

# LAND CONFERENCE

## 2022 DAY TWO

17-19 AUGUST

THE FAILED PROMISE OF TENURE SECURITY  
CUSTOMARY LAND RIGHTS AND DISPOSSESSION

### Rapporteurs 'master document' (mistress document)

#### Recap of Day One

Wilmien Wicomb of the Legal Resources Centre welcomed everyone back and presented a short summary of Day One by way of a 'recap'.

#### Special Keynote Address

Mahmood Mamdani, a Ugandan professor and specialist on understanding colonialism, anticolonialism and decolonisation, wrote the book 'Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism' which places South Africa's experience with indirect rule via chiefs in a comparative light - and shows that our experience under colonialism and apartheid was in many ways what was done elsewhere. Africa's pre-colonial past was characterised by integration not separation, in the sense that identity was fluid and claims to membership of political entities could shift. It was a colonial practice to categorise people and to segregate them into fixed ethnic groups, where rights did not change and ethnic identity also remained the same even with the movement of people. Ethnic identity became fixed through colonialism in a way that it was not before - and this is the basis for much conflict, especially land conflict. It was a colonial creation. In reality, though, most places are multi-ethnic which means that in practice, even when defending custom, you will have some people who will have rights and others who will not. There are two big issues. First, how do we define the community? Based on the experience in Uganda, and the realisation that decolonisation meant removing these fixed identities, the only way to support custom to serve people's needs is to say: do not group people based on ancestry, but based on where people decide to live. Community must be based on residential proximity. Community must mean residential - otherwise there will be a contradiction between citizens of different statuses. Second, how do we define powers and accountability? Officials must be elected and not appointed. The people must be mobilised as a group who can hold their elected persons accountable. "When I came to SA in 1991 I realised that it was not different from what had been done in Uganda and elsewhere. Here, too, custom was ethnic. The whole thing that the rural areas had been under customary law was a lie because "custom and customary law are not the same.... Custom was not law; it was a social resource." There were customary leaders, sometimes it was clan heads or chiefs. There were different customary authorities. Custom changed. But customary law is the separation of custom from society and making it law and using it as a weapon against the people.

### **Plenary 3: Organising against Bantustan mentality: Emancipation from below**

Constance Mogale, national coordinator of the Alliance for Rural Democracy, convened a plenary in which activists and organisers from rural communities presented the stories of struggle from communities - struggles to defend land rights, to re-assert land rights, to demand accountability from chiefs, protection from the state, and participation in decision-making affecting them. These are struggles waged against traditional, corporate and state institutions and the individuals that represent them.

#### **Margaret Molomo**

Mining was a central theme. "It is painful if we can tell our struggles with the mine", said Margaret Molomo from Mokopane in Limpopo, who recounted how one day she was sitting "at home, where I built my home on land that belongs to me" when she heard from a neighbour that the mine is now destroying our land. The chief responded that he did not know anything about mining and that mining is not his business. "We confronted the chief to say we have documents that prove you have signed the mining deals and even received some compensation." Organised as Kopano Foundation, the community told government officials that they want public participation before a surface lease agreement was concluded, and refused to consent to mining but the mining began operations, irrespective of objections and protests. Struggles also related to graves, and attempts to get SAHRA to assist, and disputes over payments of R4,000 to households for prospecting on their land. "The same government that oppressed us is back. Our government is our skeleton diggers."

#### **Christinah Mdau**

The Mmaditlhokwa community in the North West commemorated the Marikana massacre this week - and the violence and suffering from mining continues. Although people have been living in the area for more than 70 years, they were relocated by the company Tharisa and they continue to be threatened by mining expansion, causing environmental, infrastructure and health problems, and they call for respect for their identity and integrity - "We are called Bakgatla ba Kgafela in order to be controlled", she said. "The situation that we are facing in reality is bad. Our land is our life. The dispossession of our land still happens today. We are confident, valuable, determined, qualified, dignified. We work hard with everyone affected, this is not a friendly summit, we are here to fight for our families."

#### **Zibuyisile Zulu**

Zibuyisile Zulu, an ARD member from Matshansundu in KwaZulu-Natal recounted how a mining company Jindal (based in India) arrived in their village in Melmoth to speak to the traditional leader and not with the residents "the only person the mine communicates with is the chiefs. The mines only communicate using guns and violence." Attempts to get the chief to intervene to stop the mining failed - having promised to support the community against the mine, the chief was then seen in a mine-owned vehicle and claimed not to know about people's objections to the mine. Violence ensued, people were shot at. "If we are to die, let us die for our land", she said, and even as people were being attacked, and the chief watched from the car, SAPS vehicles would come to silence and intimidate community members. Some people are now not able to stay in their homes, because hitmen have been sent to assassinate them. There is an urgent appeal for help from lawyers as the community's case is still going forward. Meanwhile, people are very unsafe.

#### **Fani Ncapayi**

The Cala Reserve case is a powerful example of contestation over the institution of traditional authority. Dr Fani Ncapayi set out this case, concerning the Cala area in Sakhisizwe municipality demonstrates in clear terms that the democratization of governance in SA remains unfinished. This is evident in rural areas; the system is still undemocratic because the community members do not elect their leaders. They are still experiencing the imposition of traditional leaders. In 2012, the headman retired and informed the community it was time to elect a new headman - because it is customary practice in most of the communities in the area to elect the headmen - but the traditional council rejected their proposed headman

and imposed a headman instead. We were told: 'You as rural people have no right to elect your leaders'. Through the struggles of TCOE, CALUSA and Inyanda, and attempt to engage the Premier and the Provincial House of Traditional Leaders, without success, after which with support from LRC, the community took the case to court, and won; and won again on appeal; and when the authorities did not apply the instructions, the community returned to court for a further instruction to the traditional council to follow the decision of the community to appoint the elected headman. Fani left us with a question to reflect on: if we were to have elected leaders who are accountable to the community, what would happen to the councillors who are imposed on the community? Will people want their local leaders also to be councillors - and not to have councillors, as candidates, imposed by political parties? Either way, we need to look at democratising rural governance.

## **Session 2A Comparative African experiences with formalisation**

### **Judith Atukunda**

Civil society organisations from Uganda, Malawi and Mozambique collaborate on a study to look at the outcomes of titling or formalisation measures and their impacts on tenure security in customary land settings. Judith Atukunda of LANDnet Uganda presented. Secure land rights are considered key for economic development and therefore it is often argued that African Indigenous land tenure systems should be registered to facilitate development. They have examined the experience in three countries that took steps to formalise customary land rights. Our study shows that it is possible to document customary arrangements in particular as countries are making strides when it comes to build land info systems and are tech advancements that move away from non-digital ways of producing land information. Successes of these initiatives include a reduction in the cost of land registration, a reduction in conflict and an increase in economic returns and reduction. However, these initiatives have been ineffective in addressing discriminator cultural norms, in particular with regards to women, and beneficiaries often don't receive the documentation they are entitled to. She concludes that land titling and certification is not an end but a means to an end. All parties must be involved in the process with a particular emphasis on women's land rights. She recommends that titling systems have to be well grounded in legal and policy frameworks that govern customary and statutory systems. Finally, these projects need to be sufficiently resourced to make them work.

### **Phyllan Zamchiya and Chilombo Musa**

A dramatic development is underway with forms of landholding evolving closer to western models of private ownership - in part due to formalisation initiatives imposed 'from above' - but there are also more incremental forms of change emerging on the ground. From 1990-2017, 32 new land laws were introduced across Sub Saharan Africa, many of them focused on formalising customary land rights. What are the implications for women? A PLAAS study was conducted with partners in Mozambique, Zambia, Zimbabwe and South Africa and 443 questionnaires were administered to look at land rights changes in customary contexts. Formalization takes different forms in different countries, and is promoted by the World Bank which has put \$100 million into these processes. Meanwhile, there is also a change on the ground, for instance in SA, urban elites hold onto customary land to avoid paying rates and to seek cheap retirement homes, building mansions on communal land. Chilombo shared the results, explaining that politicians advance 'flanking mechanisms' to justify formalisation, by arguing that women will be able to own property in their own names. The reality is more worrying. In Mozambique there is a difference about which women can access these: married and widowed women can access, but divorced and single women have struggled to access. In Zim and SA, commodification of communal land is becoming common. Traditional land is being sold by chiefs. Women who are connected to local elites tend to benefit from the registration of customary land holding certificates. So we see exclusion of certain segments of women. Violence perpetrated against women and 'sextortion' against women is linked to access to land. 65% of our respondents were asked to pay exorbitant fees in order to be able to register land. Women said they cannot access registration. What women say they prefer is to live on communal land - but patriarchal practices are an excluding factor. There needs to be measures taken to combat these issues that stem from patriarchy within customary systems - rather than replacing customary systems with formalisation.[I was not in this session and struggled to make sense of the notes here]

## Augustine Fosu

The Ghana case shows that the idea that land law reform and a strong legal framework for land titling registration and the formalisation of customary land rights can provide tenure security of poor households and women is simply not true. Historically, land law reforms are implemented to shield capitalist accumulators to perpetuate the exploitation of poor households through land titling registration. These reforms fortify the positions of traditional authorities in land administration to expropriate their subjects during land commoditization - without the state's interference. Augustine's research on land rights in peri-urban Ghana shows how the legacy of colonialism is present even in the present day: "Chiefs invoke the power of the state to dispossess their people." Few people register their land in Ghana today. Traditional leaders sign for the allocation of land to residential areas, but the affected people do not know anything about this process because they are not included in these chiefly processes. Land laws ostensibly to secure tenure in fact provide a mechanism that people use to dispossess other people from their land. Augustine recommends that land law reform in Ghana and elsewhere must involve the whole country and be incremental rather than discontinuous. Clans and families should be able to allocate land - not chiefs. Power to allocate should thus be devolved. People themselves know how to protect their land. Research also shows that people also know their boundaries.

## **Session 2B Understanding customary land rights in context: historical interpretations and current struggles**

### Derick Fay

'Native assessors' served to assist magistrates in the colonial period to administer the law, and played a significant role in the Cape, giving testimony in about 1 in 5 cases based on the records from 1905 to 1920. There were very few 'land cases' in the Eastern Cape - but land was a factor in many cases, for instance on inheritance, debts, payments, compensation and so on. Land was considered to be purely an administrative matter. Derrick observed that "when land is treated as purely administrative there is no need for the court to understand further; likewise, the claims of widows and other perspectives may be dismissed rather than being heard in detail." In the case of Bizana, customary law was recorded through case law and filtered by administrative legal systems. As with other attempts to integrate customary law into western legal systems, there was profound gender blindness (for instance, native assessors not interviewing any women). In all these cases, there was little enquiry into the content of customary law. Little is said about 'Native Assessors' in the archives, but case records provide insight into their role in specific domains of custom like customary debts and payments. While land cases are scarce in native appeals. The formalist approach to land matters, and has had profound impacts. Then, as now, the courts remained ignorant and did not look at how tenure relations were changing.

### Gaynor Paradza and James Chikwezira, North West University

This presentation addressed how customary land tenure is administered in SA, and specifically how municipalities and traditional authorities govern land, using data and interviews on Bushbuckridge in Mpumalanga and Mokopane in Limpopo. Key issues in customary land administration are that community rights are not registered and so there is a multiplicity of statutory, cultural and religious practices/laws, and ambiguity creates loopholes that some actors - especially male traditional leaders and state officials - exploit to their advantage. Traditional councils continue to issue PTOs (permission to occupy certificates) when large-scale commercial land deals are introduced like for shopping malls, and it generally happens without consulting the customary and traditional landowners as indicated by Speaker Mahlake. Developments are happening in areas under traditional leaders and the only 'stakeholders' are the traditional leaders and investors, leaving out the community. There is pressure on customary land to convert to perceived more secure forms of land holding in SA, mostly because of individual elites and companies coming in. For this reason, there is a need to develop and improve ways of recording rights and tenure systems in rural areas to protect rights of the indigents.

## Tara Weinberg and Sithe Gumbi

Communal property associations and community land trusts have both been problematic in their implementation, and traditional leaders and government have used these institutions to enrich themselves. Collective forms of ownership in SA take various forms. CPAs began in 1996 through the CPA Act, intended as a means through which people could acquire, hold and manage their land jointly. They were meant to be a land reform program. They were developed so people could claim their land in groups - like at Mogopa and Dithakwaneng in the North West and the Native Farmers Association at Driefontein and Daggakraal in Mpumalanga - where the ANC leader Pixley ka Seme assisted in drafting articles of association in 1912. One of the anomalies about trusts versus CPAs is that they both receive land from the same department but are registered by two different institutions - the Master of the High Court and the Department (DALRRD), respectively. While both are problematic in their implementation, there is a further problem which is the accountability requirement - Trusts are not held to the same standard. CPAs remain the best vehicle to hold and manage land according to the people we engage with.

## Session 3A The problem of legislating customary law

### Michael Bishop

Customary fishing rights are property rights - like land rights. Michael focused on the Gongose case to illustrate the manner in which customary rights are asserted in respect of Section 211(3) of the Constitution. In Gongose it was shown that customary law can only be altered by legislation if the law makers have actually considered the content of customary law. It cannot be trumped by legislation which clearly uses automatic override clauses - for instance, where a law states that where there is a conflict between the Act and customary law position, then the Act is applicable. Michael also went through the 5 steps that must be considered by those who seek to defend customary rights - whether land or fishing or other:

1. Is there a customary law right?
2. Does it meet the definition of a Section 211(3) law ?
3. If it is a Sec 211(3) law, how does it affect the exercise of the customary law right?
4. If this 211(3) law limits the exercise of rights, does it impact on a right in the Bill?
5. Is this limitation justified in terms of section 39?

### Thandabantu Nhlapo

Thandabantu Nhlapo was on the law reform commission and instrumental in the drafting of the Recognition of Customary Marriages Act. He expressed his unease with how custom has been treated in law reform processes - including those ostensibly set up to protect and defend custom. How should we assess customary law? It can be checked against nine considerations: 1. customary law is recognised in terms of section 211(3) of the Constitution; 2. it is also subject to the Constitution; 3. it is also subject to any legislation that deals with customary law; 4. customary law may be regulated by other legislation; 6. the version applied in SA is 'living' and not official customary law; 7. it is an independent source of law, separate from common law and legislation; 8. where it exists, there is no further need for regulation; and 9. it can and must be justified under section 36; 9. There is a misunderstanding of section 211(3) of the Constitution, and the biggest problem for me is in the Traditional Courts Bill: in the attempt to regulate customary law, parliament trumps customs. Our current parliament has a very bad consultation culture as seen in Tongoane and other cases. Section 7 of the Recognition of Customary Marriages Act is similarly problematic.

### Jackie Sunde and Wilmien Wicomb

Customary fishers in KZN and Eastern Cape won a victory in the courts in that the case forced the legislature to consider customary law. There was a parallel struggle of fishers who were excluded from the Marine and Living Resources Act - and sought to be recognised. In 2012, while engaging with the government, they insisted that customary fishing rights must be recognised in policy - but the government said the onus is on people to provide they have rights. But the demand for recognition quickly became like

a trap of formalisation: “We very naively took the opportunity to assist the legislature with coming up with mechanisms to go to the ground, identify rights and legislate them.” The result was regulators in Pretoria coming up with impractical and inappropriate rules - in the name of customs they did not understand at all. International experience shows that many post-colonial states have struggled to come to terms with fishing rights or to develop hybrid systems of fishing rights. Like with land, you need to understand custom first. There are global guidelines for securing tenure: since 2007, the UNDRIP (UN Declaration on the Rights of Indigenous Peoples) has affirmed a right of free, prior and informed consent, while the 2012 Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of Food Security (VGGT) say that states must recognize the tenure holders, support them, establish safeguards, prevent forced evictions, and provide access to justice, among other things. In SA, the small-scale fisheries policy drew on the VGGT and said people’s decision-making must be recognised. A core lesson is to take a procedural approach and identify the principles underpinning custom - for instance the principle of subsidiarity which means decision-making at the most local possible level - rather than trying to codify customary law. Don’t codify customary law.

### **Session 3B: Mobilisation and litigation nexus**

#### **Baby Makgeledisa and Alex Dyzenhaus**

The case of Putfontein in the North West illustrates the deliberate nature of how land claims have been frustrated and even actively sabotaged by elites who have private interests. Baby described how the community who had bought land in the early 1900s were later dispossessed in the 1970s, and their claim in the 1990s was ostensibly settled. But “the land is back only by mouth - but physically it was never given back to the rightful owners”. This is because, first, the settlement and development funds were lodged with a company that they didn’t know and which they were told was liquidated - though it later turned out it still existed. Second, when the claimants wanted their land back, the land commission combined, or incorporated, all the claims lodged by other villages and farms surrounding Putfontein into Batloug CPA. But those claimants had their own CPAs registered. Up to today, those people’s land is still incorporated under Batloug CPA. When raising complaints to not have land under the traditional leader, the claimants were made to register family trusts. Alex outlined the evidence that restitution failures after claims settlement are not a new reality, instead he spoke of the challenges claimants face when they take action to protect and promote their rights. Non-claimants also face the same uphill battle in having their land rights recognized because the claims process only accounted for some of the dispossessed. “Those professional classes in government are colonising our land - more than ever before. The systemic continuation of imposed traditional leaders will never end in South Africa. We know our customs and traditions. We don’t need traditional leaders to tell us what our customs are. The government has made [check] the traditional leader the custodian of our land without our consent. That is why they have so much power to sell our land.”

#### **Kearabetswe Moopela and David Coplan**

Struggles to defend or gain restoration of land is linked with its spiritual meanings. Kearabetswe and David discussed struggles to defend sacred sites from mining, specifically a site in the Moletsi mountains in Limpopo, targeted for a huge opencast iron mine which would ‘decapitate’ a sacred mountain at Mmadimatle. The spiritual meaning of land is not just a basis for restitution, but about the ongoing meaning of land - from the past through the present to the future. While you can move the living, you cannot move the ‘living dead’ - even if you exhume graves, “ancestors cannot be removed” and people will remain using the site as a pilgrimage even when it is cordoned off. For people for whom sites have this meaning, mining and the destruction it causes constitutes a spiritual genocide in attempting to sever an umbilical link between the living and ancestors. The River Club Development in Observatory, Cape Town, opposed by Khoi Khoi activists and others against Amazon, is another case which illustrates these challenges. There’s a need to incorporate spiritual recognition into the recognition of customary land rights.

## Nonhle Mbuthuma and Johan Lorenzen

Nonhle Mbuthuma of the Amadiba Crisis Committee in Xolobeni argued that defending land rights starts with organising as communities and building unity on what people want. The big corporations are like Goliath and if you are fighting Goliath, you need unity, she said. “We don’t want mining - but we do want development. We don’t want mining.” They are pushing an agenda of economic development at the expense of our natural resources. Why must our local economy always have to be suppressed for the national economy? It is bizarre that now we are told the ancestors are standing in the way of development. Our mothers lived off the land and water and if we go ahead with this, how long will those jobs last, how long will those minerals be there? Johan Lorenzen from Richard Spoor, supporting the Xolobeni residents, added being a lawyer is mostly about writing down what people say: “my job is to translate that in a way that is understandable to the courts. Organising is more important than lawyers”, he said. Mobilising isn’t just about communities. Communities are not an island. Allies like lawyers, activists, academics, need to see ourselves as *part* of communities and stand in solidarity.

Hi everyone, you can find the archive of [Day One](#) (click here)

Some do’s:

- Please write as much as possible, even if it is VERY MESSY and not 100% accurate.
- Please type in ‘real time’ as people are speaking. Even if you type slowly, please type rather than taking handwritten notes and typing up later.
- Please include direct quotes using inverted commas “like this” whenever possible if someone says something quotable (doesn’t matter if in another language, your own translation is fine).

Some don’ts....

- Don’t worry about spelling and grammar. It really doesn’t matter!
- Don’t delete any chunks of anyone’s text - yours or anyone else’s!

Task:

Write notes, as detailed as possible.

When you can, cluster them under these theme headings.

You can also leave a general chunk of text that doesn’t fit into these categories.

Themes:

1. Points of **Agreement**: What resonates with our own experience?
2. Points of **Disagreement**: What do we disagree with or need clarity on?
3. Insights and **New ideas**: What are our new insights and lessons?
4. Are there **Action points**: What does this mean for our movement / our call for action?

Rapporteurs:

- Joburg: **Tshepo**, Mbuso, Jeanette, David, Ektaa
- Durban: **Saadiyah**, Aaron, Kiren
- EL: **Sipesihle**, Goodness, Ona, Bonani

- Online: Shane, Ashley, **Ruth**, Wilmien  
(bold = person responsible, eg. for sharing out sessions & ensuring notes are done)

DAY 2: Thursday 18 August 2022

## Responding to the problem – here and now

RECAP OF DAY 1

**Wilmien Wicomb, *Legal Resources Centre***

After Nolundi opened, Nokwanda led the groups to remembrance of those comrades who were no longer with us. Mme Maleud kicked off with a call to action for women - THEY CAN GIVE US CARS MONEY BUT WITHOUT LAND WHERE WILL WE STAY?

Prof Weeks suggested amalgamation - this spurred discussion throughout the day - on how the communal and customary laws can be amalgamated.

Prof Mnwana presented on the precarious nature of community.

Dineo Skosana and loss and mining of graves, followed by Mr Nkosi who echoed that dispossession is also a spiritual question. Simon Gush shared his videos on restitution

What is being restitution by the state when they don't seem to know what was lost.

Cecele, David Mayson and Colin Louw - lead discussion on the TKLA and CPA. the CPA chair must apply to be a chair. And the problems as they occur in respect of the different provisions of the CPA and TKLA.

Adv Ngcukaitobi : sec 25 promises - transformation and equality if the CLTB does not capture; this it is unconstitutional. His 5 problems with it were:

- 
- 1. bill must be scrapped
- 2. demand new bill with a bottom up approach
- 3. robust institutions of customary law
- 4. Build ipilra up amend it and make it permanent
- 5. Win the appeal in the itb case

Afternoon plenary, Sithe Gumbi and Janet Bellamy presented their case studies that show how difficult it is to get access to the courts.

The case study shows how claimants are failed by the courts.

In different venues we asked participants to share their views, from this we learnt that dispossession is not historical, it happens today. In Durban ppl stated that people continue to be colonized by municipalities and traditional authorities. Some women still need a male intermediary before they can realize their rights. In Johannesburg, we do not need a chief, the chief needs us. Strong agreement with the problems from the Trust Prop Control.

False option that Trusts give communities

dispossession also occurs where their rights to community and ancestral rights are infringed

In jHB , individual households can withdraw from their traditional communities and how different



terms in local languages may be misinterpreted and all these words mean community in some way. In EL, a sense that people must hold the government accountable to each other. Look into capitalizing use of marijuana.

### **Action Points -**

Durban agreed with TN , also agreed that women still struggles with equality and to have the constitution to be applied in practice

JHB - how can they get the courts to support and assist community members when Trusts and CPAs are no longer accountable- strengthen customary law.

IPILRA must be made permanent.

Some CPAs behave like traditional councils - must democratise it.

Communities must adopt sustainable development of the land.

EL: people who are given land must be equipped to work the land

Oppression and dispossession occurs by Municipalities, white farmers , chiefs and traditional councils. The state is also taking access to natural resources from poor communities.

One woman expressed the hurt she experienced by the relocation and dismantling of graves, she said "Dismantling a grave is dismantling a woman."

### **Mahmood Mamdani, *Makerere/Columbia University (special guest)***

#### Summary:

Mahmood Mamdani, a Ugandan professor and specialist on understanding colonialism, anticolonialism and decolonisation, wrote the book 'Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism' which places South Africa's experience with indirect rule via chiefs in a comparative light - and shows that our experience under colonialism and apartheid was in many ways what was done elsewhere. Africa's pre-colonial past was characterised by integration not separation, in the sense that identity was fluid and claims to membership of political entities could shift. It was a colonial practice to categorise people and to segregate them into fixed ethnic groups, where rights did not change and ethnic identity also remained the same even with the movement of people. Ethnic identity became fixed through colonialism in a way that it was not before - and this is the basis for much conflict, especially land conflict. It was a colonial creation. In reality, though, most places are multi-ethnic which means that in practice, even when defending custom, you will have some people who will have rights and others who will not. There are two big issues. First, how do we define the community? Based on the experience in Uganda, and the realisation that decolonisation meant removing these fixed identities, the only way to support custom to serve people's needs is to say: do not group people based on ancestry, but based on where people decide to live. Community must be based on residential proximity. Community must mean residential - otherwise there will be a contradiction between citizens of different statuses. Second, how do we define powers and accountability? Officials must be elected and not appointed. The people must be mobilised as a group who can hold their elected persons accountable. "When I came to SA in 1991 I realised that it was not different from what had been done in Uganda and elsewhere. Here, too, custom was ethnic. The whole thing that the rural areas had been under customary law was a lie because "custom and customary law are not the same.... Custom was not law; it was a social resource." There were customary leaders, sometimes it was clan heads or chiefs. There were different customary authorities. Custom changed. But customary law is the separation of custom from society and

making it law and using it as a weapon against the people.

Mamdani:

- Kampala,
- I will use the time to talk about my own journey, my discovery of the meaning of these terms we use - custom, customary law, tribe etc
- My journey in Uganda and SA
- I'll begin in 1986 when we had the end of 5 year guerilla war, new government in power - national resistance movement
- Commission into local government - I was chair of that commission
- 2 years around the country - I realised that I hadn't known the country
- I knew the urban areas
- I was tourist through the rural areas
- I could name all the areas I had been to but didn't know what rural life was about
- I learned that two huge separations countryside and urban areas
- Urban-rural separation - a political separation - we had a representative parliamentary democracy in urban, formally extended to rural areas (by voting) but peasants did not vote for those who really administered their day to day lives - 'chiefs'
- Members of Parliament were elected Chiefs were always appointed, not elected,
- Whereas in towns - administration clearly defined its separation of powers - admin, judicial, parliamentary power
- No differentiation of power when it came to the chiefs (talking about Uganda) and you can see for yourself how much of it translates to South Africa.
- Chief had powers of taxation, ran courts, had admin powers
- If single authority that defined life of peasant - it was the chief, who was not elected
- Did not claim democratic legitimacy but customary legitimacy
- Second separation = ethnic separation
- Each area defined as 'ethnic' even if the population was multi ethnic
- Only indigenous groups are said to have land rights - even if the areas again were multi ethnic.
- Ethnic identity fixed - born with it, into ethnic group
- Could not change ethnic identity
- Could change religion, but not ethnic identity
- This had not always been the case. If look at precolonial history every group in Uganda a different history
- The largest group - Baganda - hand full of clans
- 4 or 5 at start of 13th century, grew through conquest etc the clans multiplied, they absorbed new people
- You were not born a Baganda, You could become a Baganda, you could become a Zulu if you look at South African history
- This was a process of cultural social integration
- Standard rule precolonial Africa was integration not segregation
- Segregation comes with colonialism
- problematic : 1) gives rise to land q - colonialism introduces the notion 'indigenous' ; cannot be indigenous even if born there. Which was not the case in precolonial Africa.
- Right to land in colonial period becomes ethnic right - ethnic identity is fixed, cannot be changed even if residence changes
- African people are migrants, even in colonial period migrant labour specific to Africa
- Residents changed from gen to gen
- Ethnic id remained the same, rights did not change -
- 2nd problem - rise to ethnic conflict → in every place those indigenous those not with diff rights
- When I came to SA in 1991 - Natal - I realised that it was not very different

- There are two separations; urban and rural
- Customary rule in rural areas, two languages
- Democracy for urban system, customary for rural
- I lived my whole life under apartheid
- 2nd discovery that this was a lie - the whole thing that the rural areas living under custom
- Discussed in Uganda commission - we must make a clear distinction between custom and customary law - these are not the same
- When we discuss the existence of rules, by which we lived, in precolonial africa - custom
- We must make a distinction between customs and customary law - not the same.
- Everyone knows that precolonial africa had states but had many societies without states
- In those without states - not as if no way of maintaining order, but order was maintained by Society - custom was part of society (it was not law, not part of the state)
- Regulated external conflicts through custom= social resource
- Customary leaders - sometimes clan heads, other times chiefs, but part of society and held accountable by society
- No single custom that happened with the colonial state
- Different customary authorities in different customary domains
- West africa - market controlled by women, religious by men, land by clan heads
- Custom changed - sometimes diff customs clashed, conflicted, this was normal, customary law comes with colonialism
- Customary law = separation of custom from society and making it a weapon of the state
- Now making appointees of the state
- Presumed to remain static, unlike positive law in the urban areas - form by legislators and which changes over time,
- Custom said not to change - sacred part of custom
- Single customary authority - presumption of single custom - has total power
- Our commission was faced with this question- what do we do
- History and reality we are living, independent in 1962 commission 88
- What is the antidote
- We could learn from other places - Tanzania , Burkina faso
- Could learn from our own past - the precolonial
- By both looking at what existed and how conditions changed, could learn stand on our own two feet
- Use our past as a resource, not be cut adrift from it, but be brave?
- There are two big issues:
- **1) the community - how do we define the community?**
- **2) how do we define powers and accountability?**
- Colonialism had defined communities as 'ethnic' and frozen the ethnic
- Pre-colonialism had a mobile porous definition of ethnic - ethnic group
- People could come in and leave the ethnic group, so how should we define the community
- Most of the places are multiethnic
- If we kept colonial order - divide community
- Those with rights and those without - could not gain rights just because born
- So the definition of the community had to be the village - the residential community
- Not ID reflecting ancestry but reflecting future you wish to make - where you decide to live
- Every community people who share past not all share the future
- We acknowledge common past, but those who diasporic have multiple identities
- People do not share the same histories
- Community must be recognised as residential - everybody must have = rights
- 2 - powers : have to break so called customary understanding of power as fused
- Make clear separation officials and people - officials must be elected, cannot be appointed
- People have to be organised as village assembly - hold officials accountable
- In different african countries
- These two things leave us with
- 2002 - board of organisation LEMU (land equity mov uganda) - covers part of uganda land

customary land, one feature that separated from market, and did not separate land from user of the land, belonged to the ?

- We wrestled with question of how to maintain right of the user to land but at the same time ensure that the user has access to the market
- 10 year later - conference Makere - faced with WB demand that land must be a commodity for sale
- Global conference invited people - for who feature of customary land was a reality - Chinese, Indians especially from migratory communities,
- Discussed World Bank challenge - where land belongs to the tiller as a right, market has limited development
- Studied chinese case spectacular development of market where land remained village land
- Village owner of land, individual is user of the land
- Indivi can lease land but not sell land, lease temporary?
- No contradiction between commodity production and village ..
- Land belongs to the tiller, one who works it
- Telegraphing across ideas, some may have to be translated to suit local conditions - price we pay for all education

We can learn from our own past.

Use the past as our resource.

Religious domain controlled by women, land controlled by clan heads - custom changed. Sometimes customs clashed and conflicted; this was normal

Customary law comes with colonialism; customary law is separation of custom from society and making it a weapon of the state

Like zulu - in the times of shaka - the clans grew - you can become part of another group - if you were taken over - you could become a mahara, a zulu etc. the

One of the first commision, which I was asked to chair, in those two years, I realised that I didn't know the country.

Urban- Rural separation was a political separation.

Members of Parliament were elected and chiefs were appointed.

There was no differentiation of power in Uganda.

The chief defined the life of the community. It claimed customary legitimacy.

We began to think of this as a commission, each group had a very different history.

"Segregation comes with colonialism"

Ethnic identity cannot be fixed.

**In JHB we lost connectivity at 9h30 in the morning of Day 2. So I took notes on a word document.**

Members of parliament were elected but chiefs were not, they were appointed.

There was no duplication of power when it came to chiefs. The chiefs had administrative and judicial powers.

Their authority did not claim democratic legitimacy, it claimed customary legitimacy. Ethnic identity was fixed, you were born into your ethnic identity.

The largest ethnic group in Uganda had a handful of clans including that of Xhaka. If you look at the African history of culture, you could become zulu, Swahili, etc. there was no separation.

You could not be indigenous to a place even if you were born there. This is not African culture.

African people are migrants.

When I came to SA in 1991 I realised that it was not different. Here too custom was ethnic. I realised that the whole thing that the rural areas had been under customary law is a lie. Custom and Customary law are not the same.

Order was maintained by society, custom was not law it was a social resource. There were customary leaders, sometimes it was clan heads or chiefs. There were different customary authorities. The market was controlled by women. Custom changed and it sometimes conflicted. Customary law is the separation of custom from society and making it law and using it as a weapon against the people.

JHB reconnected at 9h46.

Two issues. In 2002 he became part of an organization called Lemo. It covers part of Uganda where land was customary. Land belonged to the people in terms of use. There was a question of how to maintain the rights of the user and ensure that the user has access to the market.

## Responses from venues

What people say

What was the mood like as he spoke? Were people agreeing or disagreeing? Any comments?

Any questions?

Reactions/Comments/Questions EL

**Prof Mamdani**-Most people seem to agree (by nodding and murmuring yes) with the difference drawn between customary law and custom. No questions were raised. No comments were made.

**Christian NW**-People kept nodding as activists kept hammering the fact that we are here to fight for our humanity.

**Zibuyisile KZN**-A lot of people were also empathising with this case. They were more agitated (and kept exclaiming) by the fact that the chief had sided with the mining businesses. The people were especially exclaiming and restless when they learnt that the KZN people were now receiving death threats. They also shared the same sentiments expressed in the videos on the negative impact of mining on the land. Some even joined in the singing and dancing of the Zulus (can't capture these gadget issues but the main videographer did).

**Margaret LP**- People listened attentively with interest. There was some nodding especially in relation to the point that there was a lack of public participation. There were more exclamations on the issue of corruption/bribery. Likewise with the notion of having a backbone and continuing to fight despite it all. One woman said "Danki mama ngokuba nesibindi" which loosely translates...

**Mahlake MP**-People concurred (murmured) with the notion of being deprived of their land which is then given to the rich that collude with chiefs. Many sympathised with the death of one of the community members who was shot and the speaker who was also attacked. This left a sombre mood in the room.

**Dr Fani Ncapayi**- Spoke of the case of Cala Reserve who successfully challenged the imposition of an unelected headman. The people attentively listened. People were at awe with the fact that the imposition of the headman was even perpetuated at a funeral where people would not say much as that is not the place or time for such discussions or for the community to be informed of their leader as it was not an invitation for a discussion. The people further showed engagement with the fact that the community was

not given a chance to engage and make representations, and that they were merely told that they now have a named headman. People were a bit restless and noisy at this point and asking for a break.

Highlighted that governance needs to be democratised because there is a lot of potential for autocracy in traditional councils. What role do the councillors that are not elected by community members but by political parties have? I foresee a case where community members want to elect their own people to hold accountable, what will this do to the electoral system.

**Mr Mkhize KZN-** People concurred with Mr Mkhize from KZN when saying we are still on a long walk to freedom, we need to decide on our own language of communication, English is foreign and confusing to us.

People also empathised with the woman whose land just next to their gate was sold by an Induna to some other people.

**Nomvuso EC---**Komani Gwatyu- We had asked for some piece of land for some development. We were never granted the land yet a great-grandchild of Mathanzima was given the same land to develop.

Mr xxxx from Centane—The Gloria Robe issue...an Agri-business in Centane brainwashed all chiefs, built them an office and bought them a bus. The community is left with unfulfilled promises. We had approached the LRC but they vanished as soon as they realised that we were dealing with gloria. She has now taken over our hotel. She has let her cattle graze on our land. We need help.

ORGANISING AGAINST BANTUSTAN MENTALITY, SELF-EMANCIPATION FROM BELOW (all? Language issue) - We will do our best in JHB and KZN and hopefully EL also to translate as we go.

(I will translate the Zulu segments of the conference in real time instead of waiting for the translator at the end.)

CHAIR: Constance Mogale, Alliance for Rural Democracy

Good Morning everyone. Thank you for allowing this panel to give us their experiences in relation to the challenges they face in their communities. We are going to play a 2 min video to show what is happening at one of the villages in KZN. This panel is meant to show power and how people defend their rights and how the Bantustan legislations are oppressing them such as TLGFA, MPRDA and now recent TKLA

Customary law belongs to the society. Our people are not waiting for the government to come to their rescue. Our people are not sitting like victims, not waiting for any messiah to come and rescue them. Seen betrayals eg. restitution of land right act for us to get our land back and we live in peace, but that promise was betrayed. Those who got land, the TL are colluding with companies to take land from our ppl

“Let sleeping dogs lie” notion does not exist for communities. The activists that we have worked with are not lying down, they are reacting, I am going to call Christinah from Mmaditlokwa in Brits, cross to KZN and what are their challenges and how are they responding to that. Margaret Molomo, radical feminist who has risen up to defend land rights in Mapela. Speaker Mahlake, from BBR who is working to enforce Ipilra. With the help of others like Shirhami Shirinda, Tshepo Fokane and others they have worked to ensure that traditional leaders are allocating land for people for grazing and ploughing. They have ensured that COGTA comes down to the people and accounts to them on what should be done.

We have come to the conclusion of the first session of today. What are we opting for? We are opting for farming, grazing etc.

## COMMUNITY ACTIVISTS

– **Christinah Mdau**, *Mmaditlhokwa Community, North West*

Christinah Mdau, Mmaditlhokwa in the North West commemorated the Marikana massacre in her community. Although people have been living in the area for more than 70 years, they were relocated by the company Tharisa and they continue to be threatened by mining expansion, causing environmental, infrastructure and health problems, and they call for respect for their identity and integrity - “We are called Bakgatla ba Kgafela in order to be controlled”, she said. “The situation that we are facing in reality is bad. Our land is our life. The dispossession of our land still happens today. We are confident, valuable, determined, qualified, dignified. We work hard with everyone affected, this is not a friendly summit, we are here to fight for our families.”

Good morning everyone, I am Christinah Mudau from Mmadithlokwa, Marikana.

We recently commemorated the ten year anniversary of the massacre.

We are here as activists. We were relocated by Tharisa. Our problem is that the mine has come closer to our community and we are experiencing many problems. We all have rights even though our situations are different. In Mmaditlhokwa there are families that have been living there for more than 70 years.

The purpose of our organisation is to observe human rights violations and respect for human rights. We are called bakgatla ba Kgafela in order to be controlled.

The situation that we are facing in reality is bad. Our land is our life, the dispossession of our land still happens today. We are confident, valuable, determined, qualified, etc. We work hard with everyone affected, this is not a friendly summit, we are here to fight for our families.

We were relocated by Tharisa where mining is happening in 2009

Problem is mine has encroached further into community

Cracks, damage, epilepsy, children suffering cerebral palsy, eye problems, breathing problems. When they feel you are a foreigner from Eastern Cape or Moz, your house will be repaired with stop nonsense. I come from the Mining Host Community in Crisis Network. During mine blast, people are made to evacuate when the mine needs to. Even those who are crippled they are made to go out

There are families with 70 years of residence, even when the farmers came, they had to demolish graveyards and I remember yesterday that potatoes turned into humans. We are relocated because white farmers had been relocated from previously. Saddens our community - purpose of our CBO is to observe and secure appropriate redress when human rights are violated, respect blacks and culture. Denied our identities by other peoples tribes - we are called bakgatla ba kgafela ba Pitsing - who are we really? Someone is silencing us, who are we really?

S24 of Constitution says we have environmental rights.

Despite fears, we hold onto our goals - we have to call out everything . Our land is our life - dispossession is still in action happening today

Rural governance silences the voice of communities. Land rights do not benefit landowners. "We are prosperous, valuable, disciplined , prepared, qualified, approved - that is why we are seated here today. "We work hard with everyone affected - this is not a friendly summit, we are here to fight for our humanity to be respected. Even when the farmers came, they demolished their graveyards to make way for farming. Aiming to secure appropriate redress where human rights have been violated, particularly for black people. We are being denied our identity so we could be silenced. "Our land is our life" [add direct quote of 'We are..... dignified etc] "We are here to fight for our humanity to be respected."

Zibuyisile zulu from melmoth

Member of ARD. We have been abused by mines- never consulted us but consult chiefs. Mines fight us and this has affected children. We fight because we see cars coming. I call on the community to see that the mine has arrived. We block their routes. We dodged bullets and told them they can kill us as this is our land. The chief is present with the mine, (is not present at the shooting? Please check)

They saw that we will not retreat. A police car was damaged as school children would throw stones at it,

A letter was sent requesting a meeting. It was a khukhulangoqo meeting. At the meeting the chief was not present. Police were armed. Chief eventually arrived. The police brought him in and he greeted us. He told the community that he is aware of their problems and requested that they go to Court and talk. He also does not want the mine.

In court, the chief did not discuss anything. A child spoke up and told the chief that he told them to come to court. The chief did not discuss the issues he had mentioned in the meeting. The chief has sold us out. There is nothing more I can say. [addition] The mine is threatening to kill us by sending hitmen. We can't even sleep at night. If we can get lawyers to assist as the elderly have to hide whenever they hear cars at night.

- **Zibuyisile Zulu, Matshantsundu Community, KwaZulu Natal**

Zibuyisile Zulu, an ARD member from Matshantsundu in KwaZulu-Natal recounted how a mining company Jindal (based in India) arrived in their village in Melmoth to speak to the traditional leader and not with the residents "the only person the mine communicates with is the chiefs. The mines only communicate using guns and violence." Attempts to get the chief to intervene to stop the mining failed - having promised to support the community against the mine, the chief was then seen in a mine-owned vehicle and claimed not to know about people's objections to the mine. Violence ensued, people were shot at. "If we are to die, let us die for our land", she said, and even as people were being attacked, and the chief watched from the car, SAPS vehicles would come to silence and intimidate community members. Some people are now not able to stay in their homes, because hitmen have been sent to assassinate them. There is an urgent appeal for help from lawyers as the community's case is still going forward. Meanwhile, people are very unsafe.



Good morning, I am Zibuyisile Zulu from Matshansundu. We have been badly affected by the mine and they have never consulted the community. The only person the mine communicates with is the chiefs. The mines only communicate using guns and violence. Our children are traumatised, they run when they see cars because they know that trouble is brewing. We said we are not leaving even with their constant threats of death, we will die on our land, we will die for our land. The chief was seated comfortably in one of the cars from the mine and he was going to watch his people die. School children even assembled and assisted us in fighting against the mine by throwing rocks at the cars. We mobilised everyone from our community, even the young men that have gone to work in Durban. We waited for the chief at a meeting we planned but he did not come. We had to get the police present upon the chief's arrival. We came prepared with weapons just in case his goons from the mine decide to attack. The chief arrived disoriented, he was brought by the police and you could see the fear in his eyes because he knew he was in trouble. He claimed that he did not want the mine at the meeting which came as a shock because he was the one selling us out.

Sanibonani, I am from Melmoth, the village of Matsansundu. I am a member of ARD. We are being oppressed by the mines that arrived in our village and did not speak to us as a community. The mine does not consult us. But the mine prefers to speak to the TL, when we go to speak to the TL they take out guns and are ready to attack us. Whenever our kids see that the mine staff are approaching the village, our kids come out running to say Granny, here is the mine. The mine does not even come to meet the headmen. Whenever the mine comes, i call all our community to say let us run onto the roads to stop the mines and we perform direct protest action when the mine cars and staff are in the village. The gun was fired at us even 5 times and we said we are not going anywhere. If we are to die, let us die for our land. The chief is inside the car when this happens watching us when we are being attacked so even if we die he will be watching us. Even the SAPS vehicles will be brought to the village to silence and intimidate us. We managed to speak as a community even with our neighbours who live in Durban to say to the chief, we need to have a meeting.

When it was time to have a meeting with the TL we met as all the communities under Entembeni TA and we waited for the chief the whole day. The police were even called again to disperse us from the meeting. The community meeting did not disperse until the chief arrived - he simply greeted us as his community. The chief claimed that he knew all our complaints and concerns and then requested that we meet at the office of the TL and members of the trade council including us as activists, residents and others. The chief wanted to meet with the community to inform the mining company Jindal that we do not want the mine. When this meeting with teh Jindal reps happened, the chief changed his story - the chief now said a young person should speak for the community (pretending not to know why the community has gathered). He also made sure that we do not take recordings of the initial meetings. The chief has sold us out. There is nothing more to say. I forgot to add something: we have had to move away from home now - we are not sleeping in our homes, the mine sends hitmen to our communities to assassinate us now. We are appealing for help to have lawyers because our case is still going forward.

**Reverend Mavuso (summarising Zibuyisile?)** [When they come with cars, we know they are coming to shoot us]. On one of the days we saw them coming, we blocked the road, we put tyres on the road. We were joined by school kids, they joined us in that struggle. We even had a big

meeting where we said we want the chief to hear us, because we want to say that we don't want mining in our land. Then the police came and then the chief came to us, and he said he knows our grievances. Then he said the following day we must go to the traditional court. Then the next day he changed his story. Then his brother said: ..... So it ended up being the brother of the chief that said to the chief that people are here to say you also don't want the mine in the area. We know if it is the chief that signed a deal with this mine - because when the mine came, the chief was in the mine's car. That is our story at Matshansundu.

**[video of what is happening at the Matshansundu village where Zibuyisile is from where they are opposing Jindal Mine a]**

They are fighting the proposed plan of the mine to mine iron ore in their area

Speaker 1: We do not want the mine, the mine is bringing suffering to our area.

Speaker 2: Our forefathers are resting in the land they want to mine

Speaker 3: If the mine doesn't go, there will be violence in the area

Speaker 4: This is in my blood - fighting for the mine

Speaker 5: I grew up in this area and it has fertile soil, my father's grave lies here and he asked me to protect his resting place.

Mining was a central theme. "It is painful if we can tell our struggles with the mine", said Margaret Molomo from Mokopane in Limpopo, who recounted how one day she was sitting "at home, where I built my home on land that belongs to me" when she heard from a neighbour that the mine is now destroying our land. The chief responded that he did not know anything about mining and that mining is not his business. "We confronted the chief to say we have documents that prove you have signed the mining deals and even received some compensation." Organised as Kopano Foundation, the community told government officials that they want public participation before a surface lease agreement was concluded, and refused to consent to mining but the mining began operations, irrespective of objections and protests. Struggles also related to graves, and attempts to get SAHRA to assist, and disputes over payments of R4,000 to households for prospecting on their land. "The same government that oppressed us is back. Our government is our skeleton diggers."

**Margaret Molomo, Mokopane Community, Limpopo**

Greetings, my name is Margaret Molomo. I am from Mokopane. The problems of the mine is what we are being challenged with as residents from rural areas. It is painful if we can tell our struggles with the mine from when we started to today, we will not stop. One day I was sitting at home, where I built my home on land that belongs to me. I was then called one day by a neighbour who said the mine is now destroying our land. Then I went to the Traditional Council the next day - the chief responded that he did not know anything about mining and that mining is not his business. We confronted the chief to say we have documents that prove you have signed the mining deals and even received some compensation. We told the chief that we will convene a community meeting and the chief did not attend - but we told the community that we want the chief directly to come and address us as people. We then started mobilising village by village, that is how Kopano Formation started (CBO) and we said let us go to the chief. We repeatedly went back to the TL and said that you are wanted by the community and you have a duty to address us. The chief said "my children, I am still preparing myself, I will come to meet you". Instead we learnt that the mine is ready with the surface lease agreement, not even consultation

- we refused and told the mine “not here on our land” and the mine had to abandon that idea. But the mine persisted, so it approached the Municipality and gov officials because they are sent by the President. We told government officials that we want public participation and we still refuse to consent to mining. But the mining began operations, irrespective of our objections and protests.

We learnt that mine exec Robert Friedland offered Mokopane Local Municipality some money of R11 million to ensure that mining does proceed. We know that Shanduka Trust under President Ramaphosa will get 5% - this is happening on our land. A grandmother will be given a mere R4000 when there is prospecting on her land. I told the chief that many have passed away, and I will not ever be scared to live at home and from now on I will be waiting for you to attack me. You will never come to my house with your thugs. That is how we have been defending our land rights.

Next problem is the graves. We spoke to Cape Town, SAHRA (SA Heritage Resources Agency) about our graves but they failed to come and assist and we know that the owners of the mine are located in CT with the SA heritage resources council/ We are also facing challenges of access to water. We also engaged SAPS to educate them on our land rights, now when we protest the police are with us and support our activities because they understand our struggles. When the mine officials complain that they have paid their bribes, we advise them it is not our problem that they have wasted money trying to steal our land but they will not succeed.

If we tell you about the challenges we face because of mines we will never end. One time when I was at my house, I was told by one of the community members about the problems caused by mines. On the next monday we went to see the chief and he denied knowing about the mines. We told him that we know you received payment from this mine. Monday we went to the chief. When we asked the chief what was happening, he said he didn't know anything. We asked while holding documents that show that the chief agreed and how much he is earning from the mine. We asked to have a meeting with the chief but he didn't arrive, his headmen were the ones present and we sent them away. When we met with the chief, the mine had a surface use agreement which was not successful. The mine then came with the people from the department to discuss the surface use agreement but there was no public participation.

When they prospect they give our grandmothers a once off payment of R4000 and that is it. We fought, they wanted to relocate the graves and build a water drainage system for the mine.

“The same government that oppressed us is back. Our government is our skeleton diggers.”

When officials from the government came to us we told them our challenges with the mine and why we don't want the mine to get mining rights. However, the state gave the mine the licence anyway. Mr Ngoako Ramahlodi was still a minister of the Department of Minerals at the time. I told the chief that I will never be afraid to sleep in my house fighting for our land. I told him that people are dead. The mine later took our ploughing fields. We reported this to the police and they said we must follow procedure.

**Speaker Mahlake, Moreipuso Community, Mpumalanga**

Thanks Connie and all the viewers from other provinces. I am from Mpumalanga Bushbuckridge area. This is a rural area that engages in farming. Open fields in Bushbuckridge are used for cultural purposes. What is happening there is that they are demarcating our ancestral land for residential purposes. Mr Shiramhi and Tshepo met with the forum and the chief and told them to

stop selling our ancestral land. We depend on our land for farming and grazing but the same traditional leaders are selling our land. We have watchdogs who inform us about any development in our land. The area that was visited by Tshepo and Shirhami has a lot of sand and the traditional leaders sell this sand without our concern and an old man who protested was attacked and this was during the lockdown. One old man was shot a few months ago. I was also attacked and they poured petrol on me. Mr Mabuza raised our concerns with Cogta but nothing was done. We have now decided to take it upon ourselves to protect our land. We are assisted by ARD.

We are surrounded by Mozambique and Eswatini, this is a very rich area with farming activities. Most of our residents keep livestock in their yards, open fields used for ploughing and grazing. The area is rich in cultural activities, we are diverse. Villages are administered by TC in BBR. When we are being threatened by the chiefs, most of our agricultural land is being demanded into residential areas and we are not being consulted. We rose up as residents and said we cannot allow business ppl to take our land. We wrote to COGTA to say we have rights and cannot allow the land in our area to be allocated to business sites. Thanks to Shrihari Shirhinda and Tshepo Fokane who have supported our struggle. In BBR most people have used livestock for their livelihood = we depend on soil and that is our livelihood and food security. But the same traditional council sells the land to foreign nationals and we have been fighting that. Thanks also to Mathews Hlabane . We have watchdogs in all our areas, if cattle farmers spot any developers we move as farmers to that particular area.

We have been threatened by the chiefs who are administering our land. They are demarcating the area to residential areas. They don't discuss anything with us. We cannot allow our cultural land to be taken over by businesses. If they want to sell their land they must sell their stands. We depend on soil. We depend on it for food security. They also sell the land to foreign nationals. We have resisted that.

Villages are run by traditional councils. These chiefs are threatening us.

We wrote to cogta raising our concerns as communities, we walked around showing them where we farm and land that we want left alone.

Traditional councils are also selling the land to foreign nationals and people who have money. If we spot any developments, we move to that area to stop those developments from taking place.

Mr Dibakwana has a PTO and now the TC is selling sand without permission of the farmers [sand mining] . We find the TLB digging without his consent. Fortunately during COVID the programme stalled. By the same TC, [Setlhare} was demarcating our grazing land into residential land. We have been attacked while defending our rights. I was almost burnt alive by assassins while defending our land rights. The serious challenge of TC is allocating residential sites to non-SA such as Eswatini around the Nkomazi area. Our collective position is that when we see anyone on our land, we go there to protect our land. We want to maximise our efforts to scrap this bill, because if it is passed then our land will be taken from us.

They were using covid to demarcate the area into a residential area.

We have taken a decision to stop anyone from using our land.

“Let's protect the land by any means necessary.”

### **Dr Fani Ncapayi and Nomvuso Nopote, *Cala Reserve, Eastern Cape***

The Cala Reserve case is a powerful example of contestation over the institution of traditional authority. Dr Fani Ncapayi set out this case, concerning the Cala area in Sakhisizwe municipality demonstrates in clear terms that the democratization of governance in SA remains unfinished. This is evident in rural areas; the system is still undemocratic because the community members do not elect their leaders. They are still experiencing the imposition of traditional leaders. In 2012, the headman retired and informed the community it was time to elect a new headman - because it is customary practice in most of the communities in the area to elect the headmen - but the traditional council rejected their proposed headman and imposed a headman instead. We were told: 'You as rural people have no right to elect your leaders'. Through the struggles of TCOE, CALUSA and Inyanda, and attempt to engage the Premier and the Provincial House of Traditional Leaders, without success, after which with support from LRC, the community took the case to court, and won; and won again on appeal; and when the authorities did not apply the instructions, the community returned to court for a further instruction to the traditional council to follow the decision of the community to appoint the elected headman. Fani left us with a question to reflect on: if we were to have elected leaders who are accountable to the community, what would happen to the councillors who are imposed on the community? Will people want their local leaders also to be councillors - and not to have councillors, as candidates, imposed by political parties? Either way, we need to look at democratising rural governance.

Morning everybody. I am going to share an experience of the case of the people of Cala reserve in the Sakhisizwe municipality. Who successfully challenged the imposition of an unelected headman. The case of Cala Reserve demonstrates in clear terms that the democratization of governance in SA remains unfinished. You look at it in rural areas. You look at it urban. Even though you have elections in 5 years, as members of TCOE we believe that the system is still undemocratic because the community members do not elect them.. We have a democratic government that exercises the same systems of excluding community members.

Although we have elections every 5 years in municipalities , that system for us as members of TCOE, CALUSA, INYANDA we believe is still undemocratic because communities do not elect leaders, they are imposed by political parties. The same imposition TL exercise in rural areas. The case of Cala Reserve, from 2013 the origins is the TLGFA of 2003 and communities started seeing implementation and effects of the Act in 2007. Neighbouring village of Tsengiwe had the headman who passed away and, at the funeral of the headmen the community is informed that they are lucky that they even have a headman who is imposed on the village. That headman is still in power even today!

Interestingly, while South African residents rejected the laws being imposed by the current government and that of apartheid, these communities are still experiencing the imposition of traditional leaders.

Cala reserve is a neighbour to Tsengiwe where this headman was imposed. What happened in 2012. The Headman who had been in office since 1979 retired, and he informed residents and TC that he will retire therefore the community will need to elect a new headman. The TC promised to follow up and engage the community towards the end of 2012. At the beginning of

2013, the TC then promised to return for the preparations of another headman. But residents knew according to their practice in their area they will elect their headman. The residents decided to elect yet the TC rejected their proposed headman instead TC said they will come to the village and impose the headman.

Most communities elect their own headmen as practice in these areas.

On 23 March 2013, the TC advised they are not there to discuss, instead they are there to impose the new headman. That is the first time the community saw the headman - the TC rushed the meeting and dismissed the rejection. The residents began mobilizing against the headman being imposed upon them and processes included letters and correspondence to the Premier and the Provincial House of Traditional Leaders.

We are working with the community to teach what their rights are in terms of the law.

We were told: 'You as rural people have no right to elect your leaders'.

So a decision was taken to take the matter legally. That is when we involved the LRC. I want to highlight a few things about this case. The first sitting was in favour of the community. They appealed and we won that appeal process again. They were instructed to apply the practices of the area which they didn't do. When we went back for the review of the appeal, they were instructed to follow the decision of the community to appoint the elected headman.

I think the issue of governance needs to be looked at in terms of it being democratised. One issue I want to leave you with. If we were to have elected leaders who are accountable to the community what would happen to the councillors who are imposed on the community?

I foresee a situation in which rural people will say we want our local leaders to be our local councillors in the municipality. [I think I got this wrong?]

We need to look at democratising rural governance, an issue I want to highlight = if we have elected leaders accountable to communities at community level then the next Q is what about councillors not elected by communities who are not based in our communities but imposed on us by politicians.

Comments and Questions:

### Johannesburg Questions

- **Malatse Mampye** from Bakgatla ba Makau; Can't we come up with legislation that focuses on reparations for mining dispossession?
- **Jonas Makubunyana [from where?]**: My question is that the government is separating land from other elements, we have water rights, ploughing, hunting, grazing, harvesting rights, heritage rights and where will we practise our rights when we do not have land because the government wants to compensate us with money instead of land. If we opt for cash instead of land, where are we going?
- **Koketso Manku, National Movement of Rural Women**: social justice practitioner (from?): Do mining communities not prefer to have mines in the communities or is it a

matter of transparency, or could they be fishing for benefits? It is painful to see how our traditional leaders are treating people despite chapter 12 of the Constitution.

### Durban

- **Bhekisisa Khanyeza:** I have no questions but a comment; a huge problem we are facing is that there aren't black people in South Africa but slaves. Everything we do is done in English and all we are doing is for them. Mandela once said that it is a long walk to freedom and there isn't any freedom at the moment. I want us to have our own language of communication that might be used for everyone to understand because English is confusing the masses.
- **Nonhlanhla Shabalala, Jozini:** I want to share a painful experience. It is painful when your parents who lived on the land for 35 yrs, then one day the induna arrives and allocates the land to a stranger. At home we have a ploughing field and then a stranger arrives who wants a site for a car wash. Without being consulted we lost our site; the induna and chief said we do not have any land rights, the land belongs to the chief.
- **Dingeni Mthimkulu, Babanango:** I want to talk about mining and relate that I am also affected by the same challenges in our area. I believe that mines will destroy our land once they start operations. I am also affected and I am in solidarity with the people of Entembeni to oppose Jindal Mine [based in India] that will destroy livelihoods and food security. On the Cala Reserve case I also learnt how painful it was that the community elected their own TL but they were defeated - thankfully they were able to stand up and fight.

### East London

- **Nomsa [surname?] from Gwatyu:** (The first part wasn't fully captured?) Mathanzima's grandchild came to our land and he claimed that he bought it. My question is why did the government approve this purchase? They closed the gates and we have been deprived of water because that is now his land. We have to wait more than two hours to get water because the person who opens the gate is having lunch so we have to wait for him. Mandla Mandela came to belittle us in April telling us that we have been surpassed by a child as a result of our rebellion and he is pushing a project meanwhile we have been begging for that land and we still are.
- **Mr Ntshoko] From Coastal Links:** It is going to be painful because I am going to speak about Connie's friend. We have a woman who has taken all the chiefs, build them an office. She told us that she is going to start a project. She started a farm with our grandfathers' land. We were looking for someone to assist with farming. All the crops we had planted were destroyed and eaten by her cattle. Gloria?? We do not know where to go to express our views/ our cries. The LRC went to intervene but when they saw that it was Gloria they disappeared. She took our hotel KwaNobanjana. In that hotel she is encroaching on our land a lot. We are trying to remove her but she is resisting. She has a titanium project that we would like to get involved in but have been unsuccessful. We want help. We do not know what to do anymore.

## COMPARATIVE AFRICAN EXPERIENCES WITH FORMALISATION

CHAIR: Admos Chimhowu, *University of Manchester*

We begin to look at the attempts to make land under customary authority more secure

We have 3 great presentations of countries facing similar issues-uganda, malawi and mozambique. Each presentation will last 15 mins and 5 min notice. I'd like to invite Judith, Clemont to get on with the presentation

**Evaluating land titling as a means of securing tenure in the context of customary tenure: A case of Uganda, Malawi and Mozambique** Judith Atukunda, *LANDnet Uganda*

Junior Alves Sebbanja, *ACTogether Uganda* Kate Chimwana, *National Engagement Strategy Platform for Land Governance Malawi*, Clemente Ntauazi, *Livningo Mozambique*

Thank you very much, chairperson. Good afternoon ladies and gentlemen.

I am presenting this in my capacity as a fellow of the Netherlands Academy - this is where the research was done. I will be presenting a study done in Uganda, Mozambique and Malawi.

Secure land rights are considered key for economic development. It is also argued that african indigenous land tenure systems should be registered to cause development. That development is experience through poverty eradication, people feel safe now that land is registered

A number of countries have taken steps to pilot the approaches that have on board to formalise customary land, and they come under the titled: Evaluating land title rights as a means of securing tenure in the context of customary tenure ..... they have the concept of systematic titling and have leveraged used in technology such as open source software and crowdsourcing the tools focus on immediate problems, it can be termed as ...perceived tenure security overlooking the sustainability, the long term impacts of reg, and how registration falls into the framework of ??

We examined how it has developed in the three countries. Objective .. document failures and successes in formalisation. The method adopted - lit review, sampling for field work, primary data collection was done through interviews and dialogues then presented in a report.

First findings: after lit review we look at pre col era - what was it like prior to col

Malawi: land was help communally by tribes. Local and trad leaders were in charge of the land -it was categorised as private

Sec tenure systems : uganda - lease owned

The land act came into force to regular land.

Long term registration- Examined how it manifested across the 3 countries.

Successes, challenges and strategies.

Uganda, which is similar to Malawi

When it came to practice, how land is held, what custom governs the tenure system it became a problem

It proposes the set of a land registry like it is for the rest of the tenure (uganda and mozam) it was run across the country by traditional leaders and colonial in complex relationships ( this shows the power dynamic) re the mines coming into comms in South Africa. Who has the power in SA? The security system exists alongside informal/cust tenure.



The study showed it is clear the legal framework allows docs under customary arrangements - gives user rights and documentation of the same.

Mozambique DUAT and certificate of ownership(uganda) recognise a person's right under customary tenure. The document can later be processed to create a cert of ownership.

Countries are making strides when it comes to build land info systems and are tech advancements that move away from non digital ways of producing land information. That also informs the relevance of the approaches as they are more for collecting data in digital forms. It has its own problems - not discussed now. Some of the words I quote from the interview "[check quote] for the info to fit, certain technical requirements must be met. you are superimposed under the customary system that requires a general boundary approach. Some communities know where their land is.

It is crucial for Uganda's legal framework, especially the Survey Act and Registration of Titles Act to be amended to allow for current initiatives on titling. Certain operations operate outside the law (customs aren't well incorporated when they are elevated to a statute level. How do you incorporate the legal systems into customs ?

- What rules must be followed for foreigners who want to acquire customary land
- Successes: reduction in cost of land registration - due to systematic later. Increased security of tenure, comparison between perceived security and defacto security- whether the governments protects people's rights
- Reduction in land conflict
- Increase in economic returns and reduction
- Challenges:
  - Ineffective in combating cultural norms(woman are prejudiced)
  - Beneficiaries didn't receive their title deeds

Conclusion: Land titling and certification is not an end but a means to an end. All parties must be involved and women's land rights must be at the centre as they are main users of the land.

Reccs: titling systems have to be well grounded in legal and policy frameworks that gov cus and stat systems and be tailored to .... And ensure deliverables are given to communities.

Attention must be given to women and children( vulnerable groups)

There are insufficient resources when implementing these projects.

"Attention needs to be given to be women, children and the vulnerable"

Land was held communally in Malawi by the native trust land.

The National land policy proposes progressive policies which need implementation.

What we found in the study is that is clear that the legal framework in these countries provide for documentation under customary arrangements that confer user rights to the occupants of such land for example Deireitode Uso e Aproveitamento da Terra (DUAT) in Mozambique and Certificate of Customary Ownership (CCO) in Uganda.

Thank you for listening.

### **The impact of formalisation on women's land rights**

Phyllan Zamchiya, *PLAAS, University of the Western Cape*

Chilombo Musa, *University of Cambridge*

A dramatic development is underway with forms of landholding evolving closer to western models of private ownership - in part due to formalisation initiatives imposed 'from above' - but there are also more incremental forms of change emerging on the ground. From 1990-2017, 32 new land laws were introduced across Sub Saharan Africa, many of them focused on formalising customary land rights. What are the implications for women? A PLAAS study was conducted with partners in Mozambique, Zambia, Zimbabwe and South Africa and 443 questionnaires were administered to look at land rights changes in customary contexts. Formalization takes different forms in different countries, and is promoted by the World Bank which has put \$100 million into these processes. Meanwhile, there is also a change on the ground, for instance in SA, urban elites hold onto customary land to avoid paying rates and to seek cheap retirement homes, building mansions on communal land. Chilombo shared the results, explaining that politicians advance 'flanking mechanisms' to justify formalisation, by arguing that women will be able to own property in their own names. The reality is more worrying. In Mozambique there is a difference about which women can access these: married and widowed women can access, but divorced and single women have struggled to access. In Zim and SA, commodification of communal land is becoming common. Traditional land is being sold by chiefs. Women who are connected to local elites tend to benefit from the registration of customary land holding certificates. So we see exclusion of certain segments of women. Violence perpetrated against women and 'sextortion' against women is linked to access to land. 65% of our respondents were asked to pay exorbitant fees in order to be able to register land. Women said they cannot access registration. What women say they prefer is to live on communal land - but patriarchal practices are an excluding factor. There needs to be measures taken to combat these issues that stem from patriarchy within customary systems - rather than replacing customary systems with formalisation.

Thank you very much colleagues for joining this session. Thank you to our esteemed chair. Today we will talk about the impact of formalisation of women's land rights together with my colleague. I will talk about the context and my colleague Chilombo will go into empirical findings. As Judith has tried to emphasise there has been a dramatic development in Africa about the need for the form of prop rights in land. Our chair has written authoritatively on it. In other cases it involves a conversion of customary land rights like in ... and Zambia and the land use is transforming the landscape.

Landholding is evolving into the western model of private ownership. "Evolutionary Development". From 1990-2017, there were 32 land laws were brought in across Sub Saharan Africa and much focus on formalising customary land rights

The African Union has declared a goal of 30% benefits for women, to own property in their own names; to co-own prop resources, to co-own family and common property, resources to bequeath land as inheritance, to borrow money from banks and invest. Some people believe it leads to the deepening of democracy. .

They are being forcefully supported by emp data

Rwanda leads this through certs of title, establishment of land admin info system

They have improved land access for women

Rwanda adopted a model without gender bias

Our departure point, the form approach is a deeply politicised approach : how many certs have

been issued ...

Approach:

- Narrows down to a depoliticized approach
- Power and property relations that are not gender neutral
- Territorial interests of the state
- Consequences for excluded groups
- Study was done in zam, zim, mozam and SA
- 443 questionnaires were done
- Formalization takes different form in different countries
- In mozam the program targets 40% of beneficiaries of women
- Zam: unleg custom land holding cert. It is being driven from the law by donor support. Whether legislated or not Registration is more and more important in the African continent
- SA: urban elites move to custom land to avoid paying rent and get cheaper returns
- zim t local state apporpirates land for urban dev.
- Consequences are high for women, poor and marginalised.

Chilombo:

- I will talk abouts results,
- We compared 2 countries mozam and zimbabwe and grouped Zimbabwe and south africa together for sims.
- What we see in the 1st, they have flanking mechanisms, when we look at dev narratives for form of custom land
- Arg1:
- Women will be allowed to own property in their own name
- In Mozambique: single women and mono women benefit more than women in families
- In Zambia: those women have access to info, more knowledge, connected to local elite(benefici of customary land certificates)
- Argument 2 :women own comm prop
- In mozam and zam comm prop resources are not being registered under any system and women
- Argument 3: form reduces land conflict
- Evidence: based on boundaries determined through form, in zam 85% respondents say land conflicts are reducing.
- When it comes to cert holders accessing credit it has no big impact
- In SA and Zim: compared experience based on dominant narratives
- ... prevalent in both countries . In South Africa traditional leaders sell off customary land and violence on women. Women are excluded using violence. Women who stand up for their land rights are being abused
- In Zimbabwe: 67% reported paying high fees to access customary land which results in excluding women who can't afford those fees:
- Women were asked - do you want customary land to be formalised?
- Women prefer to live on customary land, patriarchal systems are prevalent and they exclude women from the access, use and transformation of customary land.

Land holding is evolving land laws

Ideological thoughts are not sufficient to deal with the issues, they now also need to work wit solid case studies

- Formalisation is happening different in different countries
- 100 mil USD - put forward
- Mozambique

- Zambia - eg of traditional land holding certificate.
- In SA - urban elites hold onto customary land to avoid paying rates and to seek cheap retirement home
- Women are still socially marginalised together with the poor. In SA there are mansions on customary land.
- You see the dichotomy of rich and poor in real time.

Chilombo Musa, carrying on from Philani, presented the results, comparing Mozambique and Zambia. Flanking mechanisms are evident, justifying formalisation, especially the main argument that women will be able to own property in their own names. In Mozambique there is a difference about which women can access these: married and widowed women can access, but divorced and single women have struggled to access. There is a differentiation and exclusion of certain women. Another argument is that women will be able to gain access to common property resources. But we found that common property resources are not being registered and women are being excluded. In Zambia 85% said that their conflicts are decreasing.

In Zim and SA, commodification of communal land is becoming common. Traditional land is being sold by chiefs. Women who are connected to local elites who tend to benefit from the registration of customary land holding certificates. So we see exclusion of certain segments of women. Violence perpetrated against women and 'sextortion' against women linked to access to land. 65% of our respondents were asked to pay exorbitant fees in order to be able to register land. Women said they cannot access registration. What women want: women prefer to live on communal land - but the patriarchal are an excluding factor. There needs to be measures taken to combat these issues that stem from patriarchy.

### **East London responses**

**Nomonde Phindani:** I want to comment on the last presentation. Just two things that are frustrating me. We get so excited with little things that we think are achievements. IF we have 50% of women in 50% we celebrate. But is that helping us as poor and disadvantaged. Listening to this presentation on how women are considered in formalisation. We can be given land and still be disadvantaged. If we look at the history of oppression. IF you give me land without any support it does not help. If you give me a farm with no skills then there is not much I can do. Whether land is in my name or not it does not help on its own. It does not excite me. If you give me land but there is no market for my produce. Then they give us a few wheelbarrows and expect us to celebrate that. Is that something we should be celebrities? We are still excluded economically as women. There are other skills and assistance required to be provided to women - women empowerment needs to occur on a practical level - taking into account the exclusion that occurred to women in SA.

**Busisiwe Tshalana** from Kwabaca, Mount Frere: as I have heard about discussion about land and women - I almost used soil instead of talking about land. I heard them talk about the oppression of women. I hear that in other countries it is better for women. I asked myself. How many women own mines and how many own farms? There are many different pieces of legislation? Women have long been oppressed. If we are married in terms of customary law when my husband dies and I go and report it. I am told that I am somewhat inferior to a woman who married my late husband in terms of civil law. However, were have been told that if you celebrate your union in terms of customary law you are deemed as married. However, we see in practice that is not the case. It is quite evident that men are more free than women. If you're driving behind a vehicle that is not really observing the rules of the road, people often say that it is a woman that is driving. Even after realising that it was a man driving the person who said

that does not correct themselves. It goes to show that women still have a long way to go.

Bonani Loliwe:

First issue- How many women own prime land ( this includes coastal land)?

The status of women has long been overlooked.

Comments/Reactions/Translations EL

### **Judith Atukunda**

Translation---- Research was done in Malawi, Mozambique and Uganda to establish the meaning of granting title deeds in relation to communal land. The registration of title deeds took a long time but with the necessary technology (the sort we currently do not have in RSA), it was done. This brought hope for development to the communities. The successes of this process are that it is cost effective due to the tech used. It has also resulted in less conflict over communal land. However, there are still people who have not yet received those title deeds...similar with the issue of restitution in RSA. Further, we should never think this registration is the end of the process, it is only the beginning. Most importantly, women's rights must be at the centre of these processes.

### **Junior Alves Sebbanja**

Translation—The most important thing is that the registration of communal land must take cognisance of women's rights ....

From Zambia and Zimbabwe land was indeed given to women. From a distance this looks good, however, the power over this land is not necessarily with the women. When you zoom in you realise that most women who got the land in Zimbabwe are married. In RSA ...

Let us not make our land a commodity, something we're always looking to sell. The people were then promised that they would be given summaries of these presentations, so to save time the translations would be cut short.

### Questions

**Nomonde Phindani-** a comment on the presentation by Phinani. I am frustrated by the fact that as women we get over excited by things whose meaning we do not even know. Merer representation might mean nothing. We may be given land and still be disadvantaged. We tend to be given land without the necessary training, equipment or market to work the land. Empower women holistically. Merely giving women land means nothing. We are expected to be happy with the bare minimum that our government does. The room concurred.

**Busisiwe Tshalani Mt Frere-** I wanted to talk about soil but then I was like nope, land is much more appropriate. The oppression of women moves me. I wonder how many women actually own farms. Even the marriage regimes are as oppressive, one thinks they are married but then upon the death of their husband they learn that they are not legally married and the marriage is not recognised. All these things are oppressive. Freedom for women is still an unknown phenomenon. All it means for now is that there is "freedom of a man over a woman". Women are always treated with inferiority.

**Dr Ncapayi-** Are we condoning private property? If yes, what about the costs of the titling process? If we privatise land, how are we going to ensure that the land registered to certain people who are not using it is accessible to those who would like to work it?

**Chair-**How many women own prime land, including coastal land?

Responses...logistical issues, we cannot stay to get the responses...

Durban Responses:

We cannot expect private actors to be at the center of this.

The sustainability of this is very difficult without outside finances. A lot of poor people are failing to pay the state.

Philani's response:

- It is problematic at a policy level - eg. assumption that if people have a certificate they can access finance from commercial or other sources. But this is not the case. You need a capable and efficient state.
- If this is privatisation? Definitely, formalisation is a privatisation model that is being implemented gradually and in a less costly manner. The players at the centre of this, the World Bank put \$100 million. You will see where it is coming from, and the logic behind it. And the idea is to create some kind of land bank for the investors, so that they can make the land 'legible', so that it can become transactable.
- What is the future and sustainability of all this? In our study area in Zambia, there were some difficulties in terms of handling the local register. The people working on it - paralegals, survey people - are overwhelmed and it's not up to date. The certificate is not the solution! There are increased rates of homelessness and landlessness. This is because, where people default, people lose their land. Customary land is converted into state tenure when the state acquires the land as people default. **(so it goes from customary land to private land to state land).**

### **Land Law Reform and Tenure Security in West Africa: Evidence from Ghana**

Augustine Fosu, PLAAS, University  
of the Western Chere i

Good afternoon colleagues. I am very happy to be part of this conference. Looking at the context, I know my two colleagues have given a full bag of form ???. Trying to view this one in historical context. In col period, africa saw a lot of land reforms that were distorted in favour of colonisers. The key purpose of this was to give a robust legal perspective on land reform. There is a breakdown of land law reforms and the community. Most of the people were not aware of these land laws due to lack of education.

Many has been said in relation to formalisation. I see from our observation in terms of what transpired yesterday. I will give you a presentation on how this has happened in Ghana. This paper argues that the conception that land law reform will provide a strong legal framework for

land titling registration and the formalisation of customary land rights will support the tenure security of poor households and women, in particular are a misnomer in Ghana. Rather, historically, land law reforms are implemented to shield capitalist accumulators to perpetuate their exploitation of poor households through land titling registration, and the reforms fortify the position of traditional authorities in land administration to expropriate their subjects during land commoditization without the state's interference.

Regarding title registration in Ghana and Africa more generally, in relation to what transpired yesterday and this morning, a common theme is a disease of dispossession. Perspective on how this happened in Ghana - the conception of land law reform . LLR I am going to give a presentation on how this happened in Ghana. [very powerful verbatim quotes if we can harvest them - maybe from ppt]

I used secondary data. Ghana has used land law reforms since colonial periods, there is a breakdown as a result of various contestations. Land law reforms are political processes, but most of the LLR being conducted in Ghana do not involve the ppl. He has researched this issue, he found that in colonial periods, they set up their own tribunals , using educated people to interpret the customs. They used treaties 9 that were the Tripartite treaty of 1831 and xxx? There are treaties that colonists used to enter land issues, like the Tripartite treaty 1831. Further there were various ordinances that were promulgated that gave the colonial powers rights more above customary rights. In fact it relegated the Ghananian people's right in land as similar to a usufruct.

Low levels of land registration. Most people were not aware of the land laws that were in place - only local elite and foreigners had access. In this manner they used state power to dispossess people of their land. In contemporary Ghana - chiefs now hold power so much so that they can invoke state processes to dispossess people of land (not sure if accurately captured)

De facto land registration - most people are still not aware of the land laws and processes in place. The administration is cumbersome - which causes further issues. Leases ?

to tenure security, when there is a change in chiefs peoples tenure is affected. Chiefs can ask you to bring your documents (to prove ownership) if you don't have it you can be dispossessed of your land. He found that due to the statutory reg of the power of chiefs - they control everything.

Even the kings do not respect the laws in place. King said that not all that is printed in the act is applicable to his jurisdiction.

conclusion LLR has created a system where customary law is now being used to dispossess people of their ancestral land. Women are particularly affected.

Augustine Fosu's research in Ghana shows how the legacy of colonialism is that even in the present day, "Chiefs invoke the power of the state to dispossess their people."

Few people register their land in contemporary Ghana today.

There exists de facto land titling registration.

Traditional leaders sign for the allocation of land to residential areas, people do not know anything about this process because they are not included in the participation by the chiefs. Even the official government does not do anything, they are directed by the traditional leaders and chiefs.

"Chiefs have a lot of power, they control everything and they do not respect the land laws that are written."

Chiefs, social elites, politicians and foreigners use traditional laws to dispossess communities of

their land.

Most customary land is not registered. There is lots of tenure insecurity. There were a lot of evictions as a result. Scholars submit that land law reform is a political process that leads to tenure changes leading comms to lose their identities. Treaties were used to enter into local land matters. At that time in Ghana there was no total colonial control. Ordinances were created to give auth more powers that did not exhaust under custom system. tras d councils were ... they were consid as usufructs.

Land rights got interpreted according to European land and property systems. Only the local elite and foreigners could register land rights. There was a political alliance between state and traditional system, so that the state did not interfere in land matters. Most were not aware of land law process because they were not informed. Leading foreigners to use land fir their benefit. Chiefs were given power, and invoked state power to justify what they were doing to communities. Most land reforms conducted were backed by donors, as a result .... Of the chiefs, chiefs no invoke the power of the state to expro from their people. Land title registration has been too slow. Only a few can register their titles and tenure security is very poor especially in areas around... [?] 1. existence of de facto land titling registration - when people are educated they can reg their land. Highly educated people do not participate because of their higher education. 2. Awareness of land laws, land titling registration procedure, the relevance of lease and planning of the community is a problem. "Quote from slide" 3. Land use type, litigation of land and threats from traditional authorities. 4. Determinants of the impact of land law reform tenure security in post-colonial Ghana.

Concluding: Land law reform has led to a process where people use it to dispossess other people from their land. I recommend that land law reform in Ghana and elsewhere must involve the whole country and be incremental rather than discontinuous. Clans and families should be able to allocate land - not chiefs. Power to allocate should be devolved. People themselves know how to protect their land. Research shows that people know their boundaries. Land law reformers created a new system, where people use it to dispossess others from their land. Causing strife especially for women who are displaced further from necessities ( food/water) Chiefs break their fiduciary rules and do not get any prosecution (no state interference) and people harp on this issue. Statutory recognitions of custom land admin and political alliance between chiefs and politicians

### **Durban questions:**

**Msizeni Myaka from Babanago:** Mine owners used chiefs/traditional leaders to exploit our people. In Ghana they had their way of life. The government now changed this and gave chiefs power. Just like SA, our leaders are... [add] it is now clear that we all have the same challenge. When investors come they use chiefs to dispossess Africans of land. Government promotes it. When you see people getting evicted, there is a chief behind.

### **Johannesburg**

**Baby Makgeledisa:** What does the law of african courts say about the continuous dispossession of land?

Does the certificate that one of the speakers was talking about include grazing and water rights for women? If yes, can financial assistance be provided? People experiencing financial



challenges, will they be assisted. Are they just gonna be left so that their land will be reposessed by the bank

**Elizabeth Moleko:** I am a widow. Where I live our Chiefs are councillors. I have lived in my area for 29 years and I still don't have a title deed. What do I need to do to get a title deed? Secondly do the councillors have a right to give out/sell land? Where I am situated, there is an abundance of minerals, there is water and coal under the ground I am living on. My house shakes because of the mining that takes place near my house. I want the government to give me my land, I am a woman and can work the land. I do not want the R25 000 compensation that the law together with the government wants to give me (as compensation for land?) Yes.. The counselor sold the grave yard for R2000. I live off the land and make my living by farming. "Enough is enough."

**Christopher Mohulatsi:** Mozambique did not have traditional leaders, this was the case when samora machel. necessary training and funding is necessary in respect of women empowerment initiatives.

**Makubyana Rabogajane Jonas (holding horn):** I am holding Phalaphala, a whistle. We are asking for the government to interact with the community. We want the government to have a channel of communication when we can talk and get access to the on a daily basis

## Responses

**Judith:** A lot of what was spoken about are borrowed concepts - What are the approaches that work best for us. Don't simply impose on the communities. Right to learn, however, how can we access the market - we need to bring in the leaders to understand and critically think about community problems in that manner.

**Augustine:** In relation to the network that has been established, because in the African context, the chiefs are also there, in the meetings, ppl must also attend and stand up. NGOs support is also important. We must understand the position of women in patriarchal societies - look backward, but also how it affects women today - need to be backward looking, currently analysing impact on women and forward thinking (sorry paraphrased here) . Believe that the support from NGOs is important and will take the conversation far.

**Chilombo:** I want to end with- there are alot of power struggles. Translate to women further being excluded and vulnerable to formalisation processes. There is this exclusionary method being used in Zambia. Land is not being registered and communities cannot access the land going forward. Breakdown the processes and vested interests so that it may benefit people. A holistic process is needed.

**Philani:** Is the land title giving people access to water and grazing land? On the issue of traditional leaders in Mozambique, the main argument is that this is going to improve land governance. On the ground there is a shift in the decision making powers from families to the ruling party elite. This also happened in Zimbabwe and Zambia. If you look at the sector of the ???? it is referred to as the 'cock' (local word?) which in local idiom reflects masculinity. There are traditional leaders in Mozambique - but they were not involved in land admin. Are title deeds important? \_ yes you can register your common property DUAT (land title). But what is happening on the ground is prioritisation of residential land. There is a need to challenge the notion of 'land banks' (or portfolios of land available for investment), as this prioritisation is

occurring to benefit the investors. Civil society must push for consultation. Scholars must have enough academic courage to challenge the development models that are not benefiting the poor, especially women.

UNDERSTANDING CUSTOMARY LAND RIGHTS IN CONTEXT: HISTORICAL INTERPRETATIONS  
AND CURRENT STRUGGLES

CHAIR: Nolundi Luwaya, LARC, *University of Cape Town*

We will ask the presenters to share their presentations.

**Ascertainment and Ignorance: the Making of Customary Law of Land in the Eastern Cape**

Derick Fay, *University of California*

'Native assessors' served to assist magistrates in the colonial period to administer the law, and played a significant role in the Cape, giving testimony in about 1 in 5 cases based on the records from 1905 to 1920. There were very few 'land cases' in the Eastern Cape - but land was a factor in many cases, for instance on inheritance, debts, payments, compensation and so on. Land was considered to be purely an administrative matter. Derrick observed that "when land is treated as purely administrative there is no need for the court to understand further; likewise, the claims of widows and other perspectives may be dismissed rather than being heard in detail." In the case of Bizana, customary law was recorded through case law and filtered by administrative legal systems. As with other attempts to integrate customary law into western legal systems, there was profound gender blindness (for instance, native assessors not interviewing *any* women). In all these cases, there was little enquiry into the content of customary law. Little is said about 'Native Assessors' in the archives, but case records provide insight into their role in specific domains of custom like customary debts and payments. While land cases are scarce in native appeals. The formalist approach to land matters, and has had profound impacts. Then, as now, the courts remained ignorant and did not look at how tenure relations were changing.

Where do the court cases come from and where do they not come from?

How do these reflect different histories of engagement?

The second area I consider here is the personnel in the courts. At the time of 1883.

It became clear that the position of assessor was used to train magistrates and as a way to get

...

Approximately 1 in 5 cases was considered in reference to the testimony of the native assessors. Of the 400 ...

Land cases were extremely scarce in appeals and native appeals but there were a lot of them.

Land was considered to be purely administrative ...

"... when land is treated as purely administrative there is no need for the court to understand further likewise, the claims of widows and other perspectives may be dismissed rather than being heard in detail.

The native assessors 1905-1920: case records show 1 in 5 cases was considered in ref to native assessors. The cases are limited in scope and deal with customary debts, payments, compensation for an imbongi etc.

Case of Bizana: customary law recorded through case law and filtered by administrative legal

systems

Question: how does the court learn about customary law?

- Paper (currently been written) is about the process called ascertainment
- How actors come to know about it ?

Attempts to integrate customary law into western legal systems. Profound gender blindness  
Asking the important question: Who actually provides information??

3 areas of evidence

- Spatial (where do court cases come from and where do they not come from)
- Personnel (who provides information, what are the roles of the assessors)
- Substance of the cases themselves

Little enquiry into the content of customary law

Native Assessors: not much is said in the archives. Case records provide insight into their role.

Look at customary debts and payments. Limited to specific domains of custom.

Land cases are extremely scarce in native appeals.

Formalist approach to land matters

Remained ignorant as didn't look at how tenure relations were changing.

### **The Municipal- Traditional Authority**

#### **Interface in the Governance of Land Under Customary Tenure in South Africa**

**Gaynor Paradza, *Public Affairs Research Institute, University of the Witwatersrand***  
**and James Chikwezira, *North West University***

This presentation addressed how customary land tenure is administered in SA, and specifically how municipalities and traditional authorities govern land, using data and interviews on Bushbuckridge in Mpumalanga and Mokopane in Limpopo. Key issues in customary land administration are that community rights are not registered and so there is a multiplicity of statutory, cultural and religious practices/laws, and ambiguity creates loopholes that some actors - especially male traditional leaders and state officials - exploit to their advantage. Traditional councils continue to issue PTOs (permission to occupy certificates) when large-scale commercial land deals are introduced like for shopping malls, and it generally happens without consulting the customary and traditional landowners as indicated by Speaker Mahlake. Developments are happening in areas under traditional leaders and the only 'stakeholders' are the traditional leaders and investors, leaving out the community. There is pressure on customary land to convert to perceived more secure forms of land holding in SA, mostly because of individual elites and companies coming in. For this reason, there is a need to develop and improve ways of recording rights and tenure systems in rural areas to protect rights of the indigents.

Thank you very much, colleagues. I also want to recognise the organisers for inviting us. I also want to recognise Mahlake from Bushbuckridge who also did a fantastic job.

I will speak with specific focus on PTOs, highlight policy issues and provide concluding remarks.

We always find that land is a strategic resource for our livelihoods. You always find that it is used as a generational tool to fight off disasters and it is part of our identity.

There is pressure on land resources that continues to mount. One of the key issues when you appreciate customary law ...

We explore customary land tenure on the basis of evidence. We then highlight policy vacuum levers.

We also look at approved strategies at both municipal and provincial level.

We know that communities and individuals hold individual & community rights.

Beneficiaries have conditions that are not based on gender .

In Bushbuckridge there is this emergence of developments (malls, shopping centres).

Thanks Prof Mamdani - excellent presentation that unpacked and made relevant the key issues and contestations around customary land systems in Africa and Southern Africa. Also want to recognise the organisers for bringing various land activists together.

I recognise Margaret Molomo from Mokopane which is also an area included in the case study, in addition Ntate Mahlake from BBR municipality.

Land = strategic livelihood resource; land resource

Land is also an intergenerational asset and form of identity and belonging.

Land governance involves stewardship, generation to generation; just or unjust; sustainable or unsustainable pathways of development

Customary tenure is estimated at less than 20% of the total land area

Realise that there is pressure on land resources due to climate change, mining interests, demographic increase and rising unemployment.

Historically the customary land tenure was a resilient space, place of refuge and resource for those displaced and affected by various cycles of shocks and stress in both rural and urban environments.

Paper explores administration of customary land tenure in SA

Trying to understand how municipalities and the TL/authorities govern land.

Research methods to look at primary and secondary data, focus group discussions, information and data sources triangulation and of course case study approach: local municipalities in BBR in Mpumalanga and Mokopane in Limpopo.

Customary land administration key issues: community rights are not registered - multiplicity of statutory, cultural and religious practices/laws. Always ambiguity of loopholes used by nefarious actors to their advantage.

Spoke to the different representatives from the government and traditional leaders.

Because the laws are diverse, there is always ambiguity which is later used by these stakeholders in their understanding.

Mostly controlled by male traditional leaders/authorities

Bundle of rights relates to how land is being allocated

Customary land rights aren't registered and that is the primary problem

TL continue to issue PTOs when large scale land deals eg. shopping malls are introduced, the negotiations happen without consulting the customary and traditional landowners as indicated by Speaker Mahlake.

Developments are happening in areas under traditional leaders and the only stakeholder are the traditional leaders and investors leaving out the community.

Study confirms that there is pressure on customary land to convert to perceived more secure

forms of land holding in SA.

Need to develop and improve ways of recording rights and tenure systems in rural areas to protect rights of the indigents.

### **CPI's/Alternatives to CPAs**

Tara Weinberg, *University of Michigan* and Sithembiso Gumbi, *LARC, University of Cape Town*

Communal property associations and community land trusts have both been problematic in their implementation, and traditional leaders and government have used these institutions to enrich themselves. Collective forms of ownership in SA take various forms. CPAs began in 1996 through the CPA Act, intended as a means through which people could acquire, hold and manage their land jointly. They were meant to be a land reform program. They were developed so people could claim their land in groups - like at Mogopa and Dithakwaneng in the North West and the Native Farmers Association at Driefontein and Daggakraal in Mpumalanga - where the ANC leader Pixley ka Seme assisted in drafting articles of association in 1912. One of the anomalies about trusts versus CPAs is that they both receive land from the same department but are registered by two different institutions - the Master of the High Court and the Department (DALRRD), respectively. While both are problematic in their implementation, there is a further problem which is the accountability requirement - Trusts are not held to the same standard. CPAs remain the best vehicle to hold and manage land is the CPAs according to the people we engage with.

Talking about communal property institutions

Include community property associations and community land trusts

Their implementation has been problematic and traditional leaders and government have use CPI's to enrich themselves

Will speak to history and implementation, collective forms of ownership in SA, reflect on issues that emerge with CPIs based on experience

The limit of trust at CPA's

CPI can be problematic in implementation.

History of CPI and implementation - communal property associations began in 1996 through the CPA Act. it meant for communities to acquire, hold and manage their land. People want to hold titles together as opposed to holding it as individuals.

Black farmers came together and bought land together.

They were assisted by lawyers and ANC

In both Mogopa and Dithakwaneng communities based in North West, were to hold land in undivided shares.

1990= land is becoming a reality. Everyone focussed on the kind of institution that would hold land. They held community land conferences etc. When CPAs were established various other institutions were considered.

CPAs were specifically established to enable people to realise some of the other forms of rights they had.

Final point= restitution was a catalyst of the CPA.

One of the anomalies about trust vs CPA is that they both receive land from the same department but are registers by two different institutions (Master of the High Court and Department)

A legal opinion was sought from Budlender and it appears that the recommendations were not implemented. We learned recently from another workshop that the Deeds Registry Act in order to not allow Trusts to be set up.

The best vehicle to hold and manage land is the CPAs according to the people. Accountability requirement of CPAs is problematic because the Trusts are not held to the same standard.

They were meant to be a land reform program. They were developed so people could claim their land in groups.

Examples: Mogopa, NW; Dithakwaneng, NW; and Native Farmers Assoc (Driefontein and Daggakraal) in MPU. Black farmers purchased land in Driefontein in 1912 assisted by ANC Pixley ka Seme who assisted in drafting articles of association.

The members held land in undivided shares and they had no chiefs or leaders attached to their land which gave them apex power over their land.

People who were dispossessed of land would band up and attend workshops to map up the policy.

Their land drafts were problematic because they were set on apartheid law meaning that chiefs would have rights to the land.

They discussed unwritten codes regarding the policy and how to follow them

In 94, people who had been disposed of land could claim it back as a result of the land restitution act

Draft policy framework looked at options for CPAs:

Co-ops

Unit trusts

Share block schemes

SADT land and tribal trusts within SA

International examples: Kibbutzim and Ujaama]

- Restitution is the catalyst for CPAs but group property ownership is not new.

Sithe Gumbi:

- One of the anomalies between trusts and CPA's is that trusts are registered by the high court and CPA's are registered by the department.

- It is acknowledged that there are limitations to CPAs and Trusts alike as evidenced in legal opinions shared by Adv Budlender.

- Gumbi's view: CPAs remain the best vehicle for community land owning. Based on experience when I worked at AFRA, KZN. CPA Act makes provision for accountability, transparency, and annual report on performance of CPA committees.

- Yet Trusts are not held to the same standards as they fall under the Master of High Court.

- The best model, in Sthe's view, are CPA's because they are held accountable and a report should be submitted on how they are managing the land.

- This is problematic because trusts aren't held to the same standard.

Proposal for Way Forward:

The possibility that the state retains ownership could mean that CPA's lose their autonomy.

(Very vague proposal by Tara due to time)

Closing remarks= CPA amendment Bill - State retains ownership of the land is problematic.

### Questions and Answers:

#### **Johannesburg**

- Goedgevonden was forcefully removed and lodged our claim, we followed all steps to form our constitution. But in 2017, the mafia gov told people about financial compensation and we were worried that we would be selling our land. The government stated no, it is only compensation for loss of land and it was discretionary. But now we are being told that we must repay the R51 million back to DALRRD if we wish to be able to have our land back.
- We planned a peaceful march and were brutally attacked by the police.
- 

Emily Tjale, Boomplaats: We got a title deed in English and Afrikaans, we followed all procedures and even now our ppl were scattered across the land. WE had a business plan, strat partners and were ready to occupy our land. But now interruptions we are told to re-do verifications by dept. Officials who are more focused on salaries. On 25 Aug we returned to Pretoria where we will meet with Pres and Chief Land Claim commissioner. When we occupy our land, we are told we are invading our own land. When we are doing dispossession we are told we will end up dying.

The DALRRD officials are so stereotypical because they want bonuses. Why go back in circles. When we go back to our land they say we are invading, how can you invade your own land. I'd rather die for our land.

Their people have not settled in their land since they got it. When they were supposed to move in they were made to start again. The department officials are just working for bonuses and we do not know what the feedback is. They claim that we are invading our land. We were dispossessed and when we are repossessing our land, we are prosecuted. I would die for my land, thank you.

#### **Other Qs from JHb**

My name: Mashile Phalane. Our CPA was hijacked. The secretary of the CPA is the one who hijacked it.

**Mashile Phalane**, our Batlhabine CPA was hijacked so what do we do as a community? So what can they do as a community

#### **Durban**

- What is the reason for the failure of the Government for doing regulation on CPAs?
- Are mine employees or officials also allowed to be part of the Trustees?
- What was the solutioning this matter of officials taking beneficiaries' monies in rural areas?

Responses:

Sithembiso Gumbi



- There was a study done by the CSIR in 2005 and the department is doing revisions on that study regarding CPA's .
- Research from HLP and PAP on the challenges encountered with CPAs. To Mashile Phalane, then Sithe can engage further offline with ARD as Mr Phalane is an activist in the network.

There was a study done in 2005 by CSIR and certain recommendations were made. In response to the Durban question, I would say they are regularising it.

Professor Chakwizira

-

Professor Fay

-

**East London**

-

#### THE PROBLEM OF LEGISLATING CUSTOMARY LAW

CHAIR: Willmien Wicomb, *Legal Resource Centre*

Michael Bishop

Customary fishing rights are property rights - like land rights. Michael focused on the Gongose case which to illustrate the manner in which customary rights are asserted in respect of Section 211(3) of the Constitution. In Gongose it was shown that customary law can only be altered by legislation if the law makers have actually considered the content of customary law. It cannot be trumped by legislation which clearly uses automatic override clauses - for instance, where a law states that where there is a conflict between the Act and customary law position, then the Act is applicable. Michael also went through the 5 steps that must be considered by those who seek to defend customary rights - whether land or fishing or other:

1. Is there a customary law right?
2. Does it meet the definition of a Section 211(3) law ?
3. If it is a Sec 211(3) law, how does it affect the exercise of the customary law right?
4. If this 211(3) law limits the exercise of rights, does it impact on a right in the Bill?
5. Is this limitation justified in terms of section 39?

#### Asserting customary fishing rights in South Africa

Michael Bishop, SC, *Cape Town Bar*

Thanks very much, Wilimien. Thank you so much Prof Nhlapo for the remarks about my paper.

I am going to talk about how people can assert their customary rights which are enshrined in s 211(3) of the Constitution.

The paper is trying to figure out what specific deals mean Customary rights and legislation must be treated together instead of legislation trumping customary rights.

The bottom line is that customary law continues to exist.

The example that I use is the Gonqose case about fishing rights.

But the principle applies to other contexts as well.

Brief description about the case. Set the steps when dealing with this kind of problem

Case- there were three fishers who were arrested for fishing in dwesa cwebe

They were arrested because there was a law that prohibited fishing in a marine protected area. So fishing was not allowed in this area. They argued that even the legislation prohibited fishing their customary rights to fish. They established that they had customary rights to fish.

But the Mag said no, the legislation trumps their customary rights to fish.

A customary right can only be distinguished by legislation that deals with customary law.

It is a very good example of how customary law continues to

Based on what was said in Gonqose

It was a very clean case because there was no debate that the fishers had rights (that was clear) and there was no debate that it was a sec 211 law. There is a difference between asserting cust law rights and customary law practices. Here he is talking about rights that are recognised. There are 5 stages to determine whether - to see how they impact/limit or abosh

1. Is there a customary law right?
2. Does it meet def of sec 211(3) law ?
3. If it is a sec 211 (3) leg - how does it affect the exericiies of customary law right?
4. if this 211 3 law limits the exercise of eights does it impact on BOR right
5. Is this limitation justified?

How can people assert customary rights?

You have to treat legislation and customary law as co-existing

Qongoshe- three fishers were arrested for being in marine protected areas

- They argued that they had customary law right to fish
- Magistrate court - They established that they had customary law right but the high court disagreed.
- SCA agreed with the Mag court.
- This is example of legislation not trumping customary law rights
- There is a difference between asserting customary law rights and customary practices.

### 5 stages

- Is there a customary law rights

Qongoshe case provides guidance. There will be case where this is disputed. Requirements: (1) community must be governed my a system of customary law not just one practice. (2) there must be rules or regulations on how is this done. (3) it must be asserted by a member of the community. (4) is there legaltion that deals with this customary law.

- Is this the statute that meets sec 211(3) requirements

Two req: (1) legislator new that the law could affect customary law right (2)

- If so, how does it affect customary law rights

Legislaiton that extinguishes the right.

- Is the limitation justifiable

*There are 5 stages 1 is there a customary law right*

*Is this a statute that meets*

*If it is such legislation, sect 211 (3) legislation*

*IF it does limit the exercise of the right in any way? Does it limit a right in the BOR*

*If there is a limitation is it justifiable as per s 35*

*Is there a customary law right or can it be established that there is?*

*What are the requirements to set customary law rights?*

- 1) *Is that the community must be bound by a system of law not just that they have rules of how to*
- 2) *Whatever the issue (right that's being asserted) is whether i -there must be rules governing this right*
- 3) *IF is asserted by an individual it must be asserted by a member of the community*

*Is it a section 211 (3) (It is meant to afford customary law a certain status) law?*

- 1) *it has to appear from the law itself - the legislature knew that the law could affect customary law rights - if it does not appear in the law that is it not a 211 (3) law.*
- 2) *How does it affect customary law rights? - you could have an act that distinguishes customary law rights -*

*What the SCA said is that*

Must have a permit to exercise this right.

It either means that the minister is obliged to recognised customary rights to

Is there a customary law right?

If it limits the exercise of the right?

The community needs to regulate itself when it comes to

There must be regulation on how it can be done.

The individual is a member of the community.

### **Legislating Customary Law**

Thandabantu Nhlapo, *University of Cape Town*

Thandabantu Nhlapo was on the law reform commission and instrumental in the drafting of the Recognition of Customary Marriages Act. Customary law can be checked against nine considerations: 1. customary law is recognised in terms of section 211(3) of the Constitution; 2. it is also subject to the Constitution; 3. it is also subject to any legislation that deals with customary law; 4. customary law may be regulated by other legislation; 6. the version applied in SA is 'living' and not official customary law; 7. it is an independent source of law, separate from common law and legislation; 8. where it exists, *there is no further need for regulation*; and 9. it can and must be justified under section 36; 9. There is a misunderstanding of section 211(3) of the Constitution, and the biggest problem for me is in the Traditional Courts Bill: in the attempt to regulate customary law, parliament trumps customs. Our current parliament has a very bad consultation culture as seen in Tongoane and other cases. Section 7 of the Recognition of Customary Marriages Act is similarly problematic.

Greets and thanks chair. Going to try and make it fast to see if we catch up on lost time.

Very grateful to be asked to participate, despite his lack of grounding in leg. Yes in the law commission but no technical knowledge ickly. By sharing the reasons why I am grateful to be participating in this panel.

My joy at participating comes from the realisation that this has been dragging, and peaked and is now coming back to the radar - leg and custom law. When i began to read for this... regularised concerns in the past and in all instances the worry was that it was not quite right about the way we went about....

Customary law. Although I can't put my finger on where the effects are going.

- I'm excited because this panel shows how things have changed since a while ago (the last 5 years)
- In 2017, I voiced my concerns re custom law losing to the process of legislation. (Quotes article)
- **"Constitutional confrontations"** in culture, gender and living law"
- Very pleased ....
- Appears to have been brought about by judicial developments in particular the decision, of course in *Gongose*. SERI panel will speak to this - Making it unnecessary for me to simply admit the case
- I heartedly acknowledge indebtedness to mb on for his inputs in this panel.... I'm equally indebted to have heard snr discussions with Wilmien so i really want to record my indebtedness to these 2 colleagues. A lot of what I say next accounts for the fact that between the two of them .... In this area for this time
- Aware of the constraints of that
- Brief summary of colleagues' interaction and re-reads of the paper by Michael asserting custom fishing rights in SA. It's about fishing but rich in issues i have been worrying about
- I have put together a list of what i think i am getting out of this
- Just to start us off it has 9 points. It is basically the present reflection of the accepted position of customary law and also some academic debates around legislating customary law which have been raised by recent events in Constitutional courts decision (or decisions in a particular case - sorry, i'm unsure)

The 9 points fit the attempts:

1. Customary law is recognised in section 11(3) of Constitution
  2. It is subject to the constitution, we know the above from cases like *Bhe* etc
  3. Subject in addition to the constitution and any legislation that deals specifically with customary law and this is important, also very evident in Michael's paper. It is also subject to any other legislation that deals with customary law.
  4. Customary law can be regulated by other legislation
  5. The version applied in South Africa is living not official customary law
  6. It is an independent source of law apart from common law and legislation - we all
  7. It can be just under the culture and equal protection provision of the constitution
  8. Where it exists there is no further need for a regulation .... Wrote this down " where it exists, what Wilmien called theoretical and no need for tighter regulation and that's accurate because there might be need to align customary principles with the constitution. Substituting customary law, means that it may be regulated by others... S 39(3) is starting point for customary law and where it ends in that it does not violate the constitution, it is not banned from operating
  9. If it is interfered with for reasons other than the above, namely in line with constitution, it actually limits / alters rights held under customary law, such limit Michael Bishop makes clear: it must be justified under s 36 and we recall that that clause reqs parliament to apply its mind to the imperatives of s36:
    - s36(1)(a): the nature of the right
    - s36(1)(b): the importance and purpose of the limitation
    - s36(1)(c): the nature and extent of the limitation
    - s36(1)(d): the relation between the limitation and its purpose
    - s36(1)(e): less restrictive means to achieve the purpose.
- A point that interests me: i recall the dissent judge in *Bhe* by Ngcobo who went into this a bit, and i'm excited to discuss this during q and a
  - What this implies is that legislatures must understand customary law to use living law as starting point, and thereby find less intrusive ways of intervening
  - Firstly the misunderstanding of the implications of 211(3) customary law is recognised but subject to laws in addition to the constitution, more specifically, for legislation under this section, that deals specifically with customary law, there are certain understandings that do occur.
  - The big one for me was..... It is the message as it were that African Customary Law is only constitutionally valid if it is regulated into leg and codified. References statement by DOJ in 2012 talking about DCB?
  - Even when mandated and aimed to be about dealing with customary law, it must not end custom

- law rights. Mike's paper deals with rights vs customary practices - what it distinguishes. or not
- There's a point that I must ascertain: In addition to tech legal issues there is as far as what can go wrong with legislative practice.
- Parliament had a bad discursive culture that must come in when creating legislation.
- Speaking on how parliament followed processes so bad that they should be struck down
- On the recognition of customary marriages act, it is clear s7 sub 6 is a problem : it tried to contain .... People in trad life would understand, let alone the legal process that was proposed.
- There is s8 that comes from a good place - the issue of termination.. It was moved to a court on the basis that s9.....
- The reform of customary law of success act: where to find more criticism of some things that happened : in bhe , it could have been decided on the basis of preserving ..... while encouraging a version that does not .... From the constitution.
- References a thesis that is a good guide on what went wrong with the legislature that took over the order from the case of Bhe, making nice of what intended to be intestate succession act and making it perm. There is a lot to say about that
- Let me end by saying that you can read the thesis I speak of where it makes clear that the child's portion is impractical.... Village in the Ec
- A traditional court needs noj intro; it has suffered lots of defects aside from the ...
- One may end to say that the efforts to recog custom law, park tramples over custom rights
- Post Gonqose case
- To pursue change that protects the protections given to cust law by the cc
- And tech legal teams have been increased and maybe the mindset will change when we intervene on changing customary law ...methods.

### **Prof Nhlapo**

Thank you so much.

Reasons why I am excited= Yes I was in the commission but then I had very little technical knowledge.

It appears to have been brought about by judicial developments, in particular the decision in Qongoshe.

I am indebted to Michael Bishop's contribution in Qongoshe and the discussion I had with Wilmien.

Brief summary – I put together a list of things I am getting out of this.

1. Customary law is recognized in the constitution
2. It is subject to the constitution
3. It is subject to any legislation that speaks to customary law
4. Customary law may be regulated by other legislation
5. Jdsfj
6. It is an independent source of law
7. It can be justified
8. It is theoretical
9. It must be justified under section 36

There is a misunderstanding of section 211 (3) of the Constitution

The big problem for me is in the Traditional Courts Bill

There is a point I am interested in= our current parliament has a very bad consultation culture as seen in Tongwane and other cases.

Recognition of Customary Marriages Act – sec 7 is problematic.

There is a point I am interested in= our current parliament has a very bad consultation culture as seen in Tongwane and other cases.

Recognition of Customary Marriages Act – sec 7 is problematic.

The Traditional Courts Bill needs no introduction. In the attempt to regulate customary law, parliament trumps customs.

The Nkunzi Chairperson asked jokingly whether people needed translation and they responded, yes. She then began translating.

Summary: Jackie and Wilmien:

This presentation focussed on customary fishing rights and how

### **Giving effect to customary rights in legislation: the case of customary fishing rights**

*Dr Jackie Sunde, Masifundise Development Trust Wilmien Wicomb, Legal Resource Centre*

Customary fishers in KZN and Eastern Cape won a victory in the courts in that the case forced the legislature to consider customary law. There was a parallel struggle of fishers who were excluded from the Marine and Living Resources Act - and sought to be recognised. In 2012, while engaging with the government, they insisted that customary fishing rights must be recognised in policy - but the government said the onus is on people to provide they have rights. But the demand for recognition quickly became like a trap of formalisation: "We very naively took the opportunity to assist the legislature with coming up with mechanisms to go to the ground, identify rights and legislate them." The result was regulators in Pretoria coming up with impractical and inappropriate rules - in the name of customs they did not understand at all. International experience shows that many post-colonial states have struggled to come to terms with fishing rights or to develop hybrid systems of fishing rights. Like with land, you need to understand custom first. There are global guidelines for securing tenure: since 2007, the UNDRIP (UN Declaration on the Rights of Indigenous Peoples) has affirmed a right of free, prior and informed consent, while the 2012 Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of Food Security (VGGT) say that states must recognize the tenure holders, support them, establish safeguards, prevent forced evictions, and provide access to justice, among other things. In SA, the small-scale fisheries policy drew on the VGGT and said people's decision-making must be recognised. A core lesson is to take a procedural approach and identify the principles underpinning custom - for instance the principle of subsidiarity which means decision-making at the most local possible level - rather than trying to codify customary law. Don't codify customary law.

Their presentation complements MB's this afternoon

- JS and WW will talk about before and after Gonqose. To what extent they realised the promise.
- Shared pics of the customary fishers in KZn and Dwesa(?)
- Important implication - that it forces the legislature to consider customary law
- Laws are not made for parliament, but we must force for laws to be made by the people
- That legislature must take into account the customary law.
- How can you say you are regulating something if u dont understand it. H
- Although Dwesa struggles were ongoing. There was a parallel struggle of dishers -traditional (without customary systems) who were also struggling because they were excluded from MLRA,
- These small scale fishers must now be recognised.
- In 2012 whilst engaging with Dept - they told dept to put cust fishing rights in the policy . dept gave a legal opinion. They said they must distinguish between customary law rights and custom. They also said that people must prove they have rights
- They were excited that the wording of the policy - however, they soon realised that if the dept doesn't understand it is of no use.
- "We very naively took the opportunity to assist legislature with coming up with mechanisms to go to the ground, identify rights and legislate them." There needs to be a paradigm shift in that the dept must think in a different way to recognise these rights.

Jackie:

- Thinking about lessons that have emerged from international experience, many post colonial states have struggled with how to come to terms with fishing rights. This has occurred in various countries and its constantly evolving - iro fishing rights
- How to develop hybrid systems of fishing rights
- (fishing rights) is also Adjacent to land tenure systems rights.
- Emphasizing the need to understand the customary systems - VG - understand custom ary rights establishing a fishery system - and interrogating what it means
- Giving guidance as to how one goes about understanding these systems
- Good guidelines of >>>>Setting out the procedure and establishing a commission for customary fishing laws.
- Since 2007 - UNDRIP - useful for us is the voluntary guidelines on tenure.
- VG
  - States must recognize the tenure holders
  - State must support these tenure holders
  - Establish safeguards
  - Prevent forced evictions
  - Provide access to justice
- Ppl working in marine tensure - the SSF guidelines drew on VG guidelines,
- Also it said that the peoples decision making must be recognised.
- In SA context it is critical that the legislation - starts from the point of understanding their fishing rights in their setting

Reality

- The amendment act did not realise all our hopes iro customary rights and its recognition
- There was an inclusion that spoke of shared rules - this is the alleged inclusion of customary law.
- Department has reverted to individual rights - the notion of community was out the window.
- Arbitrary rule that if there are no 20 members of a group they were forcibly grouped with neighbours (even if they are not in the same community)
- The best of a regulator - in pretoria - writes regulations without the faintest understanding on the ground ( this was published in 2016)
- Dwesa is a huge and v poor area. The regulations said that the 39 people must meet everyday and tell the parksboard who these people are by 12 pm. Most of the fish they were allowed to fish were not even found in dwesa
- The govt seems to think that the case only applies to Dwesa - they believe that cause they recognised SSF they have now recognised customary rights.
- Interesting to compare it to tembekas comment that the state wants to control customary land
- A great frustration is that what they have been trying to communicate with the departmnet - we

want to assist them in recognition - however, dept keeps making politically motivated decisions.

Jackie

- Lesson:

- Emphasis on procedural approach and identifying the principals not trying to codify customary law.
- It takes a long time the
- Support fishers in articulating the underlying principles and values.
- Identify principles of customary law
- Do not codify customary law
- Support fishers in articulating the underlying principles
- Principles include subsidiarity and are socially embedded.
- 

They will talk about the promise of Qongoshe. Important contribution of Qongoshe- law is made by the people, not politicians. For the legislature to legislate customary law it must understand what is happening on the ground. Context of Qongoshe- communities' fishing rights were recognised earlier. In 2012 they told the Department to consider those rights when attempting to regulate fishing. We tried to inform the Department that they needed to rethink how they regulate customary rights.

Recognising decision making in the affected communities is extremely important.

Despite having advised the Department, the Legislation that dealt with fishing did not make reference to communities customary law rights.

International experience: many states struggled to regulate these rights. In contrast to SA, most countries integrate regulation of fishing rights with land tenure rights. Example : South Pacific- had a clause dealing with investigating rights as they exist on the ground.

We let the department know that, You should find a ways to recognise and implement these laws.

- Jackie - thinking about lessons that come up from int exp, many post col states have battled with how to come to terms with fishing rights.
- Many countries struggle with how to infuse the eBay of custom law, and amalgam custom with state law with hybrid systems of fish mang
- In contrast to Sa most countries.....

## Questions

EL

**My name is Mthobeli?** I have learned a lot by being here. However, even after the many interventions and assistance from Wilmiem and Jackie there are still rights that being hidden from us.

Also we have been told that the land belongs to us however, we see that the land still belongs to the State.

The other issue is that I am a member of the executive committee of the CPA. What I have found is that we as the CPA have no power, no authority. We are being ruled by the Department. Our cries often go unheard and our questions answered. They are no able to access to the ocean. They need the issue of title deeds answered.

## Johannesburg:

Shirhami- My question is for all the speakers, in Limpopo we have initiation school regulations, this regulation is giving powers to the leaders to, the situation is such that you cannot have the school if you have not attended initiation school. Aren't these Regs impacting on customary law?

Where would you draw the line in customary law and regulation as a regulator, especially when it comes to what women can and cannot do in relation to the land issue?

Christopher Mohulatsi- How people can assert customary law? We have a problem with chiefs that when traditional healers are getting medication on the side of the road where there is a sign that stops such but which is 30 km away. And they get arrested, what transgression will such a person



face?

Solomon Mabuza- We have a problem of land being sold by traditional leaders, who is monitoring traditional leaders and municipalities? What is the purpose of spluma?

Our land is being sold without our permission by them.

#### DURBAN QUESTIONS:

\*SINGS\*

NKANYEZA BHEKSISA : We cannot keep on talking about the same thing without any change. So we must talk followed by the action so .....The premier of kzn he said we must do the first things first. Okay, now we have spoken large, now we must act large. The thing we must first change, because we talk about sa, we are talking about the pain in your.

So now is the time to change the name of South Africa, so that the name will prove us. This land called South Africa must be called Gubhandlela so we are able to make our own customary law.

My question is: how can another nation make laws and rules for another nation, in another language to the nation the laws are being made for - that's why I came to the decision to abolish south africa to our new name of our country.

My name is gumbi, all fathers were gumbi. They were all oppressed, i am still oppressed, when are we getting a time to rest. Here we talk of title deeds. I think I have a title deed, i don't need another. I am a title deed myself. If we have people who keep those title deeds for us. We are the owners of this land, we are title deeds.

#### Responses

**Michaels answers** : its got to be a question determined by the custom law by the community itself. Membership is likely to be hereditary. The rules might change in every community at it might not be possible to make a standard for all.

Jhb ques touched on nb ques: custom law in conflict with cc provisions, or where reg actively undermines cultural practice or rights

- The law does have a role here
- The eg you gave of initiation school, it would be a claim to say the regs limit custom pract. They try to alter custom law without going through the process to di that.
- Is there a justified reason to change custom law in that way
- The other part of custom law is that there is tension between recognition that it may be in conflict with other provisions of the Bill of Rights. .
- 211 3 says icustom law is subject to the cc, it doesn't have special .... Looking at gender rights and equality.
- U must understand prop and context under which it operates
- There are cases that are challenges to custom provisions on abscess of gender
- EC ques: go to main prob - what we say the law should be and sit in offices and see this is what the cc says. But there is a massive gap in what happens in the ground. Custom alw is not being applied the way it and cc envisions.
- Custom alw doesn't solves its own probs.....
- Where thats debates in gov and popular meetings. Without making them real theyre just paper.

Jackie's answers:

- Africa eco philosophy - does ocean have rights as sacred space
- What we see is that the government does not engage with custom law as people live their lives, in all of nature. Their spiritual practices are often linked, like the western. Customary land related rights are all intertwined.
- Western law compartmentalised things in ways that living custom law does not.
- Sea for ritual purposes has not been recognised
- Speaks to the problem, which is understanding custom law in its own setting and context.
- This comes to the issue of whether the ocean has rights in african eco ohil
- This hasn't been expressed in jackies research like it has in new zealand where the rights over rivers have been recognised etc

- This will emerge, what we are learning from custom comm, their relationship with nature is very diff than western relationship
- We saw in Shell, where custom communities had seen the ocean as people nb to the tradition and ancestors
- .... Wasn't articulated in the way ocean rights have been done in other jurisdictions.
- The relationship with the ocean is very diff than it is from a customary perspective
- An alternative worldview must be infused in how we view rights in the ocean in Sa.
- This is an opp for that diff relationship coming from customary rights wrt our understanding of laws in relation to the ocean.

Wilmien

Understand what customary law is. The Tcb is to be brought in line with the constitution and protect women. The bill does the opposite. THE BILL IS TERRIBLE FOR WOMEN. It is so far removed from the law made in a vacuum like that.

Linah Nkosi:

My question is about customary law, what does this law say about women? And the role of women in the community? We see that they are not allowed to speak in pub meetings. Even those int rad courts and councils. There is no female induna. Gov passes a law that restrains parents from disciplining their children, but not protecting women.

Sibiya

I am happy to be here because we can express ourselves. Where we come from we can't express ourselves. We might even be killed.

I heard someone speak about the ITB judgment. The judgment was granted ages ago. However, the govt does not want to implement the judgment. I dont understand why.

You'll notice that South Africa is a republic, thats what we teach our children. We need to show people that sa is a republic and therefore no one is above the law.

. Michael- in response to JHB= where regulation undermines practice of customary plaw that is an amendment of customary law. So, the question will be whether the limitation is justifiable.

Question in JHB we have a serious problem with Traditional Healers that get their herbs on the roads who are getting arrested by police for transgressing the law. What law is this?

Wilmien

There is not one custom alw in sa. each comm has its own

- We know that in many comms, custom law is being applied against women
- Application of the customary law is discriminatory to women.
- How does parli write leg re custom law\_ they must write it to protect women effectively. They have failed miserably. We are trying to understand how to do that best and most effectively and it hasn't happened at all.

Michael on the issue of traditional leaders in municipality's

- They are meant to be present but not vote. To enable the muni council are aware of one another to open communication. That is what its meant to do. But if its not there is a problem.
- Im not sure if that will resolve the problem between politicians and traditional leaders.

### JHB comments and reflections after DAy 2

**Person 1** – I was impressed by the fact that the struggle that communities went through, the legal resources they mobilised and many communities like Xolobeni give us hope. If our neighbours succeeded, it means we at Gamotlatla can also succeed.

**Shirhami**- I learned that there is a difference between speakers that interact with people on the ground and those that do not engage people on the ground. Which means we need our researchers to change their approach – they must go to the ground.

Today was better than yesterday, we were allowed to ask questions to our satisfaction.

**Mmaseipati Mokone** – I missed the yesterday’s session and what I learned today tells me that I missed a lot yesterday. We overlook some of these things but they are similar, Marikana, Mmaditlhokwa, Xolobeni. Today we got energized to fight on.

Complaint.

We need to add more time, we don’t have enough time to contribute to the conference.

**MOBILISATION AND LITIGATION NEXUS**

CHAIR: Nokwanda Sihlali, LARC, *University of Cape Town*

- The panel will explore community activism and customary law.
- There are judgements that have been won but aren’t recognized by the government to this day.

Welcome to this panel, joined by strategies from activists and attorneys which has been well illustrated by Baleni, Tongoane, Maledu and others. Baby lives in NW and is a committed land activist who prides herself in helping Africans to understand their realities.

Alex is a PHD candidate in political science.

Alex is a phd candidate at the Cornell University

**Conceptions of Justice: Obstacles to Land Restitution in South Africa’s Putfontein Community**

Baby Makgeledisa, *Land activist, North West* Alex Dyzenhaus, *Cornell University*

Baby Makgeledisa argued that her experience in Putfontein illustrates the deliberate nature of how land claims have been frustrated and even actively sabotaged by elites who have private interests. The Putfontein case is one where a community who had bought land in the early 1900s and the were dispossessed in the 1970s, and their claim in the 1990s was ostensibly settled. But “the land is back only by mouth - but physically it was never given back to the rightful owners”. This is because, first, the settlement and development funds were lodged with a company that they didn’t know and which they were told was liquidated - though it later turned out it still existed. Second, when the claimants wanted their land back, the land commission combined, or incorporated, all the claims lodged by other villages and farms surrounding Putfontein into Batloun CPA. But those claimants had their own CPAs registered. Up to today, those people’s land is still incorporated under Batloun CPA. When raising complaints to not have land under the traditional leader, the claimants were made to register family trusts. Alex Dyzenhaus outlined the evidence that restitution failures after claims settlement are not a new reality, instead he spoke of the challenges claimants face when they take action to protect and promote their rights. Non-claimants also face the same uphill battle in having their land rights recognized because the claims process only accounted for some of the dispossessed. “Those professional classes in government are colonising our land - more than ever before. The systemic continuation of imposed traditional leaders will never end in South Africa. We know our customs and traditions. We don’t need traditional leaders to tell us what our customs are. The government has made [check] the traditional leader the custodian of our land without our consent. That is why they have so much power to sell our land.”

Alex Dyzenhaus:

I am not a lawyer but the law plays a huge role in dispossession. There are numerous issues that land restitution communities face, it has become expensive. Failed promise of restitution and many issues plague claimants and communities; extended red tape, court cases, heavy reliance on lawyers and institutions to assist. Bottlenecks in the legal system are (a) land acquisition (land holders), (b) post purchase, (c) post settlement. Post settlement problems in claimant communities where there is no money to fund developments or internal conflicts. These processes might affect communities. Often see bottlenecks as an obstacle to getting land.

“Policy feedback” is a concept to describe the ways in which how you engage with the state affects how you experience policies. Using this framework, I looked at a 2004 survey with land respondents and looked at the land claim process and the people within that process. This 2004 survey data, from 6 yrs into the restitution process, includes some claimants have been awarded land and others have not lodged their claims under restitution but they also faced dispossession.

Claimants take collective action - whether they are people dispossessed under colonialism; farmworkers; squatters; people in traditional areas. The finding from the analysis was that people with claims in the system are more likely to have undertaken collective action around land than those who don't have a claim (despite being dispossessed). Claimants are less likely to report wanting to focus land reform on dispossessed dispossessed under colonialism, farmworkers, squatters, traditional areas. Claimants are less likely to believe that the law should dictate land policy. Land reform claimants tend to be frustrated with this process and end up trying to focus on their own claim instead of the collective. Claimants are frustrated by the process and may lead to more narrow claims; it may be mobilising and also demobilisation. Important to centre their experience and prioritize them.

### **Baby Makgeledisa, Putfontein land claimant**

Good afternoon, I come from NW from Putfontein village - the land of honey and milk. Putfontein is actually our ancestral land where they stayed from the 17th century. In 1886, gold rush and mines opened in JHB. Our then forefathers, through the Lutheran church, organised as men to be able to purchase land directly in 1904. They had to go to the mines in Joburg so they could purchase land. They turned to work in the gold mines to be able to purchase land. They are called 70 Borithithi. There was a law as a result that said people can buy land. They found out their land was in debt in 1914 which led the people to go work so they can settle that land. In Sept 1977/8 ppl were forcefully removed to Ramatlabamma.

The land was restituted by Thoko Didiza in 2000. When they received their land from the farmers in putfontein, they had nowhere to go which led them to our mercy. The department tried to get a farm to compensate for the land that the farmers occupied but it has never happened. Minister Didiza asked the community to allow Dept. to find a farm for existing white farmers to have alternative land in order to allow claimants to have their own landholding. Alternatively, Dept. would compensate the farmers. To date, this has never happened. Local politicians and the Ditsobotla Mayor, Mr Bogatsu (now NW Land claims commissioner). Mayor advised that Putfontein needs to be upgraded and developed with basic services before ppl can be restored to the farm. When land was restored, settlement grants were given to the then Mayor Bogatsu who informed the community that a company was appointed to develop Putfontein (Urban Dynamics). But after some time, Mayor Bogatsu stated the company had

been liquidated - this was dishonest. I did some research on the company and I realised that it was never liquidated, the company still exists, and yet our settlement grant never helped the people of Putfontein.

When the claimants wanted their land back, the same Mayor Bogatsu combined / incorporated all the claims lodged by other villages and farms surrounding Putfontein into Batlounge CPA. But those claimants had their own CPAs registered. Up to today, those people's land is still incorporated under Batlounge CPA. When raising complaints to not have land under the traditional leader, then claimants were made to register family trusts. "The land is back only by mouth - but physically it was never given back to the rightful owners". Community cannot get reparations because they are already compensated with land in Ramatlabamma (Mahikeng). But even this land in Rama is belonging to other people so that means we will be taking their land. We did not get the resettlement grant, discretionary grant or even post settlement support. We had to mobilize our communities and with the help of Dr Classens, ARD and others we got attorneys to close the diamond mine on Putfontein which is our ancestral land. We had to mobilize communities so that attorneys can assist us.

Why incorporate those people in the Batlounge CPA and when the rightful owners of that ask to be removed in order to not be under tl they were told to register trust. The land is only theirs by mouth and they have no deeds. They are also observing a monopoly by the Batlounge clan in the North West. Their land still hasn't been developed with three grants that they have received. Why did we have our land taken and have our grabbers compensated with the same land we claimed? Aninka Clasasen assisted us in closing an illegal diamond mine that was mining in our land. Mr Henk Smith (LAMOSA attorney) and Johan Lorenzen (Richard Spoor Inc attorney) were mobilized by Annika Claassens and they taught us our rights and showed us how to fight for our land. The dispossession still continues under the new government through mining companies, the government is colonising land reform to this day. The systematic exploitation of commoners by traditional leaders will never end.

In closing, we feel there was no meaningful land tenure reform for those whose land was dispossessed. We just see mining companies who come to our land and they never informed us. Instead professional classes in government are even colonizing our land even more. We have no land rights, occupation, ownership from people of African origins.

Tweetable: "Those professional classes in government are colonising our land - more than ever before. The systemic continuation of imposed traditional leaders will never end in South Africa. We know our customs and traditions. We don't need traditional leaders to tell us what our customs are.

The government has made [check] the traditional leader the custodian of our land without our consent. That is why they have so much power to sell our land."

### **A Neglected but Vital Factor in the Demand for Land: The Spiritual Power of Restitution**

David Coplan, *Wits University*, Kearabetswe Moopela, *land research anthropologist and ethnographer*

On the spiritual power of restitution, and the spiritual content of land struggles, Kearabetswe Moopela and David Coplan presented on struggles to defend sacred sites from mining,

specifically a site in the Moletsi mountains in Limpopo, targeted for a huge opencast iron mine which would 'decapitate' a sacred mountain at Mmadimatle. The spiritual meaning of land is not just a basis for restitution, but about the ongoing meaning of land - from the past through the present to the future. While you can move the living, you cannot move the 'living dead' - even if you exhume graves, "ancestors cannot be removed" and people will remain using the site as a pilgrimage even when it is cordoned off. For people for whom sites have this meaning, mining and the destruction it causes constitutes a spiritual genocide in attempting to sever a link between the living and ancestors. The River Club Development in Observatory, Cape Town, opposed by Khoi Khoi activists and others against Amazon, is another case which illustrates these challenges. There's a need to incorporate spiritual recognition into the recognition of customary land rights.

### **David Coplan**

Introducing Kearabetswe Moopela (research partner).

Focus has been slightly different to presentations thus far. Our case which has been litigated for years, involves the study of indigneous African religious sacred sites. Mobilised in order to protect a sacred site in Limpopo from a huge opencast iron mine, which will "decapitate" their land. About customary law and about the importance/meaning of land. The meaning of land and how it affects identity, history and how communities mobilize to protect them from destruction by mining companies and other corporations.

### **Kearabetswe Moopela**

Focus on the heritage sites. Presentation will cover some of the talking points on culture, heritage and land in SA. Many African rituals take place at residences of diviners and healers; more lengthy ceremonies may require that people visit shrines and caves. The belief system says ancestors take up residence on mountains etc.

On 2 April, the shrine was set on fire. Same fate befell Moutse and some people were evicted in 2013. The pilgrims do not dispute that the land does not belong only to the farmers. True original owners have [?]

We do not know the exact number of shrines in SA but they span from Lesotho all the way to the North West. The place under discussion is Moletsi mountains in Limpopo. The cave is below the peak of Mmadimatle, known as a sacred site because from the times of chief they were known to inhabit the caves and mountains. Blood of legendary ancestors gives solace, meaning to health practitioners, trad healers who revere Mmadimatle. Highest category of mythology - Mmadimatle is a beautiful place. Significance relates to blood shared on the mountain and source of mystique of ancestors who died in the cave. Mining companies have had a licence to remove the upper 40% of the mountains since 2014. Local efforts formed to protect the peak of the mountain. Case submitted to SAHRA based on the identity of the site, and observers of african traditional religions including bakgatla ba kgafela. The place is sacred for its rich history, archaeologically as well. Grace Mosuku: "if a person wants to destroy you, they will only have to destroy your roots and you will be destroyed also".

The spirits of the great chiefs and diviners still dwell in the mountains and caves, the blood of their ancestors give solace to healers and communities alike. There are also gods associated with the place according to tswana mythology. And alignment can connect using the blood as a connecting factor. The mystique of the cave comes from the blood that was shed in the 19th century. There have been attempts to preserve the mining. The SAHRA case regarding the mine is not only for these people but for the entirety of the country. If a person wants to destroy you they;d destroy your roots and in their case it would be the mining of Madimatle.

The mine would contribute to the gdp but it will also contribute to an ancestral genocide. The residents of the region have already been removed to the nearest black township. There are plans to remove the people buried in that site but that would be impractical since ancestors can not be removed. People will remain using the site as a pilgrimage even when it is cordoned off. The african indogenous knowledge system has been completely disregarded by mining companies and the government alike. The activity at sacred sites helps black people find an identity that was ripped off during colonialism. Protecting mmadimatle is a step towards the right direction for the development of customs in post colonial South Africa.

Mining the mountain causes spiritual genocide. NHRA under which SAHRA operates does not include the sacred sites, and even subsequent amendments to the law do not include sacred sites. Dr Sbongile Msuku recommends ppl be exhumed from the sites and find an alternative pilgrim and not go to the cave to pray and workshop. Lack of understanding that ancestors cannot be removed. Regardless of whether ppl who worship there are still on the site or not. In fact we found some people from KZN had dreams about the site and were instructed to travel to the site. People will continue to visit the site even if the site is closed down.

River Club Development: Khoi Khoi activists and Amazon is another case which illustrates these challenges.

Moletsi mountain cannot be allowed to be decapitated and hollowed out. Protecting Mmadimatle is one step in resolving land problems in the interests of land identification. Preservation of Mmadimatle is a step in the right direction. Need to incorporate spiritual recognition into the recognition of customary land rights.

**Durban comment:** We still need to worship land owners to connect to spiritual and sacred places on this day and age. we are not free without our lands in our own hands.

## East London

Discussion while waiting for the session to begin

One man (Rastafarian) stated that the current chieftaincy system is not African, it reflects a British system. We need to go back to an African version of chieftaincy. As to what that is...it is yet to be determined. Many people responded by saying that no chieftaincy system will ever serve them well so there is no need to be trying to revert to an African chieftaincy system, whatever that means.

Translation, Baby & Alex

The main issue is that in restitution processes, there are always conflicts. The problem starts with the fact there is a willing buyer/seller approach. Post settlement was also never budgeted for in RSA so it is a problem too. Chapter 12 of the Constitution went on to grant chiefs control over land. This then enabled the problems we have such as the one in Putfontein which led to the LAMOSA case.

Translation, Kearabetswe & Prof David

The presentation was on land given to a mine by the government over land that has a history of sacredness (African spirituality). The community challenged this but the government was of the view that mining will bring development so the graves will have to be relocated. The community argues that removing the bones of our forefathers will not remove the sacredness of the place. People will still be called to that place for spiritual reasons.

## **Nonhle Mbuthuma, Amadiba Crisis Committee (Xolobeni) and Johan Lorenzen, Richard Spoor Associates**

Nonhle Mbuthuma of the Amadiba Crisis Committee in Xolobeni argued that defending land rights starts with organising as communities and building unity on what people want. The big corporations are like Goliath and if you are fighting Goliath, you need unity, she said. "We don't want mining - but we do want development. We don't want mining." They are pushing an agenda of economic development at the expense of our natural resources. Why must our local economy always have to be suppressed for the national economy? It is bizarre that now we are told the ancestors are standing in the way of development. Our mothers lived off the land and water and if we go ahead with this, how long will those jobs last, how long will those minerals be there? Johan Lorenzen from Richard Spoor, supporting the Xolobeni residents, added being a lawyer is mostly about writing down what people say: "my job is to translate that in a way that is understandable to the courts. Organizing is more important than lawyers", he said. Mobilizing isn't just about communities. Communities are not an island. Allies like lawyers, activists, academics, need to see ourselves as *part* of communities and stand in solidarity.

### **Nonhle Mbuthuma**

The spokesperson of the Amadiba crisis committee. They say our community is unregistered because of fights with big corporations. "We are fighting with Goliath and that Goliath is big corporations". In order to protect themselves, they remain unregistered. Regarding the litigations, there will be a lot because the mining companies will use anything to pull them down. There are cases that have been served to the activists. Comrades have claims to pay exorbitant amounts when they have no money. The mining companies discovered titanium in their land and they want them to move. They began by organizing themselves as a community before the mining company attacked them. They blocked all possible areas of mining as a community. We do want development, as long as it is not mining. Richard Spoor was part of the tourists who visited our area and he came to hear our cries. He was the first lawyer who came to speak to us telling us about the beauty of our community and he said when they come again, we should chase them. He said he will protect us as a lawyer. The government is trying all tactics to break us apart by pushing us to vote and we will not do that. Our land is organised in a collective way. (Could this be added to possible solutions?)

If you own your land in a collective, it will not be easy to sell the land. Mr Gwede Mantashe wanted to treat us as if we own a title deed. No, if you want a decision, you will only get a decision in a collective way. No one owns the land individually

We organise ourselves to make sure that even if the mining company comes there will be no space. Even if we did organise ourselves, we could not take the matter further because we need legal assistance. We used our mobilisation to block all the activities of the mining. That is our role as communities, and we were united to do so. When you start a resistance you need to be clear, and we were clear we do not want mining.

When you start the struggle you need to be clear what you want. We don't want mining - but we do want development. We don't want mining. Our human rights lawyer, Richard Spoor, because our area is one of the beautiful tourist areas that attracts people. When it started to be seen on the news, he just came back and came to listen. He explained himself because his interest is because of the beauty of our areas. Rural communities don't believe any



stranger.

The World Bank even stated that the land in Transkei is very difficult to develop because of the land administration and because it's owned in a collective way - and you need a collective decision. The elites don't want a collective decision. They want a simple decision. That is why they push the TKLA {missed a sentence{in order to get a decision from the chief, which is what we do not want}

TWEETABLE: They are pushing an agenda of economic development at the expense of our natural resources. Our mothers lived off the land and water and if we go ahead with this, how long will those jobs last, how long will those minerals be there?

The strategy of using the legal system, it played a very good role. The minerals are no longer being pushed on the land itself. Now they are pushing to mine oil and gas in our oceans. While you see minerals diminishing from the land, they are pushing to say if we mine oil and gas in the sea, the economy of SA will go up. Why must our local economy always have to be suppressed for the national economy? Yes, jobs, but how many jobs? For how long? Why are women not able to feed their children once there is mining? Once people cannot have access to fish in the ocean,

The mining companies don't understand that our African ancestors are also residing in the ocean. Now they are saying that our ancestors are blocking development. Now we are insulted. Now we hear that development is more important than our ancestors. We are affected by climate change. We are affected by the floods and we are affected by the drought. But now it is our fault and our ancestors that we are standing in the way of development?!

Now there is only the short term and ourselves; there is no more focusing on the long term.

### **Johan Lorenzen**

Nonhle and I are tired but we are so motivated when we are in panels like this. It's absurd that Nonhle needs me to tell her story to a court; a descendant of American missionaries in East Africa, to tell her story. The point is how the law [missing] We would have had a flourishing accountable and democratic system, atonement. Nonhle would be a lawyer then!. There was no distinction between lawyers then people were just allowed to present

It is a privilege of a lifetime to work with this community.

What is the nexus between litigation and mobilisation? It's often not a happy nexus. Lawyers are celebrated and paid. Clients often don't get what they want out of the legal process - and they can be marginalised by those they are supposed to be representing them .... [please check this]

It is clear that my privileges of race, class and education are being expressed.

First lesson is solidarity. It is not detached from being mindful of who we are. From each according to our abilities to (something) what we need. Communities approach lawyers for a specific skill set. First job is to write down what the clients tell us - lawyers are the creatures of the client's instruction.

Zadie Smith: "writing is routinely described as creative. Writing is control... over the cyclical miracle of creation." And being a lawyer is mostly about writing down what people say.

Privilege to stand in solidarity with Nonhle; my job is to translate that in a way that is understandable to the courts. Mobilizing isn't just about communities. Communities are not an island.

"Organizing is more important than lawyers"

Mobilising isn't all about 'communities' - we as lawyers, activists, academics, need to see

ourselves as *part* of communities and stand in solidarity because we only have one planet, as climate change shows. If we aren't standing with them, we risk our own lives as well as theirs.

Translation, Nonhle & Johan

Xolobeni is along the sea. There was a mine that wanted to mine there. The community was well organized and stood in unity rejecting the idea of mining. Transkei land is regarded as difficult to develop due to being communal and not individually owned through title deeds. The government had tried to impose the title deed system and the community refused as this would divide the community and allow the government to rule. The community refused the 40% and *it would have refused any other percentage anyway*. This is because the community believes that the sea is sacred and mining will disturb this sacredness. Further, mining will destroy the ecosystem and contribute further to climate change. This will negatively affect us in the long run, we will not be able to conduct fishing...

Q and A:

### **Johannesburg**

**Koketso Manku [from where?]:** There are people with no access to land and that is a ticking time bomb. The issue of restitutions is very critical. There are CPA's who have not gotten their land since '94 People don't have access to land reform policies

**Billy Masha [Ga-Masha?]:** I want to ask the panel who promised who and what? From the negotiations at the CODESA sunset clause promised us basic services, and yet nothing followed. Effectiveness of litigations I am not sure, my Rev went to court in 1949 and won a court case against removal of our community (Ga-Masha) but in spite of that we were still removed. The Commissioner of Restitution in Limpopo has even awarded land to the traditional leader.

Durban

**Ntombela Lerato from Durban:** We would like to thank the organizers of this conference its been quite eye opening and fruitful. we lent a lot as community members. we will go back to our communities to fight for our land with all the information you armed us with in this conference.

**Nkosi Cendula from Izingolweni:** How can the lawyers in this platform help us in our case because the traditional authorities keep making unilateral and discriminatory decisions in eZingolweni?

East London

**Nomonde Phindane, Berlin:** It is important to have a balance. When the one is missing then it may create issues. .... There are a lot of resources that are spent to ensure that this conference is a success. There were issues around the IPILRA, Communal Land Rights Bill, and otehr legislations - where in many cases, people aren't familiar with them. How do we get these bills to the people on the ground so they'd be conscientized with what is going on. [Integrate with this] I observed that its important to have a balance, community mobilization and legal assistance. We are here for these three days and I know that there are a lot of resources invested in this to ensure that it is a success. But I want it noted that it is important to educate our people in the communities. How do we then make sure that the discussions

here are then taken to the people in the communities?

**Andile Sishuba, Hewu Rural Forum:** I am just trying to test if I followed well and I think our whole conference is about three things.

- First aspect is **land possession**. Land is the basic need for everyone. I would go further to say we need a motto to summarise the whole struggle into one sentence which we will capitalise on and which will help us to focus on the whole struggle. The summary I want to suggest is “A piece of land to all those who qualify” (?) so that the focus is on the right to have access to a piece of land.
- Second aspect: about **traditional leadership**. We need to establish if there is a role for chiefs in modern society. If there is not, then let there not be one. We only had a headman, we only got chiefs during the time of Sebe under the Ciskei. My own brothers were working at Marikana or wherever these other places with mines. They would come back and hear us talking about chiefs and they would ask: who are these people? When we were growing up there were no chiefs. Now you are bringing us a chief which comes to our land and you expect us to not do anything.... [translate and integrate] From 1963 we were never ruled by a traditional leader. Our case is being confused by the chiefs and yet it is new. When our brothers came back from the mines they heard us talking about the chiefs and asked us who these chiefs. They said when we return we are being imposed upon and we cannot have land but it is not something we know.
- Third aspect: if this **customary law** is recognised then many of these things will be solved because we understand our customs. If we don't understand (or agree?) We can sit down and discuss and agree on what we are going to follow.

#### **Closing remarks:**

**Kearabetswe:** The land will always be there and it needs to be preserved the way it has for generations.

**David:** Ancestors cannot be moved, they are the roots - part of the What the colonial process did was to convert people into a rootless labour force. Where did we settle? Where did we come from? Where are our ancestors? They are still alive. They are still communicating with us. In that sense, we DO have land. This is how we will create SA as a country and a nation.

**Alex:** Thank you for running the conference. Defer to Baby.

**Baby:** My last and final words; we should consider that our ancestral land was for us and coming generations for generational use not for mining. Mining houses are not in that land. Don't be fooled by people who say they are developing your land. Our rural areas are not developed by anybody and they will stay like that. Thanks to Dr Classens, Brother Henk for helping us to close the fraudulent diamond mines. I thank LAMOSA and the ARD.

**Johan:** Want us to be mindful of how the harms even with taking back land, the harms have rebounded in ways that we don't completely understand as well as profits that are taken off to places that we don't completely understand. While looking back always need to be looking forward to envision the society we want to build together based on the experiences of

**Nonhle:** We need to mobilise and organise ourselves. If we don't we will be defeated. The enemy on the other side is really well organised. As activists we need to be go-getters, to conscientise our people. There's nothing that can beat us.

*Moved to another session*

## **A Glance at Liberia Land Reform: Progressive Land Rights Law that Protects Customary Land Rights**

John Kelvin, *Rights and Rice Foundation in Liberia*

### **DURBAN - Day end debrief**

1. Points of Agreement
  - a. Behkisisa Khanyeya: there is one thing that we said today that traditional leaders and municipalities are working together to dispossess the community.
  - b. Baba Sibiya: Mthatha woman who spoke about roads that are bad, no electricity, I thought that woman was speaking about my area - since they are the same things happening in my area.
  - c. Msizeni Myaka from Babanago: what touched me today is that all the testimonies show that I am still living in a colonised Africa. All decisions are taken by the chief, not by the people.
  - d. Baba Sibiya
  - e. Nobuhle from Makhasanene: is happy but has realised that we are all oppressed are not free and those that we call our chiefs are all oppressing us.
2. Points of disagreement
  - a. Baba Sibiya: Indunas are not chosen by us, the induna is appointed by the chief. There has never been a case where we chose the induna. Mabuyakhunu(?) there have never been a case where the people voted chose induna (headman) they are always chosen by the
  - b. Behkisisa Khanyeya: I disagree strongly with all the speakers. Cause its sounds like we must bow down to the government that is oppressing us or is creating those law that are oppressing us
  - c. Nonhle from Eastern cape: Why do we need a title deed. I disagree that we need to formalise customary land tenure. It will further entrench patriarchal aspects of the system.
  - d. Lina Nkosi: We want to see women empowerment. We are also want to see women over 40 being able to be employed.
3. Insights and new Ideas
  - a. I used to think that South Africa is the only place with bad things happening. However I now understand that this is happening all over Africa. We can never rest, even when we are dead our graves are exhumed.
  - b. Behkisisa Khanyeya
  - c. Zakhele Nkwankwa ( he was an applicant in the ITB ) : leases introduced by ITB, wanted me to lease my home and . we took them to court we won. But they have not yet refunded me
  - d. Nonhle from EC:
  - e. My name is Mbathat- we must be involved when new laws are enacted. We must be there when laws are made and debated. When laws are enacted and promulgated we must monitor.
  - f. Themba from Matubtuba-
  - g. Dinge Mthimkhulu - give them feedback bout the workshop. When ppl come with challenges we must follow up with those communities to ensure that those communities get solutions:
  - h. Nokwanda shabalala
4. Action Points: what does it mean for the movement

### **Johannesburg end-of-day Debrief:**

### 1. Agreement points:

- When you are alone, you cannot achieve anything. That is what prompted us to register our CBO so that we do not individualise the land struggles.
- What I want women to do is work hard, let us put our skirts away and be ready to work hard
- I have to give thanks to the conference and from our area Nkadikitlana, I have learnt so much in this space including how to better resolve our land claim on the outstanding Section 42D agreement and the settlement grant due to us as claimants.
- From Mokopane, I say that land is sold because of men, as women we must take a stand. I have learnt a lot and will continue to cry for our land. The Government has failed us as women and we must protect our land.
- For years we have been migrating across different places in the region so we have taken residence in different places.
- The struggle that Xolobeni is going through and the legal resources they were able to mobilize has inspired me. As communities we can learn lessons and stand up - but we also need legal practitioners to avail themselves. From the struggle of Putfontein I learnt that they are courageous and managed to fight for their land rights.
- \*\*\*Huge improvement in having more time today to be given the platform to ask questions which means our points are taken seriously and incorporated into the planning.
- Custom and practice changes and evolves over time. Customary law is truly static and it must not bind people
- Experiences and lessons from Africa was appreciated, we hope that South Africa can draw lessons from there and not repeat the same mistakes
- The stories from other communities are very inspiring, it's like an energy drink for me
- Molatelo Mohale: traditional leaders want to own the land, TL are against SPLUMA implementation and the TL are opposed to CPAs because they are threatened by the landholding entity which is a more democratic governance structure. We need to even invade the same spaces that TL occupy and lobby them and others who we do not normally work with.
- Formalisation of customary rights does not necessarily translate into secure tenure for women

### 2. Points of disagreement:

- Prof Mamdani inputs need to be debated further - we agree with some facts and not all. Customary law must be context specific; we cannot adopt the diaspora practice in all the contexts. Prof did not touch on spiritual connection of the belonging to the land and to the community ties.
- If South Africa wants to follow the Ghana route and give chiefs power of attorney what about the democratic vision that was promised in 1994? Will the Traditional leaders elect a president of the country? Surely if they can take decisions at the village level then why not?

### 3. Insights and new Ideas

- I see a difference between researchers who are also on the ground as researcher/activists who are not rooted in theory but able to meet people on the ground. Academic evidence was resonating with our experiences and not reading from exploiters' and written books. We need to change the attitude of researchers to go to the ground so they can understand customary law better than reading in the books. The written text is very different from what happens on the ground. We want to see more collaboration and meaningful interactions.

4. Action Points: what does it mean for the movement

- We wish that there's a commitment to go back and have a coordinated action to demand restitution and restoration of our customary land.
- We need recognition and respect of our customs, not codification which locks us in.

-  
Durban day end brief

1. Points of **Agreement**: What resonates with our own experience?

Nkanyeza Bhekisisa: There's one thing that was said today, that talked about municipality's and traditional leaders colluding to dispossess poor people

There's one woman who spoke, I think she's from Mthatha, she spoke about road that are bad there is no electricity, I thought that women was talking about my area, in my area, those things she talked about happens. No roads, no electricity, no water.

What touched me was that all testimony was that I am still living in a colonised Africa. the decisions made here are made with the chiefs.

Nobhule: My name is nobhule I'm from Makhaseneni. I am happy but I've realised we are all oppressed, we are not free. Those we call our chiefs are the ones oppressing us.

2. Points of **Disagreement**: What do we disagree with or need clarity on?

Sibiya: I've noticed a speaker referred to that statement, the indunas, I mean we are chosen by ppl, in most cases it is indunas. In my areas there has never been a case when we choose an induna. We have never elected one. He's appointed by the chief. There was a time when mmbuyakhulu was presiding over a traditional something. The Nkosi will have 60 and community will get 40. (*voting powers iro electing a new induna*) It was never put into practice. Those suffered the most during the sitting in the community court because they were chosen by the people. The induna are not elected by the people they are elected by the chief or nkosi.

Bhekisisa: I disagree strongly with all the speakers. To me it sounded like they are saying we must bow down to the government who is oppressing us. For us we don't need to bow down to gov we must fight them for presenting us with oppressive laws.

Nonhle from EC: Why do we need a title deed, it is the tile deed that oppress it. It's the people from overseas. As women, they need a man to be on that title deed. We need to abolish that. What I disagree strongly with. Is the formalisation of communal land tenure system because if we do that the oppression of women will go deep.

Linah Nkosi: We also hurt families as a single parent who are also women, we want to see the gov change the law that says if you are over 40 you cannot be employed. But people in parliament, eskom, from directors to ministers. Men eat in town and come back empty handed. We as women need to provide what the children and family needs – but they don't want to hire us.

Man: Before I came here, I thought these bad things are happening in south Africa only. Having heard diff professors saying that it's the same in places like Uganda. I can now say we don't have a place to rest. If u are

dead you can be exhumed – we have no place to rest!

3. Insights and **New ideas**: What are our new insights and lessons?

Bhekisisa: For me I can say that we must say we must reorganise and mobilise ourselves. And think about a new world. Another is possible, but we must think about a new one. Rename ourselves and our land, name our future and new idea.

Zakele: I've suffered under gov, through leases produced by ingoyama trust. They wanted me to lease my home and land. We took Ingonyama trust to court. We won the case, but they have not yet refunded me

Nonhle: What I learned today is that the land under communal ten system ruled through customary law. that land is safe for future generations unlike private land that investors can buy. The land under customary law can't be sold, you are obligated to keep it for future generations.

4. Are there **Action points**: What does this mean for our movement / our call for action?

Nokwanda Mbatha: What I see what we can do is be involved when new laws are being brought in. we must participate in those meetings or hearings when laws are made or debated. And when new laws are promulgated, we should monitor them and see theyre followed accordingly.

Themba from Mathubathuba: Because you said we must point at us, from here, from this conference we must go back and report to communities and give this knowledge to them. I have participated in public hearings, before that I didn't know they existed. Then we have information about mining because we agreed to it in the area. So from here we need to go back and inform them.

Woman: I want to agree with Themba about reporting back to our respective communities and give them feedback about workshops. When people come forward with certain challenges with land in their areas we must follow up on them so communities can get the solution.

Nonhlanhla Tshabalala: From here we still have a challenge, if we go back to communities to share information we need permission of chief or council. They will ask me who am i? who told you to have these meetings in my area? We are still having challenges.

Nonhle: Let us free ourselves from the chains of oppression and return to the community. We start alone and end up being 100. The councillor says its my ward the chief says its my land. Go mobilise. We must radicalise our struggles. We don't need anyone's permission. We must be agents of our own transformation. We don't need any permission from anyone. Let us rejuvenate our struggle. And be militant to free ourselves.

**East London**

Points of agreement: Like yesterday, it was emphasised that communities must take the initiative to develop themselves rather than waiting on the government.

Disagreement: none

New ideas: It is important to speak of land holistically and not in isolation from the issues interlinked to it such as basic services like water supply.

Action points: As already said yesterday, the communities should be educated on these laws that affect them

## For Dineo's Recap: Feedback from Thursday afternoon workshops

### Points of Agreement

#### Durban

- There is one thing that we said today that traditional leaders and municipalities are working together to dispossess the community.
- Mthatha woman who spoke about roads that are bad, no electricity, I thought that woman was speaking about my area - since they are the same things happening in my area.
- From Babanago: what touched me today is that all the testimonies show that I am still living in a colonised Africa. All decisions are taken by the chief, not by the people.
- From Makhasanene: I am happy but I have realised that we are all oppressed; we are not free and those that we call our chiefs are all oppressing us.

#### Johannesburg

- When you are alone, you cannot achieve anything. That is what prompted us to register our CBO so that we do not individualise the land struggles.
- What I want women to do is work hard, let us put our skirts away and be ready to work hard
- I have to give thanks to the conference and from our area Nkadikilana, I have learnt so much in this space including how to better resolve our land claim on the outstanding Section 42D agreement and the settlement grant due to us as claimants.
- From Mokopane, I say that land is sold because of men, as women we must take a stand. I have learnt a lot and will continue to cry for our land. The Government has failed us as women and we must protect our land.
- For years we have been migrating across different places in the region so we have taken residence in different places.
- The struggle that Xolobeni is going through and the legal resources they were able to mobilise has inspired me. As communities we can learn lessons and stand up - but we also need legal practitioners to avail themselves. From the struggle of Putfontein I learnt that they are courageous and managed to fight for their land rights.
- **Huge improvement** in having more time today to be given the platform to ask questions which means our points are taken seriously and incorporated into the planning.
- Custom and practice changes and evolves over time. Customary law is truly static and it must not bind people
- Experiences and lessons from Africa was appreciated, we hope that South Africa can draw lessons from there and not repeat the same mistakes
- The stories from other communities are very inspiring, it's like an energy drink for me!
- Traditional leaders want to own the land, TL are against SPLUMA implementation and the TL are opposed to CPAs because they are threatened by the landholding entity which is a more democratic governance structure. We need to even invade the same spaces that TL occupy and lobby them and others who we do not normally work with.
- Formalisation of customary rights does not necessarily translate into secure tenure for women.

#### East London

- Like yesterday, it was emphasised that communities must take the initiative to develop themselves rather than waiting on the government.



## Points of Disagreement

### Durban

- Baba Sibiyi: Indunas are not chosen by us, the induna is appointed by the chief. There has never been a case where we chose the induna. Mabuyakhunu(?) there have never been a case where the people voted chose induna (headman) they are always chosen by the
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- Lina Nkosi: We want to see women empowerment. We also want to see women over 40 being able to be employed.

### Johannesburg

- Prof Mamdani inputs need to be debated further - we agree with some facts and not all. Customary law must be context specific; we cannot adopt the diaspora practice in all the contexts. Prof did not touch on spiritual connection of belonging to the land and to the community ties.
- If South Africa wants to follow the Ghana route and give chiefs power of attorney what about the democratic vision that was promised in 1994? Will the Traditional leaders elect a president of the country? Surely if they can take decisions at the village level then why not?

### East London

- None

## New Insights

### Durban

- I used to think that South Africa is the only place with bad things happening. However I now understand that this is happening all over Africa. We can never rest, even when we are dead our graves are exhumed.
- As an applicant in the ITB case: leases introduced by ITB, wanted me to lease my home and we took them to court we won. But they have not yet refunded me!
- We must be involved when new laws are enacted. We must be there when laws are made and debated. When laws are enacted and promulgated we must monitor.
- Give them feedback about the workshop. When people come with challenges we must follow up with those communities to ensure that those communities get solutions.

### Johannesburg

- I see a difference between researchers who are also on the ground as researchers, and activists who are not rooted in theory but able to meet people on the ground. Academic evidence was resonating with our experiences and not reading from exploiters' and written books. We need to change the attitude of researchers to go to the ground so they can understand customary law better than reading in the books. The written text is very different from what happens on the ground. We want to see more collaboration and meaningful interactions.

### East London

- It is important to speak of land holistically and not in isolation from the issues interlinked to it such as

basic services like water supply.

## Action Points

### Durban

- What does it mean for the movement??

### Johannesburg

- We wish that there's a commitment to go back and have a coordinated action to demand restitution and restoration of our customary land.
- We need recognition and respect of our customs, not codification which locks us in.

### East London

- Action points: As already said yesterday, the communities should be educated on these laws that affect them.

### *General notes per speaker*

**Nosintu Mgcineli eNgqamakhwe-** Indeed if the community does not stand up, then nothing will happen, this is what I take. We had water issues and our municipality had failed. I had to seek Radio interviews through the Sister Organisation to cry for help. One organisation (Alfida in Gqebhera) heard me on SA FM and installed a borehole for us. We then went back to the municipality and asked that it then connect the existing waterless tapping system to the borehole. The municipality is failing. We have approached Mr Bulfo in the department of water and sanitation in the municipality but in vain. We need help to pressurise the municipality to merely connect the taps to the boreholes. We had called Mr Bulfo even during the beginning of the processes relating to the installation of the borehole but he never showed up.

Mr Ntjolo??? in Centane-It is important for us to convene and discuss issues. In Centane we had a similar problem of having decorative taps that do not have running water. We had to stand up and seek help. We took the municipality, the very Mr Bulfo in front, to court for it to install boreholes for all the seven villages in Centane. Let us continue to help each other. As we leave this conference, let us not bury the information we're getting here, let us go back to the villages and spread the information.

**Lulamile Khetsheziya in Centane-**I am concerned with the permit system in relation to fishing or any other use of land. It does not make practical sense. For example, say someone is ill and a traditional healer needs to access the protected area to get the needed herbs to heal the patient. The healer must first get a permit, is the patient not going to die while the healer is jumping through the hoops of the permit processes. The same applies with fishing, we have people who have permits while others do not have them. This is because permits are given to entities like co-ops and other

people simply do not want to be part of these. Why should they be denied access to fishing just because they are not part of a co-op? We have lived here long without permits, we never needed permits yet we managed to fish for a living. We managed to do this sustainably. But now our people will be arrested for the lack of permits. The demarcated and protected areas are often the most rich in natural resources. Currently, the demarcation is by an Agri-business person, Gloria, for her own gain at the exclusion of the community's. This must be checked.

**Phindile Port St Johns-** Our chief wanted to give away our land in the name of a town development. Fortunately with us there is unity, the youth and the elderly speak the same language. We managed to stop the chief. Any development in our land will be through engagements with us the rightful owners. However, we need help when it comes to legal issues, may we get the help we need with arising legal issues.

**Monwabisi Jenge from Xesi in Qonce-** Does customary law allow chiefs to be elected as office bearers in committees established for the management of a certain project? Or are they ex officio members? They become both the player and the referee now in projects meant to develop communities.

Response from Nolundi- we are also trying to deal with that issue. Currently, traditional leaders are governed by the Traditional and Khoisan Leadership. This Act has areas of conflict with the living customary law. Indeed it does empower chiefs to some degree...but it is not specific as to what exactly they can or cannot do in relation to community projects. So i take the quest back to you since you are the experts of your customs, does your community customs allow what the chief is trying to do? Obviously business people want the short way out, they would rather speak to one man than the whole community. So, they will always try to buy chiefs and get them to sign off your land on your behalf.

**MrsKhetshemiya-** How do PTO holders get equal protection as title deed holders? The law seems to protect the latter more than the former. People with PTOs are victims of land dispossession, Baby's presentation demonstrates this, we are also examples of this and many more communities even those on the coast. PTO do not protect us yet people who have title deeds are protected despite not even working the land, people (whites) who have long left the country or and even died overseas. Yet with us, not long after our death, our land is already being given to someone else, the powerlessness of PTOs.

Response from Nolundi—in essence PTOs are product of an apartheid regime. They were meant to offer protection that is weaker than the protection offered by title deeds (ownership). They will not start to do what they were never conceived for.

**Majikazana in Buffalo-** I was especially moved by Wilmien's statement that the government/parliament has a duty of creating laws and policies for us. In reality the policies are really not for us because the people who are making them are not engaging with us as they should. So if we do not take it upon ourselves to seek chances to make representations in law making, then we are doomed. Policy makers at the executive level were put there through cadre deployment so they know nothing, hence the useless policies.

Response by Nolundi– Indeed we have to make representations and ensure that the law reflects our views. However, the parliament can and does as it pleases sometimes and the law comes out not reflecting people's views. We are getting a bit embarrassed when we have to report after we had called you to make oral submissions. So, we don't know what must happen, maybe you should have your own political party as well since the ones you have elected into parliament tend to forget about

your views the moment they have won your votes.

**Chair... Mr** —the issues relating to land are interlinked with issues of access to basic services, i am therefore glad that we also spoke about water supply in this session. I am as impressed with the presentations as they ventured into the issues of the land and African spirituality. I hope to hear more intersectionalities even in the presentations coming up tomorrow.

DAY 3: Friday 19 August 2022

## Where to from here in addressing the problem?

RECAP OF DAY 2

Dineo Skosana, SWOP, University of the Witwatersrand

Dimuna Phiri, Land Equity International Pty Ltd., Zambia/Australia

POTENTIAL CHALLENGES TO THE FORTHCOMING  
COMMUNAL LAND TENURE BILL

CHAIR: Zenande Booi, Center on Race Law and Justice,  
Fordham University

**Are 'customary' land tenure systems in rural  
South Africa changing, and if so, why?** Ben  
Cousins, PLAAS, University of the Western Cape

**Protection gaps illustrated in previous Communal Land Tenure  
Bill**

Zenande Booi, Center on Race Law and Justice, Fordham University

DISCUSSANT

Describing the probl

FREE, PRIOR AND INFORMED CONSENT IN THEORY AND PRACTICE: WHAT'S THE NEXT FRONTIER FOR  
STRUGGLE?

CHAIR: Sienne Molepo, PLAAS, University of the Western Cape

**IPILRA and Section 54 of the MPRDA: How we leveraged various laws to achieve FPIC for mining projects**  
Aubrey Langa, community activist, Mogalakwena Mining Communities

**FPIC and natural resources:**

**Lessons from Nigeria**

Dayo Ayoade, University of Lagos, Nigeria

**Consent and Coercion: Communities' capacity to respond to external requests for community land in Liberia, Uganda and  
Mozambique** Rachael Knight, International Institute for Environment and Development

THE INTERFACE BETWEEN LAND TENURE SECURITY AND LAND ADMINISTRATION

CHAIR: Wilmien Wicomb, Legal Resource Centre

**How is the role of land administration understood in the rural context?**

Nokwanda Sihlali, *LARC, University of Cape Town*

**The Gwatyu problem**

Sipesihle Mguga, *Legal Resource Centre Thembakazi Matsheke, chairperson of an "unregistered" Gwatyu CPA*

**Nesting land tenure in land administration** Rosalie Kingwill, *independent researcher*

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