceleration Of Fundamental Change,* (Parliament of the Republic of South Africa, 2017). Available at: High Level Panel - Parliament of South Africa (last accessed 20 January 2022), at 78.

[180] HLP, at 73.

[181] HLP, at 78.

[182] HLP, at 421.

[183] Traditional Khoi-San and Leadership Bill (TKLB). During the hearings the TKLA was still an unsigned Bill.

[184] HLP, at 424.

[185] HLP transcripts of public hearings; Free State: 6 October 2016; Gauteng: 24 - 25 November 2016; Western Cape: 5 – 6 December 2016; Mpumalanga: 18 – 19 January 2017; North West: 1 – 2 March

In response to the public hearings, Motlanthe expressed that traditional leaders are asked to give the go-ahead on mining projects, under the auspices of representing the entire community, and that "*… mining companies merely give the traditional leaders an office or a 4x4 vehicle and the project gets approved."*[186]

Further testimonies from community members were heard a year prior in 2016 during the South African Human Rights Commission (SAHRC) national hearings on the socio-economic effects of mining on communities. [187] During the hearings, the vulnerabilities of the TLGFA associated with traditional leaders and the lack of community engagement under traditional governance were highlighted.[188] Community members stated that mining companies are able to enter into agreements with individuals as opposed to engaging with the community as a whole or with the lawful land owners. [189] Traditional leaders often present themselves as "custodians of communities" which prevents the community from voicing its opinions or raising concerns regarding proposed mining activities with mineral rights applicants.[190]

The HLP noted in its final report that communities' testimonies indicate a clear concern about the different conditions under which people live in areas under traditional leaders, as compared to those living elsewhere in South Africa, and that the TKLB should urgently be reviewed or withdrawn in its entirety. [191] The TKLB was subsequently amended in an effort to mitigate the concerns raised by communities of centralised decision-making by traditional leaders and chiefs.[192] Section 24 of the TKLB was amended to ensure that decisions can only be made via a majority of relevant community members, and subsequently signed as the TKLA.[193]

The theme that emerges from the testimonies and jurisprudence is of individual rights of those directly and most affected by mineral operations, contrasted with the communal or group rights to which traditional leaders are representative. The MPRDA provides a wide list of stakeholders who are considered an IAP in the approvals process.[194]

2017, Limpopo: 14 March 2017; Northern Cape: 21 September 2017 Available at: High Level Panel - Parliament of South Africa (last accessed 3 December 2021).

[186] 'Kgalema panel not keen on laws in mining', 26 July 2017, Bianca Capazorio, Business Day. www.Businessday.co.za (last accessed 12 February 2022).

[187] National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa on 13-14 September; 26 and 28 September; 3 November 2016. Available at: SAHRC Mining communities report FINAL.pdf

[188] *Idem,* at 62-63

[189] *Ibid.*

[190] *Ibid*.

[191] HLP, at 430.

[192] Parliamentary Monitoring Group, *High Level Panel recommendations for Mineral Resources: Dr Claassens briefing.* Available at: High Level Panel recommendations for Mineral Resources: Dr Claassens briefing | PMG (last accessed 22 March 2022).

[193] *Ibid.*

[194] See *infra* Subsection 2.2.2., at 23.

Therefore, strict interpretation concludes that both potentially polarising groups should exercise their participation right. This can potentially create conflict, more so with the weighted right to consent which carries with it a significant risk to approve or stop the awarding of mineral rights.

a) TKLA Salient Provisions

It is important to analyse the TKLA with the TLGFA as a starting point, as the application of the TKLA is a developing area of law, and the TKLA is intended to close the gaps created by TLGFA. With this in mind, coupled with the above-mentioned testimonies, two critical themes emerge — on the one hand, the TKLA entrenches the limited exercise of community rights under the TLGFA. On the other hand, the TKLA departs from the relevant provisions of the TLGFA which captured the idea of customary law and democratic governance.

b) TKLA entrenching limited exercise of community rights under the TLGFA

Notably, and more directly to the exercise of community consent, is the abovementioned section 24 of the TKLA. Section 24 requires prior consultation with the community —

> *"… a decision in support of the partnership or agreement taken by a majority of the community members present at a meeting; and written support of the kingship, queenship, Khoi-San or traditional council responsible for the community. Once this is met, a council may enter into partnerships and agreements with municipalities, government departments and any other body."*[195]

This puts in place a decision-making process that seeks the majority of the community, that transcends the TLGFA. The TLGFA did not itself provide traditional leaders with direct powers. Instead, the provisions required other pieces of legislation to do so — therefore it constitutes a "Framework" Act. The effect of section 24 is that agreements can be concluded without the need for consent from directly affected right holders of approvals processes. The

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[195] Section 24 of the TKLA – … '*(2) Kingship or queenship councils, principal traditional councils, traditional councils, Khoi-San councils and traditional sub-councils may enter into partnerships and agreements with each other, and with (c) any other person, body or institution. (3) Any partnership or agreement entered into by any of the councils contemplated in subsection (2) must be in writing and, notwithstanding the provisions of any other law, — (a) must be beneficial to the community represented by such council; (b) must, in addition to any other provisions, contain clear provisions on the responsibilities of each party and the termination of such partnership or agreement; (c) is subject to— (i) a prior consultation with the relevant community represented by such council; (ii) a decision in support of the partnership or agreement taken by a majority of the community members present at the consultation contemplated in subparagraph (i); and (iii) a prior decision of such council indicating in writing the support of the council for the particular partnership or agreement…*' (*author's emphasis*).

provision grants traditional leaders the option to conclude agreements or in the context of this study, exercise the right to consent based on a majority consensus of the community, which may or may not include community members who will be most affected by the mining operations.[196]

c) Problematic Departures from the TLGFA

The TKLA notably introduces a Code of Conduct for traditional councils.[197] The code of conduct outlines the rules and responsibilities of traditional council members and leaders.[198] It is also important as it set the tone for the principles, standards and ethical expectations that traditional leaders are held to as they interact with the community and third parties.[199] The code of conduct departs considerably from the traditional governance system created by the TLGFA. Three core features unpack this finding in more detail.

Firstly, while the TLGFA cited the democratisation of traditional governance as a founding principle and key objective of the act[200], the TKLA removes all references to democratisation including in the code of conduct for traditional councils. Rather, the code of conduct replaces the duty upon traditional leaders and councillors to act "…in the best interest of the traditional community…" (which the TLGFA required), with the duty to act "… in the best interests of the council… ".[201]

Closely related to the above is that the TKLA reduces the mechanisms for transparency and accountability of traditional leaders and councils to their community members. The Code of Conduct adds confidentiality provisions upon which traditional councils can rely to keep discussions and decisions about the common resources of the community undisclosed.[202] Unlike the TLGFA, the TKLA does not expressly require traditional councils to disclose their records, financial statements and gifts and donations to their community. These disclosures under the TKLA now only need to be provided to the Premier and only require a traditional council to hold annual general meetings that generally give an account of activities and finances.[203] The TLGFA obliged traditional councils to give effect to principles of public administration.[204] The TKLA removes this obligation.

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[196] 'Traditional and Khoi-San Leadership Bill Needs Tweaking.' 5 February 2017. Daniel, Huizenga IOL News, Opinion. www.iol.co.za (accessed 10 March 2022).

[197] Schedule 1 of the TKLA.

[198] *Ibid.*

[199] *Ibid.*

[200] Preamble of the TLGFA.

[201] Schedule 1 Item 2(b) of the TKLA.

[202] Schedule 1 Item 7(4),9 of the TKLA.

[203] Schedule 1 Item 7 of the TKLA.

[204] Schedule 2(e) of the TLGFA.

The TKLA notably diverges from jurisprudence emphasising democratic practices must be implemented in decision making, and the community concerns regarding centralised power exercised by traditional leaders. The concern is that these provisions undermine customary law, even though the act itself does not directly purport to alter it. It does not say that customary law provisions requiring democratic practices are amended or abolished. However, because it does not endorse the practices of transparency, communal decision making and *ubuntu*, the result of the TKLA will inevitably be to prevent adherence to customary law.

3.4. Reconciling TKLA and IPLRA

Section 24 of the TKLA points to a key issue of contestation concerning the exercise of community rights, particularly where the locus of decision-making authority in respect of customary land rights reside. Either the decision making vests in the traditional council acting on behalf of the community, or in the holders of directly affected customary land rights themselves. This analysis ultimately underscores the extent to which those most affected by mineral projects can exercise their rights to consent in approvals processes.

The *Maledu* and *Baleni 1* judgments recognise IPILRA as a vital instrument to enshrine section 25(6) of the Constitution's right to secure tenure and interpret IPILRA to provide substantive and procedural protections to individual and household land rights holders, regardless of the traditional governance formulation in the community.[205] IPLIRA is incompatible with section 24 of the TKLA's as the provision undercuts IPILRA's protections by limiting land rights holders any right of consent beyond participating in a community meeting that may be attended by community members who will be entirely unaffected by any agreement.

Considering the TKLA and IPILRA through the lens of customary law based on the *ubuntu* yardstick earlier discussed, the immediate challenge is the tension that arises between individual rights and group rights. As mentioned above, *ubuntu* emphasises communality rather than individualism, which arguably the TKLA espouses by requiring majority consensus in decision-making processes. While the IPILRA deviates by affording individual rights that can supersede the decision of the community at large. Kroeze believes that a classic demand of 'traditional legal thinking' is for a choice to be made between (individualistic) liberalism and (*ubuntu*-based) communitarianism.[206] That both values cannot all be promoted simultaneously - which, if true, could be said to render the normative force of *ubuntu* contradictory.[207] This is a valid critique, particularly in the realm of using *ubuntu* as a principle which provides a legal solution. In this instance, it is noted that as a legal concept *ubuntu* is open-ended with equally ambiguous pathways as to which interpretation is applied.

[205] See *infra* Subsection 2.2 – 2.3., at chapter 2.
[206] Kroetze (2002), *supra* n.171, at 261.
[207] *Ibid.*

Particularly given the understanding of primacy of society which argues that the traditional community itself decides whether individualistic rights are prioritised over communal. [208]

However, Himonga *et al,* argue that the idea of choice is simplistic, as it is unclear that liberalism and communitarianism necessarily conflict, and there may also be other possible choices. [209] Academic literature supports this position with the idea of 'moderate communalism'[210] which is an understanding of *ubuntu* as communalism that is inclusive of individual rights and autonomy.[211] This idea conceptualises that in a communitarian society, individual rights are recognised and exercised as part of the inherent nature of African customary law to which the moral worth of an individual is equally sacrosanct to the community values as a whole. [212] Therefore, the reduction or denial of individual rights falls short of the communal morality found in *ubuntu.*

Within the context of this study, this form of moderate communalism is preferred and arguably aligns with the operability of IPILRA and MPRDA. The MPRDA list of IAPs, as noted above, acknowledges both group and individual rights in so far as meaningful engagement in consultation is concerned.[213] Similarly, IPILRA recognises land rights to the extent that land is owned both individually and collectively, therefore recognising the layered character of authority and decision-making under customary law whereby individuals, families and kin groups all have a role.[214] Additionally, this form of communalism better aligns with the testimonies from the HLP under section 3.3.1 of this chapter.

3.5. Conclusion

The central aim of this chapter is to contextualise the source and operability of customary law, and its codification into the TKLA. This chapter illustrates that customary law rights to participate in approvals are expressed in the democratisation of traditional governance and the foundational principle of *ubuntu.* The operability of which is found in transparency, accountability and consultation.

The findings of the discussions above suggest that IPILRA preserves customary law rights and aligns with a moderate communalism understanding of *ubuntu.* This

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[208] GN. Barrie, "Ubuntu Ungamtu Ngabaye Abantu: The Recognition of Minority Rights in the South African Constitution", *South African Law Journal* (2000) 271.

[209] Himonga *et al* (2013), *supra* n 163, at 419.

[210]C. Himonga, "Exploring the Concept of Ubuntu in the South African Legal System" in U. Kischel & C. Kirchner (eds), *Ideologie und Weltanschauung im Recht* (Mohr Siebeck Tübingen, 2012), at 9; See also K. Gyekye, "Person and Community: In Defense of Moderate Communitarnism", in *'Tradition and Modernity' Tradition and Modernity: Philosophical Reflections on the African Experience* (1997), at 35-75.

[211] *Ibid;* Himonga (2012), *supra*, n. 210, at 8.

[212] Gyekye (1997), *supra* n. 210.

[213] See *infra* subsection 2.2.2 (b)., at 21.

[214] B. Cousins, "Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa", in A. Claassens & B. Cousins (eds) *Land, power & custom: controversies generated by South Africa's Communal Land Rights Act* (Ohio University Press, 2008), at 3-31.

enables individual rights to be read harmoniously with group rights, as understood from the HLP and SAHRC reports of traditional communities to be the contemporary interpretation of living customary law.

Conversely, the critical analysis of the TKLA within the chapter demonstrates that the Act departs from customary law and undercuts IPILRA. The most notable reason being that the TKLA deviates from the protections afforded to local communities by legislating limitations of exercising the right to consent for those most affected, and participatory rights envisaged in democratic governance.

The TKLA changes to the regulation of traditional leaders and traditional communities by simultaneously conferring decision-making powers to traditional leaders and reducing community participation in traditional governance processes. These circumstances create critical implementation gaps within the licensing process. In the following chapter these gaps will be examined in more detail by analysing the interplay between local communities and traditional authorities.

CHAPTER 4:
INTERPLAY BETWEEN LOCAL COMMUNITIES AND TRADITIONAL AUTHORITIES

4.1. Introduction

The Baleni 1 matter showcases that the ultimate requirement to obtain consent from the traditional community arises from engaging with customary law, and traditional governance processes. However, as illustrated in the preceding chapter, there is a legislative disconnect between traditional governance endorsed by traditional leaders, and customary law endorsed by local communities which creates uncertainty concerning the participation enquiry.[215] It is therefore important to consider the legislative and relationship factors within traditional authorities themselves which influence the participation of local communities.

Accordingly, the objective of this chapter is to evaluate this interplay. In particular, by analysing the Umgungundlovu community from the Baleni judgments. Section 4.2 will detail the historical context of state regulation of traditional authorities and leaders focusing on the relationship between local communities and traditional leaders. Section 4.3. will analyse the role of custom, culture and traditions as a relationship determinant to traditional governance and decision-making processes. Following on this is section 4.4. which unpack the case study of the Umgungundlovu community in Xolobeni to illustrate the power imbalances within traditional authorities, which play a significant role in the knowledge and exercise of participation rights. The concluding chapter highlights the negative impact of an imbalanced relationship between local communities and traditional leaders on mineral approval processes.

4.2. State regulation of traditional authorities and leaders

In order to discuss the regulation of traditional authorities, it is necessary to contextualise the legacy of the TLGFA. Briefly, the TLGFA recognised apartheid-era boundaries or homelands, which had a system of paramount chiefs.[216] The TLGFA allowed for the post-apartheid provinces that contained former homelands areas to pass their own laws regarding traditional governance, with the condition that the laws must align with the TLGFA and customary law.[217] The result being that areas with valuable resources under customary systems of law would be under the control of traditional leaders.[218]

[215] See *infra,* chapter 3., at 30.

[216] Section 28 of the TLGFA.

[217] *Ibid.*

[218] Mnwana (2021), *supra* n. 10, at 35 – 66.

The provincial statutes included provisions that governed the recognition and role of traditional leaders, the criteria for traditional council membership, and functions of traditional councils which included administration of communal land, economic development and natural resources.[219] The provincial government and Premier of the relevant province played a central role in oversight and legitimacy of the traditional authority, its councils and its chiefs.[220]

In practice, the provisions were either not fit for the purpose of the particular community,[221] or the provincial government had a heavy influence on the traditional governance processes.[222] Regarding the latter, cases of provincial government officials refusing to gazette and recognise traditional leaders appointed by customary law processes,[223] gazetting traditional councils for a term not provided for in the statutes, and even failures to remove traditional leaders after communities have provided evidence of deviation from traditional processes and corruption.[224]

This provincial government interference is prominent in mineral-rich traditional communities. The national investigative bodies,[225] research reports,[226] and literature[227] have revealed the illicit financial gains that result from public officials participating in the irregularities from the licensing phase of mineral operations.

The TLGFA enabled traditional leaders to be seen as legally recognised representatives of traditional communities and, therefore, be in a strong position to negotiate and engage directly with mineral applicants and in numerous traditional communities limited exercise of community rights.[228] The TLGFA despite its attempts to set the minimum democratic requirements of the traditional councils, and facilitate customary law processes in the appointment of chiefs, created in practice an

[219] Chapters 2,3, 5 of the TLGFA.

[220] *Ibid*.

[221] *Supra* n. 148.

[222] Corruption Watch, *Mining Royalties Research Report,* (Corruption Watch, 2018). Available at Mining-royalties-research-report-final1.pdf (corruptionwatch.org.za) (last accessed 23 February 2022), at 25.

[223] *Ntamo v Premier of the Eastern Cape* (415/2016) (2019) ZAECBHC 23.

[224] *Supra* n. 222, at 30-35.

[225] Commission into Traditional Succession Disputes and Claims: Bakgatla ba Kgafela Traditional Community, Final Report, Baloyi SC, Mahumani. 20 August 2019; Public Protector of South Africa Report No. 5 of 2017/2018, 'Allegations of maladministration in the Bapo ba Mogale Administration', ISBN: 978-1-928-366-26-3.

[226] Corruption Watch (2018), *supra* n 222, at 25-35.

[227] Mnwana & Capps (2015) *supra* n. 131; Claassens (2018), *supra* n. 22; see also L. Leonard, "Traditional Leadership, Community Participation and Mining Development in South Africa: The Case of Fuleni, Saint Lucia, KwaZulu-Natal", 86 *Land Use Policy* (2019), at 290.

[228] *Ibid*.

inexorable situation of traditional leadership that is linked to statutory recognition that is highly susceptible to abuse.[229]

The jurisprudence indicates that this is a key area for contestation for traditional communities as this form of regulation has diluted the customary law practices of engagement and consent.[230] The TKLA follows the same blueprint as the TLGFA regarding traditional leadership regulation and arguably goes further by criminalising any contestations of traditional leadership.[231] This further limits the avenues for communities to challenge the irregularities in appointments and demand accountability.

4.3. Role of custom, culture and traditions

The Baleni 1 judgment illustrates that local communities can rely on IPLIRA to enforce the right to consent during approvals.[232] Specifically, the traditional customs observed in the community can be used to exercise this right. Traditional customs are the practice that enables decision-making processes in the traditional community.[233]

The Baleni 1 matter elucidates custom more clearly as the community put forward essentially three arguments. Firstly, those most affected by the mineral application by virtue of holding an informal land title must consent.[234] Second, whether or not the right to consent exists, the community under its own customs have a decision-making process which requires a high degree of consensus from the community.[235] Lastly, for the community, the land is so closely linked to personhood that the property use is sacrosanct and cannot constitute fungible property.[236]

The community illustrated that they are dependent on the land for their livelihoods and to sustain themselves and their families.[237] Additionally, that land is integral for traditional medicinal practices that are deeply connected to the land, waters and burial sites that are slated to move if mining is to take place. The displacement would break links with ancestors — links that are important for customary rituals.[238] The community

[229] Corruption Watch (2018), *supra* n. 222; M. Buthelezi & B. Vale, "Collisions, collisions and coalescences: New takes on traditional leadership in Democratic South Africa – an introduction" in M. Buthelezi, D. Skosana & B. Vale, (*eds*) *Traditional Leaders in Democracy: Resources, Respect and Resistance,* (Mapungubwe Institute for Strategic Reflections, 2019), chapter 1; Leonard (2019) *supra* n. 227.

[230] Mnwana & Capps (2015), *supra* n. 131, at 75.

[231] Section 7(9) of the TKLA.

[232] See *infra* section 2.2., at 18.

[233] *Bafokeng Land Buyers Association v Royal Bafokeng Nation* (CIV APP 3/17) (2018) (5).

[234] *Baleni 1,* at para 24, 25.

[235] *Baleni 1,* at para 15.

[236] *Baleni 1*, at para 16,17,18.

[237] *Baleni 1,* at para 11.

[238] *Baleni 1,* at para 7.

especially feared the "… disastrous social, economic and ecological consequences of mining."[239]

In upholding that consent must be achieved through recognised customs of the community,[240] the Baleni judgment illustrates the important role custom plays in decision-making processes, and how its legitimacy can result in exclusive control over the communal property. However, this is not without complexity because of the unclear variables concerning the legitimacy of custom. For example, in Baleni 1 both the chief and the Umgungundlovu villagers essentially had to compete to bring forward the most 'legitimate' version of custom. To contextualise this aspect it is necessary to unpack the facts of the case.

4.4. Xolobeni community

The Baleni 1 case involved a dispute between the rural community of Umgungundlovu falling under the Amadiba traditional authority in Xolobeni in the Eastern Cape, and an Australian mining company, TEM. Duduzile Baleni is the head of the Umgungundlovu community and the Umgungundlovu iNkosana Council, which is a body established under customary law.[241] The area of Umgungundlovu consists of 70 to 75 households known in isiMpondo as *Imizi* (singular: *Umzi*) comprising over 600 individuals.[242] The community holds informal rights to the land under IPILRA and customary law.[243]

The dispute involved the right to mine for titanium and other minerals on land located near *Imizi* and belonging to the local community.[244] TEM's holding company, Mineral Resources Commodities, was granted a mining right by the DMRE in 2008 with the support of the local chief. The latter, by all accounts, represented the villagers as per traditional governance laws.[245]

The villagers argued that consultation and the customary processes were not followed and, therefore, the right to mine could not be awarded.[246] The community understood the customary practice of a bottom-up approach to decision-making achieved through meetings at the sacred meeting place, or *Komkhulu*.[247] According to the communities'

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[239] *Baleni 1*, at para 14, 18.

[240] *Baleni 1,* at para 83.

[241] 'Battle over mining rights in remote Eastern Cape villages', 20 February 2018, News 24. www.news24.com/news24 (last accessed 14 February 2022).

[242] *Baleni 1,* at para 2.

[243] *Baleni 1,* at para 3.

[244] *Baleni 1,* at para 4.

[245] 'Why South African community's win against mining company matters,' 13 December 2018, Sonwabile Mnwana, The Conversation. Available at www.theconversation.com (accessed 14 February 2022).

[246] *Baleni 1,* at para 15.

[247] *Baleni 1* Heads of Argument, available at: Xolobeni-Heads-of-Argument-Bundle.pdf (accessed 23 February 2022), at 99

customs, in decisions related to land use, collective decision-making must take place.[248] If there is an application for land use by an outsider not from the community, an even broader and more inclusive participation is required.[249] Additionally, if the application will cause conflict in the community, the community will decline application. The higher the potential for conflict, the higher the degree of consensus is required.[250] The court found in favour of the community,[251] however, it is important to consider the judgment within the legislative parameters of the TKLA and customary law.

The issue that arises is the determination of custom and the mechanisms available to address the essentials of custom should a dispute occur within the community. The TKLA is silent on dispute resolution mechanisms outside of leadership disputes. The fundamental challenge is that without a clear mechanism the determination of legitimate custom can only be resolved in litigation — as has been illustrated by the jurisprudence.[252]

With this in mind, the mining sector will face an untenable situation should every mineral rights application require litigation to determine the legitimacy of consent processes. Relying on the courts to manage local level disputes that have a significant impact on approvals processes is not sustainable, nor is it desirable for any mineral-rich jurisdiction.

4.5. Discrepancies of power between local communities and traditional leaders

The balance of power between local communities and traditional leaders is arguably determined by the information asymmetries that occur as a result of who was involved in the participation enquiry by the applicants, and who the applicants did not involve.[253] The applicants implement the application processes of the MPRDA and are the only party with full information regarding the proposed project.[254] The literature explains a historical feature of mineral rights applicants engaging with traditional leaders as representatives of local communities.[255] This is further illustrated in the jurisprudential trajectory, which indicates that it is those most affected by mineral operations that are the parties approaching the courts to emphasise the right to engagement and

[248] *Ibid.*

[249] *Ibid.*

[250] *Ibid;* Baleni 1, at para 15.

[251] *Baleni 1,* at para 79.

[252] *Baleni 1*; *supra* n.152; *supra* n.148.

[253] *Baleni 2*.

[254] See *infra* subsection 2.2.1., at 18.

[255] *Supra* n. 131.

consent.[256] Far more than the traditional leaders who are the predominate stakeholder when applicants are seeking mineral right approvals.[257]

There is a notable disconnect in who applicants involve in the participation enquiry, versus who will be most affected by proposed projects. These information asymmetries are further compounded by an ineffective cadastral system in the country which leaves local communities vulnerable to redacted or much-delayed information. This imbalance limits the ability of local communities to effectively exercise the right to consent during approvals.

However, it is worth revisiting the Umgungundlovu community to illustrate that the MPRDA does afford local communities the right to object to awarding mineral rights. Moreover, how a lack of meaningful engagement can influence the applicant's social license to operate (SLO) and the start of the mineral projects.

4.5.1. TEM in Xolobeni

The Xolobeni community had been resisting TEM's project since 2007 and, for this purpose, formed the Amadiba Crisis Committee (ACC) as a legal entity to challenge the application.[258] The ACC's initial objection to TEM's mining license led to a revocation of the license in 2011 with 90 days for the company to reapply, which they did in the following year.[259] The ACC once again objected and further lodged a complaint in 2013 with the Australian National Contact Point (ANCP), alleging that TEM failed to comply with the OECD Guidelines for Multinational Enterprises.[260] The ACC alleged that TEM breached the OECD guidelines on human rights labour and environmental rights, and the Australian Federal Government's intervention was warranted.[261]

The ANCP did not recognise the complaint[262] and TEM again applied for the mining rights, with the communities resisting again. The ACC and 89 residents filed an

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[256] Natural Justice (2018), *supra* n 152, at 59-69.

[257] *Ibid.*

[258] Amadiba Crisis Comittee - AIDC | Alternative Information & Development Centre (last accessed 22 February 2022).

[259] Transworld-Energy-and-Minerals-Resources-Xolobeni.pdf (cer.org.za) (last accessed 12 February 2022).

[260] The Guidelines aim to develop a sustainable approach to business conduct and promote an atmosphere of mutual confidence between multinational enterprises and the societies in which they operate by providing voluntary principles and standards for responsible business conduct. See https://www.oecd.org/corporate/mne/ (last accessed 12 February 2022).

[261] FINAL_Case_Letter_Amadiba_OECD_complaint_Covering_letter.doc (live.com) (last accessed 12 February 2022).

[262] https://cdn.tspace.gov.au/uploads/sites/112/2018/02/SouthAfrica_Mining.pdf (last accessed 12 February 2022); The Bernard and Audre Rapoport Centre for Human Rights and Justice "Property Rights from Above and Below: Mining and Distributive Struggles in South Africa", *University of Texas* (2019), at 56.

objection against TEM.[263] In all instances, the community argued to exercise their right to withhold consent based on the community special association with the land, and the decision making processes according to the communities processes.[264] Whereas TEM asserts that consultation took place with the relevant traditional leaders representing the community and consent was granted.[265] The consultations with the traditional leaders were so far advance that the local ownership requirement in approvals was completed.[266] At the time of the objection, the traditional leaders and TEM already established Xolobeni Empowerment Company Ltd (XolCo) which held a 26% stake in TEM.[267]

The result of this form of engagements is that the local communities which are the most affected by the mineral project do not have adequate information or the ability to meaningfully exercise participation rights. While the traditional leaders that are invited to the participation enquiry with all the relevant information including the financial benefits as stakeholders in the project. This imbalance will cause strong polarising views an in this case it resulted in a complete standstill of the mineral project and erosion of TEM's SLO.[268]

4.6. Conclusion

The objective of this chapter is to unpack the relationship determinants between local communities and traditional authorities in mineral approval processes by discussing the Umgungundlovu community. The chapter illustrates that the TKLA strengthens the decision-making position of traditional leaders without effectively regulating the interplay between traditional leaders and local communities to ensure that fundamental rights such as consent have a guaranteed pathway of formal participation by right-holders.

Considering the customary law pathway of decision making contrasted with the abovementioned, without a mechanism to determine the legitimacy of custom, the participation of those most affected by mining projects will be severely limited.

This chapter highlights that custom influences the exercise of participation rights, however the discussion of the Umgungundlovu community illustrates that the information asymmetries creates a power imbalance that further influence the ability

[263] *Baleni 1*, at para 23; see also Sikhosiphi-Bazooka-Radebe's-assassination-22-30-March-coverage (ukzn.ac.za) (last accessed 20 October 2022), at 13-21.

[264] Sikhosiphi-Bazooka-Radebe's-assassination-22-30-March-coverage (ukzn.ac.za) (last accessed 20 October 2022), at 13-21.

[265] *Ibid.*

[266] *Baleni 1*, para 22.

[267] *Ibid.*

[268] I Gqada 'Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project' South African Institute of International Affairs (SAIIA) Governance of Africa's Resources Programme 2011 Occasional Paper No 99.

for local communities to participate. These information asymmetries are created due to the centralised form of engagement to which mineral applicants will engage and provide with project details with the traditional leaders and not with local communities.

This creates an imbalance that impacts the ability for communities to effectively participate in the mining approvals processes. However, the Umgungundlovu community demonstrates that local communities can harness local power to influence the success of a mining project. Local communities through close proximity of the mining project can directly halt operations, in addition to, as the chapter explains, use customary practices to ensure participation.

CHAPTER 5:
CONCLUSION

5.1. Summary of the findings

The state of the South African mineral sector consists of a changed participation rights framework for local communities which requires them to consent during mineral approval processes.[269] Correspondingly, a changed traditional governance framework with the enactment of the TKLA which enables traditional leaders to consent on behalf of local communities.[270] To respond to this divergence, the aim of this research study is to examine the impact of the traditional governance laws on the participation rights of local communities in mineral approvals processes.

This research explains that the MPRDA provisions are part of a transformative agenda of the mining sector.[271] The focus of which is to enable all South Africans to benefit from the wealth of the country and move away from the sector's discriminatory laws and uphold Constitutional protections.[272]The application process in the MPRDA is accordance with these objectives by providing an inclusive definition of "community", and affording local communities procedural rights to be consulted, granted access to information and participate in decision making processes.[273]

The MPRDA goes further and requires a value-laden approach when an application for mineral rights include local communities that may have distinct governance processes or special association with the land.[274]This requires mineral applicants to meaningfully consult with the local community as part of the licensing process.[275]

The Maledu judgment confirms that the land rights of local communities which find expression in IPLRA, and the MPRDA must be read together to balance the benefits of mining with those most affected.[276]The Baleni 1 judgement reaffirms this position and requires local communities to provide informed consent during mineral approvals processes.[277]Under IPLRA, the informed consent must be done in accordance with the local community custom and processes.[278]

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[269] See *infra* Section 2.3.,at 25.
[270] See *infra* Subsection 3.3.1 (a)., at 38.
[271] See *infra* Section 2.2., at 18-19.
[272] *Ibid.*
[273] See *infra* Subsection 2.2.1., at 19.
[274] See *infra* Subsection 2.2.1., at 19-20.
[275] *Ibid.*
[276] See *infra* Section 2.2., at 18.
[277] See *infra* Section 2.3., at 25.
[278] *Ibid.*

This study finds that customary law protects and enables local communities to exercise consent during mining licensing.[279] The jurisprudence illustrates principles of democratisation of traditional governance and the high watermark of *ubuntu* contextualises living customary laws.[280] As a result, the research concludes that the customary law framework is rooted in consensus decision-making with values of transparency, accountability and consultation found in African maxims that regulate the exercise of rights.[281] This paper finds the literature on moderate communalism in understanding *ubuntu* best suits the exercise of participation rights found in MPRDA and the layered rights within IPILRA which enables individual and communal rights to land use decisions.

This interpretation of customary law illustrates characteristics that are synonymous with good governance,[282] therefore its recognition during approvals processes creates effective pathways for communities and even individuals within the same traditional authority to exercise their distinct participation rights.

The findings of this study suggest that the codification of customary law with the enactment of the TKLA creates crucially misaligned governance processes that directly limit local communities' participation rights.[283] The TKLA is inapposite with customary law by conferring consent decision-making authority to traditional leaders and limiting local community participation.[284]

This is directly explained in section 24 of the TKLA which enables traditional leaders to consent during approvals without the need to consult or attain consent from local communities.[285] It is also indirectly explained by the departure from the TLGFA language of democratisation of traditional governance and practices of transparency, communal decision making and *ubuntu.*[286] As a result, the TKLA is irreconcilable with IPIRLA and customary law. Therefore, the implication is that local communities are unable to effectively exercise the rights afforded to them by the MPRDA to participate in approvals processes under the TKLA.[287]

Importantly, the jurisprudence is clear that where misalignment with statutes occurs the Constitutional protection of customary law demands applicability to the living traditional customs and processes.[288] The Umgungundlovu community illustrates that a key determinant in this regard is the legitimacy of the traditional custom which is then

[279] See *infra* Section 3.5., at 41.
[280] See *infra* Subsection 3.2.1., at 33.
[281] See *infra* Section 3.5., at 41.
[282] *Ibid.*
[283] See *infra* Subsection 3.3.1., at 36.
[284] *Ibid.*
[285] See *infra* Subsection 3.3.1 (a)., at 38.
[286] *Ibid.*
[287] See *infra* Section 3.4., at 40.
[288] See *infra* Section 3.2., at 31.

measured against the Constitution to find applicability.[289] However, proving the legitimacy of custom relies heavily on litigious processes as the traditional governance framework does not explicitly cater for dispute resolution within the traditional authority.[290] Thus, the right of local communities to participate in approvals will be delayed due to lengthy court processes and the final determination of applications will equally be delayed.

This is highly undesirable for all parties concerned, and as the Umgungundlovu community enumerates the interplay between traditional leaders who consent on behalf of local communities without following the custom of the community can lead to an untenable state of affairs with a direct influence on the applicants SLO and subsequent success of the project.[291]

Consequently, local communities' participation rights elucidated in the MPRDA application process find effective expression under IPILRA and customary law. However, the TKLA departs from customary law and IPILRA therefore it does not enable local communities to exercise their participation rights.

5.2. Addressing the research problem

This study aimed to explore whether the TKLA and current interpretations of customary law enable local communities to exercise the right to participate in mineral approval processes. The findings indicate that the local community's participation right of meaningful consultation under MPRDA and consent under the IPLIRA are significantly weakened during mineral approvals due to the enactment of the TKLA.

Further findings show that customary law interpretations of democratisation of traditional governance and *Ubuntu* are aligned with local communities exercising participation rights in mineral applications. However, the TKLA has an influence on the exercise of these participation rights under customary law, thereby also weakening this avenue for local communities. This is notable with this research finding that the interplay between local communities and traditional leaders results in a power imbalance. The information asymmetries and the lack of a mechanism to determine legitimacy of custom to which rights must find expression creates barriers for local community to effectively participate in mineral approvals as envisaged in the MPRDA and IPLIRA.

These research findings build on the existing academic and local mining communities critique of the TKLA[292], and the body of research work challenging the effectiveness of traditional governance framework in post-apartheid South Africa.[293] Additionally, the findings can contribute to the ongoing discussions on meaningful consultation during

[289] See *infra* Section 4.3. at 45.
[290] See *infra* Section 4.3., at 45; 4.5.,at 47.
[291] See *infra* Subsection 4.5.1., at 48.
[292] See *infra* Section 1.1., at 9.
[293] *Ibid.*

mineral approvals by looking into the traditional governance processes and structures which directly influence the ability for communities to participate in approvals.

5.3. Concluding remarks

Extractive projects can transform environments and communities in profound and significant ways. Therefore, sound decisions by those most affected by proposed projects before ground is broken can mitigate detrimental and, in some cases, irreversible impacts, and ensure that applicants can meaningfully fulfil the appropriate local ownership and benefit-sharing arrangements with the local community. The jurisprudence and MPRDA are illustrative of this understanding.

However, there is room for the MPRDA to strengthen the application process, particularly with the Baleni judgment which requires effective reading with IPIRLA to enable local communities to exercise the right to consent. Flowing from this is that the MPRDA must be amended to expressly require compliance with IPILRA as a condition for the grant of a mining right. This paper illustrates from community testimonies and the design of the TKLA that the IPILRA rights are undercut, therefore compliance with IPILRA before a mining right is granted must be made explicit.

The TKLA is a newly enacted framework and it's implementation might prove an important area for future research for the licensing regime of South Africa. Specifically future research topics on the scope of existing oversight and accountability mechanisms such as RMDEC to address the gaps that for local communities to participate in mineral licensing processes.

BIBLIOGRAPHY

Primary sources

Case Law: South Africa

Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).

Bafokeng Land Buyers Association v Royal Bafokeng Nation (CIV APP 3/17) (2018) (5)

Bafokeng Private Land Buyers Association v Royal Bafokeng Nation 2016 JDR 1108 (NWM).

Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority 2015 (6) SA 32 (CC).

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

Baleni v Regional Manager: Eastern Cape Department of Mineral Resources (2020) 4 All SA 374 (GP)

Bapedi Marota Mamone vs Commission on Traditional Leadership Disputes and Claims 2015 (3) BCLR 268 (CC)

Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 (3 BCLR 229 (CC)

Bhe v Khayelitsha Magistrate 2005 (1) SA 580 (CC).

Department of Land Affairs vs Goedgelegen Tropical Fruits (Pty) Ltd 2007 (10) BCLR 1027 (CC)

Gongqose v Minister of Agriculture, Forestry and Fisheries (1340/16 &287/17) [2018]

Gumede vs President of the RSA 2009 (3) SA 152 (CC)

In re: KwaZuluNatal Amakhosi and Iziphakanyiswa Amendment Bill 1995 1996 (4) SA 653 (CC)

Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited 2019 (2) SA 1 (CC).

Mayelane vs Ngwenyama 2013 (4) SA 415 (CC)

Minerals Council of South Africa v Minister of Mineral Resources and Energy 4 All SA 836 (GP).

Mkhize NO vs Premier of the Province of KwaZulu-Natal 2019 (3) BCLR 360 (CC).

Moseneke vs Master of the High Court 2001 (2) SA 18 (CC)

Ntamo v Premier of the Eastern Cape (415/2016) (2019) ZAECBHC 23.

Pilane v Pilane 2013 (4) BCLR 431 (CC).

Premier of KwaZulu-Natal vs President RSA [1995] ZACC 10

Premier of the Eastern Cape v Ntamo 2015 (6) SA 400 (ECB)

Ramuhovhi vs President of the RSA 2018 (2) SA 1 (CC).

S v Makwanyane SA 391(CC).

Shilubana & Others v Nwamitwa 2009 (2) SA 66 (CC).

Sigcau v Minister of Cooperative Governance and Traditional Affairs 2018 (12) BCLR 1525 (CC).

Sigcau vs President of the RSA 2013 (9) BCLR 1091 (CC).

Case Law: Non-South African

Colombia:

Greater Community Council of the Popular Peasant Organization of the Alto Atrato; Judgment T-766/15 Fourth Chamber of Review of the Constitutional Court, Colombia

Legislation: South Africa

Amendments to The Environmental Impact Assessment Regulations, 2014 No 326 No. 40772.

Amendments to the Environmental Impact Assessment Regulations, Listing Notice 1, Listing Notice 2 and Listing Notice 3 of the Environmental Impact Assessment Regulations, 2014 for Activities Identified in terms of section 24(2) and 24 D of the National Environmental Management Act, 1998 published under Government Notice 517 in Government Gazette 44701 of 11 June 2021.

Broad Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry, 2018.

Bulletin 48 of 2019 based on Gazettes received during the week 22 to 29 November 2019, ISSN 1022 – 6397. Available at st20190048.pdf (juta.co.za). (last accessed 20 October 2022).

Department of Mineral Resources Guideline for Consultation with Communities and Interested and Affected Parties.

Interim Protection of Informal Land Rights Act 31 of 1996.

Mineral and Petroleum Resources Development Act 28 of 2002.

Mineral and Petroleum Resources Development Regulations (Amended Regulations) Government Notice R420 in Government Gazette 43172

Natal Ordinance 3 of 1849.

Recognition of Customary Marriages Act 120 of 1998

Traditional Khoi-San and Leadership Act 3 of 2019.

Traditional Leadership and Governance Framework Act 41 of 2003 as amended by Act 23 of 2009.

The Constitution of the Republic of South Africa, 1996.

Legislation: Non-South African

Colombia:

Constitution of Colombia (1991)

Treaties and conventions

International Covenant on Economic Social and Cultural Rights see General Comment No 21 E/C.12/GC/21 (21 December 2009)

International Covenant on Economic Social and Cultural Rights United Nations, Treaty Series, vol. 993.

The Convention on the Elimination of All forms of Racial Discrimination United Nations, Treaty Series, vol. 660.

The Convention on the Elimination of All Forms of Racial Discrimination, General Recommendation XXIII on the Rights of Indigenous Peoples (1997)

The International Covenant on Civil and Political Rights

The African Charter on Human and People's Rights

The United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295)

Policy Documents

Guideline for Consultation with Communities and Interested and Affected Parties as Required in Terms of Sections 10(1)(B),16(4)(B), 22(4)(B), 27(5)(B) and 39 of The Mineral and Petroleum Resources Development Act (Act 28 Of 2002)

Secondary sources:

Books:

Beinart, W, Kingwill, R and Capps, G *Land., Law and Chiefs in Rural South Africa,* (Wits University Press:2021).

Buthelezi, M, Skosana, D and Vale, B., *Traditional Leaders in a Democracy: Resources, Respect and Resistance,* (Mapungubwe Institute for Strategic Reflection: 2018).

Comaroff, JL and Comaroff J., *The Politics of Custom: Chiefship, Capital and the State in Contemporary Africa*, (University of Chicago Press: 2018).

Onazi, O., *African Legal Theory and Contemporary Problems*, (Springer: 2014).

Oomen, B., *Chiefs in South Africa: Law and Power & Culture in the Post-Apartheid Era*, (Palgrave Macmillan: 2005).

Book chapters:

Cousins, B., "Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa", in Claassens. A. and Cousins. B. (*eds*) *Land, power & custom: controversies generated by South Africa's Communal Land Rights Act,* (Ohio University Press, 2008), 3-31.

Bennett, T., ''Official' v 'Living' Customary Law: Dilemmas of Description and Recognition' in Claassens, A & Cousins, B. (*eds*) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act,* (Ohio University Press, 2008), 138-153.

Buthelezi, M and Vale, B., 'Collisions, collisions and coalescences: New takes on traditional leadership in Democratic South Africa – an introduction' in Buthelezi, M, Skosana, D and Vale, B. (*eds*) *Traditional Leaders in Democracy: Resources, Respect and Resistance,* (Mapungubwe Institute for Strategic Reflections, 2019), Chapter 1.

Kuwali. D., 'Decoding Afrocentrism: Decolonizing Legal Theory' in Onazi. O. (*eds*) *African Legal Theory and Contemporary Problems,* (Springer, 2014), 71-92.

Budlender, G., "Constitution Court Judgements, Customary Law and Democratisation in South Africa" in Beinart, W. Kingwill, R. and Capps, G. (*eds*) *Land, Law and Chiefs in Rural South Africa*, (Wits University Press, 2021), 21-34.

Woodman, G., "Legal Pluralism in Africa: The Implication of State Recognition of Customary Laws Illustrated from the Field of Land Law" in Mostert, H. and Bennett. T. (*eds*) *Pluralism and Development: Studies in Access to Property in Africa,* (Juta Cape Town, 2012), 35-58.

Wachira, GM., "Indigenous peoples' rights to land and natural resources" in Dersso, S. (*ed*) *Perspectives on the rights of minorities and indigenous peoples in Africa,* (Pretoria University Law Press, 2010), 297-347.

Gyekye, K,. "Person and Community: In Defense of Moderate Communitarnism" in *'Tradition and Modernity' Tradition and Modernity: Philosophical Reflections on the African Experience*, (1997), 35-75.

Himonga C., "Exploring the Concept of Ubuntu in the South African Legal System" in Kischel, U. and Kirchner, C. (*eds*), *Ideologie und Weltanschauung im Recht* (Mohr Siebeck Tübingen, 2012), 1-22

Mnwana, S., "When Custom Divides 'Community': Legal Battles over Platinum in North-West Province" in Beinart, W. Kingwill, R. and Capps, G. (*eds*), *Land, Law and Chiefs in Rural South Africa Contested Histories and Current Struggles* (Wits University Press, 2021), Chapter 3.

Onyango, P., "Quest For African Jurisprudence" in *African Customary Law: An Introduction* (Law Africa Publishing, 2013), Chapter 8.

Journal Articles

Ainslie, A and Keep, T., "Understanding the Resurgence of Traditional Authorities in Post-Apartheid South Africa", 42 *Journal of Southern African Studies* (2016), 19-33.

Barrie, GN., "Ubuntu Ungamtu Ngabaye Abantu: The Recognition of Minority Rights in the South African Constitution", *South African Law Journal* (2000), 271.

Bekker, J and van Niekerk, GJ., "Broadening the Divide between Official and Living Customary Law", 73 *Journal of Contemporary Roman-Dutch Law* (2010),

Bennett, TW., "Re-Introducing African Customary Law to The South African Legal System", 57 *American Journal of Comparative Law* (2009), 1-31.

Bennett, TW., “Ubuntu: An African Equity”, 14 *Potchefstroom Electronic Law Journal* (2011) 30.

Budlender, G and Claassens, A., “Transformative Constitutionalism and Customary Law” 6 *Constitutional Court Review* (2013), 75.

Capps, G and Mnwana, S., “Claims from below: platinum and the politics of land in the Bakgatla-ba-Kgafela traditional authority area”, 42 *Review of African Political Economy* (2015), 606.

Capps, G., “Tribal-Landed Property: The Value of the Chieftaincy in Contemporary Africa”, 16 *Journal of Agrarian Change* (2016), 452.

Claassens, A and O’Regan, C., “Citizenship and Accountability: Customary Law and Traditional Leadership under South Africa’s Democratic Constitution”, 47 *Journal of Southern African Studies* (2021), 155.

Claassens, A., “Denying Ownership and Equal Citizenship: Continuities in the State’s Use of Law and ‘Custom’ 1913–2013”, 40 *Journal of Southern African Studies* (2014), 761.

Himonga, C and Bosch, C., “The Application of African Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?”, 117 *South African Law Journal* (2000), 319.

Himonga, C and Pope, A., “Mayelane vs Ngwenyama and Minister for Home Affairs: A Reflection on Wider Implications” 1 *Acta Juridica* (2013), 318.

Himonga, C, Taylor, M and Pope, A., “Reflections on Judicial Views of Ubuntu” 16 *Potchefstroom Electronic Law Journal* (2013), 373.

Horn-Miller, K., “What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke’s Community Decision Making Process” 18 *Review of Constitutional Studies* (2013), 113.

Huizenga, D., “Articulations of Aboriginal Title, Indigenous Rights, and Living Customary Law in South African Land Reform” 27 *Social and Legal Studies* (2018), 3.

Huizenga, D., “Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC) in Xolobeni, South Africa” 6 *Extractive Industries and Society* (2019), 711.

Kroetze, I., “Doing Things With Values II: The Case of Ubuntu”, 13 *Stellenbosch Law Review* (2002), 252.

Leonard, L., “Traditional Leadership, Community Participation and Mining Development in South Africa: The Case of Fuleni, Saint Lucia, KwaZulu-Natal”, 86 *Land Use Policy* (2019), 290.

Manson, A., “Mining and ‘Traditional Communities’ in South Africa’s ‘Platinum Belt’: Contestation over Land, Leadership and Assets in North West Province”, 39 *Journal of Southern African Studies* (2013), 409.

Metz, T and Gaie, J., “The African ethic of ubuntu/botho”, 39 *Journal of Moral Education* (2010), 273.

Metz, T., “Ubuntu as a moral theory and human rights in South Africa”, 11 *African Human Rights Law Journal* (2011), 532.

Meyer, Y., “Baleni v Minister of Mineral Resources 2019 2 SA 453 (GP): Paving the Way for Formal Protection of Informal Land Rights”, 23 *Potchefstroom Electronic Law Journal* (2020), 1-18.

P. Tamang., “An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices”, 9 *Australian Indigenous Law Reporter* (2005), 114

P, Hanna and F, Vanclay., “Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent”, 31 *Impact Assessment and Project Appraisal* (2013), 146

M. Papillon and T. Rodon., “Proponent-Indigenous agreements and the implementation of the right to Free, Prior and Informed Consent in Canada”, 62 *Environmental Assessment Review* (2017), 216.

Mnwana, S., ‘‘Custom’ and fractured ‘community’: mining, property disputes and law on the platinum belt, South Africa”, 1:2 *Third World Thematics: A TWQ Journal* (2016), 218.

Mnwana, S., “Mining and ‘community’ struggles on the platinum belt: A case of Sefikile village in the North West Province, South Africa”, 2 *The Extractive Industries and Society* (2015), 500.

Mokgoro, JY., “Ubuntu and the law in South Africa” *Potchefstroom Electronic Law Journal* (1998),1-11.

O’Regan, K., “Tradition and Modernity: Adjudicating a Constitutional Paradox”, 6 *Constitutional Court Review* (2014),105.

Ozoemena, R., “Living Customary Law: A Truly Transformative Tool”, 6 *Constitutional Court Review* (2014), 147.

Pickering, J and Ubrink, J., “Shaping Legal and Institutional Pluralism: Land Rights, Access to Justice and Citizenship in South Africa”, 36 *South African Journal on Human Rights* (2020), 178.

Ubink, J and Duda, T., “Traditional Authority in South Africa: Reconstruction and Resistance in the Eastern Cape”, 47 *Journal of Southern African Studies* (2021), 191.

Wicomb, W., “The Exceptionalism and Identity of Customary Law under the Constitution”, 6 *Constitutional Court Review* (2014), 127.

Reports

Buxton, A and Wilson, E., *FPIC and the Extractive Industries. A Guide to Applying the Spirit of Free, Prior and Informed Consent in Industrial Projects,* (IIED, 2013), 1-60. Available at: FPIC.INFO | FPIC and the Extractive Industries: A guide to applying the spirit of FPIC to industrial projects (last accessed 10 October 2022).

Caripis, L., *Combatting Corruption in Mineral Approvals: Assessing the Risks in 18 Resource Rich Countries,* (Transparency International, 2017), 1-104. Available at:2017_CombattingCorruptionInMiningApprovals_EN.pdf (transparencycdn.org) (last accessed 20 October 2022).

Commission into Traditional Succession Disputes and Claims: Bakgatla ba Kgafela Traditional Community, Final Report, Baloyi SC, Mahumani. (20 August 2019), 1-200. Available at: Baloyi Commission Complete FULL_Searchable(1).pdf (saflii.org) (last accessed 10 October 2022).

Corruption Watch., *Mining Royalties Research Report 2018* (Corruption Watch, 2019), 1-25. Available at: Mining-royalties-research-report-final1.pdf (corruptionwatch.org.za) (last accessed 23 February 2022).

Davis, R and Franks, D., *Costs of Company-Community Conflict in the Extractive Sector' Corporate Social Responsibility Initiative*, (Cambridge, MA: Harvard Kennedy School. Report No. 66. 2014), 1-56. Available at: Costs_of_Conflict_Davis-Franks.pdf (shiftproject.org)

Equator Principles Association., *Equator Principles Guidance Note On Evaluating Projects with Affected Indigenous Peoples* (September 2020), 1-21. Available at: New tab (equator-principles.com) (last accessed 26 February 2022)

Fraser Institute, *Annual Survey of Mining Companies.* Available at: Fraser Institute Annual Survey of Mining Companies 2020 (last accessed 11 October 2022).

I, Gqada., *Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project,* (SAIIA, 2011) Occasional Paper No 99, 1-28. Available at: Setting the Boundaries of a Social Licence for Mining in South Africa: The Xolobeni Mineral Sands Project - SAIIA (last accessed 20 October 2022).

International Finance Corporation., *IFC Performance Standards On Environmental and Social Sustainability,* (IFC, 2012), 1-72. Available at: IFC_Performance_Standards.pdf (accessed 26 February 2022)

Mnwana, S and Capps, G., *No chief ever bought a piece of land!' Struggles over property, community and mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province,* (Society, Work & Development Institute, 2015) Working Paper 3, 1-48. Available at: SWOP Working Papers | swop (last accessed 20 October 2022).

Natural Justice., *Blood, sweat, and tears: community redress strategies and their effectiveness in mitigation the impact of extractives and related infrastructure projects in South Africa:2008 -2018',* (Natural Justice, 2019), 1-88. Available at: Blood, Sweat and Tears (naturaljustice.org) (last accessed 10 February 2022).

Pickering, J and Nyapisi, T., *A community left in the dark: the case of Mapela,* (Open Society Foundation for South Africa, 2017), 1-140 Available at In Good Company.pdf (uct.ac.za) (last accessed 22 October 2022).

Public Protector of South Africa., *Allegations of maladministration in the Bapo ba Mogale Administration*, Report No. 5 of 2017/2018. ISBN: 978-1-928-366-26-3, 1- 87. Available at: KMBT_C554-20170619165750 (customcontested.co.za)

Shivamba, A., *Mining for Sustainable Development*, (Corruption Watch, 2017), 1-102. Available at: Mining-for-Sustainable-Development-report-South-Africa-2017.pdf (corruptionwatch.org.za) (last accessed 23 February 2022).

South African Human Rights Commission., *National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa on 13-14 September; 26 and 28 September; 3 November 2016,* (SAHRC,2016), 1-108. Available at: SAHRC Mining communities report FINAL.pdf

The Bernard and Audre Rapoport Centre for Human Rights and Justice., *Property Rights from Above and Below: Mining and Distributive Struggles in South Africa,* (University of Texas, 2019), 1-73. Available at: Report Mining-and-Distributive-Struggles-in-South-Africa-December-2019.pdf (utexas.edu) (last accessed 20 October 2022).

The Final Report of the Presidential Advisory Panel On Land Reform And Agriculture, May 2019. 1-144. Available at: panelreportlandreform_1.pdf (www.gov.za) (last accessed 20 October 2022).

The High-Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change November 2017, 1-601. Available at: HLP report.pdf (parliament.gov.za) (last accessed 20 October 2022).

Unpublished: W Wicomb, “Free Prior and Informed Consent in Africa: Challenges and Opportunities,” unpublished article written for Heinrich Boll Stiftung, 2015 at 2

Online Sources

A Mining Make Over In Progress?, 3 May 2021, HSF Notes, Herbert Smith Freehills. Available at: (hsfnotes.com) (last accessed 10 October 2022).

Amadiba Crisis Comittee - AIDC | Alternative Information & Development Centre (last accessed 22 February 2022)

Baleni1 Heads of Argument. Available at: Xolobeni-Heads-of-Argument-Bundle.pdf (last accessed 23 February 2022)

Battle over mining rights in remote Eastern Cape villages, 20 February 2018, Ntongana, News24. Available at www.news24.com (last accessed 14 February 2022)

Complaint against Australian mining company MRC Ltd for breach of OECD Guidelines for Multinational Enterprises by mining agents in Amadiba Community, Wild Coast, South Africa. Available at: FINAL Case Letter_Amadiba OECD complaint Covering letter.doc (live.com) (last accessed 12 February 2022).

Government on rollout of “One Environmental System” | South African Government (www.gov.za) (last accessed 12 January 2022).

Guidelines for multinational enterprises - OECD (last accessed 22 February 2022)

Is the obligation to obtain landowner consent for environmental authorisation for mining activities a death knell for mining in South Africa?, 12 August 2021,Allan Reid, Margo-Ann Werner, Anton Ackermann and Ebun Taigbenu, Cliffe Dekker Hofmeyr. Available at: Cliffe Dekker Hofmeyr - We Offer Trusted Legal Services (last accessed 12 October 2022).

Kgalema panel not keen on laws in mining, 26 July 2017, Bianca Capazorio, Business Day. www.Businessday.co.za (last accessed 12 February 2022)

President assents to statutory recognition of Khoi-San | The Presidency (last accessed 12 January 2022)

Question NW2857 published on 11 January 2022. https://pmg.org.za/committee-question/17562/ (last accessed 10 October 2022).

Question to the Minister of Mineral Resources and Energy - NW2857 | PMG (last accessed 10 October 2022).

R20B worth of projects stalled amid licence backlog, 4 March 2021, MCSA - Mining Journal. Available at: mining-journal.com (last October 10 March 2022)

Sikhosiphi-Bazooka-Radebe's-assassination-22-30-March-coverage (ukzn.ac.za) (last accessed 20 October 2022)

State shows its contempt with Traditional Khoi-San Leadership Act, 7 December 2019, Richard Raber, Mail and Guardian. Available at: Mail & Guardian - Africa's Best Read (mg.co.za) (last accessed 20 October 2022)

Statement by the Australian National Contact Point - Specific Instance – Australian Multinational Mining Company Canberra', 8 March 2013 Statement by the Australian National Contact Point - Specific Instance – Australian Multinational Mining Company (tspace.gov.au) (last accessed 12 February)

Traditional and Khoi-san Leadership Bill Needs Tweaking. 5 February 2017. Daniel, Huizenga IOL News, Opinion. www.iol.co.za (last accessed 10 March 2022)

We want the Right to say NO! - AIDC | Alternative Information & Development Centre (last accessed 20 October 2022).

Why South African community's win against mining company matters, 13 December 2018, Sonwabile Mnwana, The Conversation. Available at www.theconversation.com (last accessed 20 October 2022).