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FOREWORD

Greetings,

We welcome you to the first issue of the Land and Accountability Research Centre (LARC) newsletter. Formerly the Rural Women's Action Research Programme (RWAR) in the Centre for Law and Society, LARC graduated to become a research centre in its own right in 2016. We remain in the law faculty at the University of Cape Town.

LARC focuses on laws and policies introduced over the last 13 years that pose serious threats to the rights of the 18 million South Africans living in former homeland areas. The articles in this edition draw attention to the way in which government backing for increasingly autocratic versions of chiefly power has triggered a post-apartheid wave

of dispossession, particularly in areas affected by mining. The three focus areas within LARC are land, mining and governance. In this newsletter we introduce our staff and associates, highlight some significant events, and describe the nature of the work done in the mining, land and governance teams.

We hope that this inaugural newsletter gives you a sense of who LARC is and what we do.

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HIGHLIGHTS

THE LAUNCH OF LARC

On 21 April 2016, thanks to consistent generous support from our donors, the Rural Women's Action Research Programme (RWAR) of the Centre for Law and Society (CLS) officially graduated into a stand-alone research centre known as the Land and Accountability Research Centre (LARC), enabling us to expand our areas of work and grow our staff. We hosted a joint launch event at UCT with Ndifuna Ukwazi, where we also launched the *Rural Land Justice* edition of the *People's Law Journal*.

PRESENTATIONS IN PARLIAMENT 2-3 FEBRUARY 2016

TKLB Presentation

In September 2015 the the Traditional and Khoisan Leadership Bill was introduced into Parliament. It will repeal the Traditional Leadership and Governance Framework Act of 2003, setting out definitions, the recognition and composition requirements for traditional structures, and the roles of traditional leaders. The Portfolio Committee on Cooperative Governance and Traditional Affairs invited LARC to a stakeholder engagement on 2 and 3 February 2016, where LARC made a submission outlining our concerns with the bill.

Land Presentation

The Land Portfolio Committee invited LARC to make a presentation on Communal Land Tenure, Traditional Authorities, Spatial Planning and Land Use Management at its Strategic Planning Workshop. The presentation discussed the Interim Protection of Informal Land Rights Act of 1996 (IPILRA), and the Department of Rural Development and Land Reform's failure to enforce the Act. It also discussed problems with the implementation of the Ingonyama Trust Act.

HIGH LEVEL PANEL

Aninka Claassens, LARC's director, was appointed to be a member of the High Level Panel, appointed by the Speakers of Parliament to review the impact of key legislation – including land reform legislation – for gaps and unintended

consequences. The Panel is headed by former President Kgalema Motlanthe, and will make recommendations regarding the repeal, amendment and enactment of laws that exacerbate poverty and inequality, and contribute to social exclusion.

WORKSHOPS AND SEMINARS

In May 2016 LARC, in collaboration with the Institute for Poverty, Land and Agrarian Studies (PLAAS) (UWC) and the department of Sociology and Anthropology at the University of Stellenbosch, hosted a series of events that were organized to coincide with the visits of two eminent international scholars: Prof Sara Berry, Emeritus History Professor at Johns Hopkins University, USA, and Professor Kojo Amanor, Professor at the Institute of African Studies from the University of Ghana, Accra.

Contested Histories II

LARC organised a two day workshop – Contested Histories II – as follow-up to Contested Histories I which was convened by the Society, Work and Development Institute (SWOP) at Wits in 2015. It brought together historians, anthropologists, lawyers and researchers from South Africa and abroad to discuss possible legal, political, and discursive tools that can be used to challenge the proposed transfer of 'state land' in the former homelands to chiefs, instead of the rural citizens to whom it belongs. LARC will convene a follow-up workshop to home in on key issues that arose.

LARC ON TV

LARC recently participated in two of South Africa's most popular debate and discussion programmes: The Big Debate and Judge for Yourself with Judge Dennis Davis. In early August the Big Debate invited LARC's Deputy Director, Nolundi Luwaya, to be part of a conversation focussing on Women's rights and culture in the context of increasingly conservative interpretations of custom and customary laws. Most recently, Nolundi was a guest on Judge for Yourself hosted by Judge Dennis Davis. This discussion centred around investigations into the mismanagement of funds due to the Bapo ba Mogale as a mine hosting community. ■



REFUSING TO BE BULLDOZED CONSULTATION AND REPRESENTATION IN TRADITIONAL AREAS BY MONICA DE SOUZA LOUW

After the assassination of anti-mining activist Sikhosiphi “Bazooka” Rhadebe in March this year, considerable attention was drawn to the development struggles taking place in Xolobeni on the South African Wild Coast. Media articles reported on a local hero slain in the fight against powerful corporate and government forces seeking to extract minerals from dunes along the Wild Coast.

Rhadebe was part of an ongoing struggle by activists and community members to be taken seriously in decisions about development in the Xolobeni area. Their demand is simple: when thinking about developing the land that has housed and sustained us for centuries, ask us what will be best for this place, before you bring the bulldozers in. Ask us, because we are the real experts on local circumstances and we are the people who will be affected by any development. Is South Africa not, after all, a democracy based on the will of the people?

Yet, litigation aimed at enforcing the demand for free prior informed consent remains gridlocked in endless delays created by elites with the resources to hire top lawyers and wage lawfare against poor community members. Various community structures embarked on joint litigation to challenge the environmental authorisation that had been given to build a toll road through one portion of the Xolobeni area. They claim that the road will facilitate future titanium mining in the area, rather than alleviate current local transport concerns, and will destroy existing homes and

livelihoods. There can be no effective mining without a heavy-duty road enabling trucks to traverse Xolobeni’s deep gorges. While these claims by community members have been articulated in public, residents remain excluded from decision-making processes. Government and corporations instead default to a model of “tribal” consultation, where **“ask us” is interpreted to mean “ask the chief on our behalf”**, silencing those who will actually have to endure bad development decisions.

When proposed developments are eventually challenged through court proceedings, this same approach manifests in preliminary challenges to the legal standing of community members or structures to bring cases to court. This **forces people to engage in endless technical legal battles** rather than raising their substantive objections to development projects.

On what basis is the legal standing of individuals and community structures being challenged? There is an assumption that traditional authorities are, on their own, “representatives” of broader community interests. **The implication is that only the views of traditional authorities are relevant or important** when making decisions about development projects, to the exclusion of other civic structures, customary groupings and individuals.

This pattern is evident in Xolobeni. After initially supporting the litigation against the toll road local inkosi, Lunga Baleni decided



to withdraw his support and instead back the construction of the road. He went on to allege that, because the local traditional council had withdrawn its participation from legal proceedings, their legal representatives also had “no authority to act on behalf of or represent... any of the communities within the jurisdiction of the Council”. The toll road company used this to justify an attack on the legal standing of all other applicants in the case.

In 2015, LARC (then part of the Centre for Law and Society) applied to intervene as a friend of the court (the North Gauteng High Court in Pretoria) in this aspect of the litigation. The Centre wished to counter the assumptions – relied upon by Baleni and the toll road company – that community groupings and individuals living within jurisdictions of traditional authorities are unable to raise concerns about development proposals independent of, or contrary to, the views of those authorities. **This assumption undermines our constitutional dispensation which protects the rights of association, expression and political participation**, and is deeply insulting to the men and women who struggled against systems of indirect rule and separate “tribal” governments for so-called homelands.

After a series of challenges posed to the Centre’s involvement, the toll road company eventually withdrew its attack on the applicants’ legal standing. For more than a year community groupings had been prevented from raising their concerns about the toll road in court due to futile litigation that was eventually abandoned by the toll road company. The applicants

are yet to have their day in court. Subsequently it emerged that Baleni is now a director of a local company set up to facilitate mining operations in Xolobeni, which means that he will benefit individually from the toll road’s construction near planned mining operations.

This story is not unique to Xolobeni. People in other areas of the former Bantustans experience the same obstacles

when trying to have a say in development decisions that will affect them directly. A recent court case in the North West dealt with the question of whether the Royal Bafokeng traditional authority was empowered to take a unilateral decision to litigate in the name of the entire Bafokeng community, without first being authorised by the Bafokeng people at a mass meeting. The case was brought by groupings who did not associate with the broader litigation and, as historical land buyers, would actually be deprived of their land rights through the traditional authority’s litigation. Judge Landman of the North West High Court effectively decided that a traditional authority could represent the interests of people falling within its jurisdiction and act in their name without needing to get a mandate or even consult them. The Judge stated that it was the traditional leader’s prerogative to decide when to consult people:

“It is the Kgosi’s prerogative to summons a *kgotha kgothe* on matters of public concern. **The Kgosi has not deemed it fit to consult the nation and to debate with them** the proposal that the High Court should be approached for an order that the

land... held in terms of the trust formula be registered in the name of the [Royal Bafokeng Nation]. **Traditional law and custom has not reached a stage where exercise of the Kgosi's prerogative may be challenged in a court of law."**

Not only is the Judge's suggestion that customary law is too primitive to admonish abuses of power offensive, his finding implies that traditional leaders could make decisions without any regard to the will and interests of affected people. This interpretation – that traditional authorities can be "representative" without a corresponding duty of accountability – cannot be constitutional.

In Mapela, near Mokopane in Limpopo, ordinary people have also been excluded from consultations about matters that directly impact them. The issue in Mapela concerns a R175 million settlement agreement aiming to resolve all outstanding mining-related disputes for the area. Instead of engaging with the community, Anglo-Platinum is negotiating directly with Kgoshi David Langa and expecting the views of people in 42 villages to be filtered through him as their "representative".

At an event launching the People's Mining Charter in June 2016, a representative from Anglo-Platinum defended this approach as follows:

"The negotiation over the settlement did take place, because legally it has to, with the Kgoshi. And **the expectation is that that conversation also takes place through the tribal authority process with people."**

What legal authority is Anglo relying on to justify excluding people who will actually be affected by mining development from direct consultation processes? The simple answer is that

there is none. Instead the Traditional Leadership and Governance Framework Act of 2003 has been misinterpreted to empower traditional authorities to speak and make decisions for all of the people who live within their "tribal" jurisdictions. This is eerily akin to the system of tribal government formerly set up for people living in the so-called homelands, and is perhaps not surprising given that **the Framework Act uses the old tribal government system as a starting point** for recognising present-day traditional authorities. This is done through a transitional provision that turns old tribes into "traditional communities", old chiefs into "senior traditional leaders", and old tribal authorities into "traditional councils".

The dynamics playing out within rural communities across South Africa exemplify how people are being "consulted" via indirect engagement with "representatives" who may well be acting in the interests of a legitimate constituency, but who may also be acting in self-interest. To be clear, consulting with a traditional authority as a stakeholder is in itself not the problem. However, when consultation with one institution substitutes for consultation with the people directly affected by proposed developments, other perspectives are ignored in favour of powerful and elite views.

To compound the problem, **the government has failed to implement laws enacted during land policy reform processes to secure tenure rights**. The Interim Protection of Informal Land Rights Act of 1996 currently affirms that people with informal land rights cannot be deprived of those rights except with their consent, or by expropriation. By circumventing direct consultation with rights-holders and speaking only to those with power and resources, developers are not only flouting this law, they are also barring any chance of accountable decision-making and fuelling the fire that kills activists like Rhadebe. ■

IN SHORT

- Community consultation prior to and during local development projects is essential, but often disregarded
- The Framework Act has been erroneously interpreted to grant traditional leaders and authorities broad powers to speak on behalf of and make decisions for their communities
- Members of communities are forced to engage in protracted legal challenges to have their say in matters relating to land and mining
- Laws which are designed to protect land rights are not being adequately enforced.



UNITED RURAL VOICE HALTS TRADITIONAL AND KHOI-SAN LEADERSHIP BILL HEARINGS

PHILILE NTULI AND THIYANE DUDA

It appears that the government has no intention of undoing apartheid injustices. Not only do post-apartheid laws reinforce apartheid tribal boundaries and governance systems that promote the hegemony of traditional leaders over communities, they also disregard the concerns of the affected communities.

In the first week of September, Parliament issued a schedule with the dates and venues for public consultations on the Traditional and Khoi-San Leadership Bill (TKLB). To the surprise of many rural communities affected by this proposed legislation, the venues made it virtually impossible for many traditional communities to participate in the process. The venues for the hearings included Vredenburg, Caledon and George in the Western Cape, Springbok, Upington and Kimberley in the Northern Cape, Bloemfontein and Midrand, Kokstad in KwaZulu-Natal, and Graaff Reinet and Port Elizabeth in the Eastern Cape. Limpopo and North West, where millions of those who would be most affected by the TKLB live, were excluded altogether.

Moreover, the official programme for the hearings was sent to the Parliamentary Portfolio Committee on Cooperative Governance and Traditional Affairs in the first week of September, giving the committee a few days to prepare its constituencies in anticipation of the first hearing scheduled for the 14th of the same month. The fact that the hearings were scheduled in closer proximity to Khoi and San communities is revealing of underlying political dynamics surrounding the introduction of this proposed law. Since it was first introduced to parliament in 2015 there have been strong critiques from activists in Khoi, San and other African traditional communities on a number of issues it raises.

The Bill is criticised for reinforcing apartheid geography and its legacy. It does so by adopting and merely renaming structures created by colonial and apartheid laws. When the Traditional Leadership and Governance Framework Act of 2003 (TLGFA) – which the TKLB is meant to replace – was adopted, ‘tribes’ created through the Natives Administration Act of 1927 (NAA) were renamed ‘traditional communities’, while the ‘tribal authorities’ created through the Bantu Authorities Act of 1951

(BAA) became ‘traditional councils. This means that traditional leaders and traditional councils have jurisdiction over land and people within the same apartheid boundaries that were carved out under the Bantu Authorities Act. The people who live within these boundaries are locked under the authority of superimposed traditional leaders and traditional councils with no means of opting-out. In this way both the TLGFA and the TKLB entrench apartheid-era divided citizenship between urban and rural citizens, with the most marginalized South Africans subjected to chiefly rule by post-apartheid law.

Government has been criticized for using the TKLB to side-step its failure to transform traditional institutions through the Commission on Traditional Leadership Disputes and Claims (Nhlapo Commission) and the traditional council elections as required by the TLGFA.

The TKLB is also criticized for unconstitutionally providing for the discretionary allocation of governmental functions in the form of unclear ‘roles’ to traditional structures. This, in effect, could create a fourth tier of government. Mine-hosting communities are especially critical of the TKLB for allowing traditional councils to enter into deals with companies, municipalities and “any other person, body or institution” without consulting the community. These communities are already experiencing challenges with unaccountable traditional leaders who exclude communities from the benefits accruing from mining on communal land.

The TKLB also treats so-called African traditional leaders differently compared with Khoi and San leaders. While traditional leaders have jurisdiction over defined areas of land and the people who live on it, Khoi and San leaders are given jurisdiction only over people who choose to affiliate with them, and not over land.

In December 2015, a schedule which concentrated hearings mainly in the North West platinum belt was strongly criticised by rural activists, including Khoi and San activists. Parliament withdrew that schedule stating its intention to reintroduce a more inclusive version in January 2016. The tensions generated

by the local government elections in August 2016 possibly contributed to Parliament's decision to halt discussion of this controversial legislation which resumed only after the elections in September 2016.

However, to the surprise of many, the new schedule released just days before the proposed hearings were to begin focused on Khoi and San areas and excluded other traditional communities. Members of the Portfolio Committee on Cooperative Governance and Traditional Affairs and at least one NGO objected to the clearly unbalanced venue selection for public hearings.

A network of rural community activists from Limpopo, North West, Eastern Cape, Mpumalanga and KwaZulu-Natal, who work together under the national umbrella of the Alliance for Rural Democracy (ARD), held a workshop in Johannesburg from 7 to 9 September to prepare for the scheduled hearings.

In the workshop rural activists were very clear that they would not accept the TKLB in its current form as it is clearly was not created for rural citizens, but for traditional leaders. The Bill encourages elite capture as it vests all decision making with traditional institutions to the exclusion of communities. It was noted that the Bill will create further division between traditional leaders and rural citizens. Some questioned the relevance of the institution of traditional leadership in this day and age. Many activists see this Bill as the government's way of taking rural citizens back to apartheid days by resuscitating the Bantustans and subjecting them to the rule of traditional leaders with no way to opt out. Activists feel this is unfair as it will curtail their access to constitutional rights their urban counterparts can fully enjoy. The rural activists left the workshop with plans to mobilise rural communities widely to oppose the TKLB. They remain critical of government's tendency to involve them only at the tail-end of law-making processes, as well as of the inaccessibility of the public hearings for many affected communities. By excluding the

majority of affected communities from the consultative process of the TKLB, Parliament is effectively ignoring the outcomes of similar legislative instruments which overlooked the constitutional obligation to ensure that the public is adequately consulted in law-making processes.

The Communal Land Rights Act 11 of 2004 (CLRA), whose objective was to transfer communal land title from the state to traditional communities' (formerly tribes), was invalidated by the Constitutional Court in 2010 on the basis that Parliament had followed the wrong procedures, including failing to facilitate public involvement in the legislative process as required by the Constitution.

Similarly, the Constitutional Court in July 2016 invalidated the Restitution of Land Rights Amendment Act (2014) due to the State's failure to satisfy its Constitutional obligation to offer the public reasonable opportunities to involve themselves in legislative processes. Constitutional Court Judge Madlanga's judgement was delivered only a few days after the President sent the Expropriation Bill (2016) back to the NCOP and Parliament, questioning too whether there was adequate involvement of the public during the legislative process. Bizarrely, despite these rulings the schedule for TKLB hearings effectively followed the same precedent of excluding large sections of those most directly affected by the TKLB from access to the public hearings.

On 9 September, the Portfolio Committee postponed the scheduled TKLB hearings to a later date and promised to organise hearings in all nine provinces. We suspect that this change was influenced by various people, including the Alliance for Rural Democracy pointing out that the venues selected could not pass Constitutional muster.

We remain hopeful that a new and inclusive schedule will be drafted for when the hearings finally take place. Aluta Continua!!! 🟡

UPDATE ON TKLB PUBLIC HEARINGS PROGRAMME

On 20 September 2016, after media publication of this article, the Portfolio Committee on Cooperative Governance and Traditional Affairs adopted a new programme of public hearings on the TKLB that includes all nine provinces. Please note that the schedule remains subject to changes by Parliament:

November 2016				
Tuesday	Wednesday	Thursday	Friday	Saturday
1 Caledon (WC) 09h00 – 13h00	2 George (WC) 09h30 – 11h30	3 Vredenburg (WC) 09h30 – 14h00	4 Cape Town (WC) 09h30 – 13h00	5
8 Springbok (NC) 10h00 – 14h00	9 Upington (NC) 09h00 – 13h00	10 Kimberley (NC) 09h00 – 13h00	11 Bloemfontein (FS) 09h00 – 13h00	12 Phuthaditjhaba (FS) 09h00 – 13h00
15 Thohoyandou (LP) 10h00 – 14h00 AND Bushbuckridge (MP) 10h00 – 14h00	16 Polokwane (LP) 09h00 – 14h00 AND Badplaas (MP) 09h00 – 14h00	17 Apel (LP) 09h00 – 13h00 AND Mkhuzi (KZN) 09h00 – 14h00	18 KwaMhlanga (MP) 09h00 – 13h00 AND Vryheid (KZN) 09h00 – 14h00	19 Pietermaritzberg (KZN) 09h00 – 14h00
22 Rustenburg (NW) 09h00 – 13h00 AND Kokstad (KZN) 09h00 – 14h00	23 Mafikeng (NW) 09h00 – 13h00 AND Mthatha (EC) 09h00 – 13h00	24 Vryburg (NW) 09h00 – 13h00 AND East London (EC) 09h00 – 13h00	25 Midrand (GP) 09h00 – 13h00 AND Graaff Reinet (EC) 09h00 – 14h00	26 Port Elizabeth (EC) 09h00 – 13h00

RESEARCH ASSOCIATES

Senior Research Associates



Rosalie Kingwill is an affiliate of LARC, as well as a post-doctoral research fellow at the Institute of Poverty, Land and Agrarian Studies (Plaas), University of the Western Cape, where she was awarded a PhD in 2014. She previously worked in the land sector in the Eastern Cape for thirty years, both in the NGO sector and as a research consultant. Her applied research interest is in land tenure reform and rebuilding accountable and apposite land administration systems in rural and urban settings. Her academic interest is in the evolution of ideas about, and theories of property; cross-cultural interpretations of property (including the ideas and practices of 'living' African customary tenure and inheritance/succession); and aligning Constitutional norms with the legal reform of property law.



Sindiso Mnisi Weeks is an assistant professor at the School for Global Inclusion and Social Development at the University of Massachusetts Boston. She was formerly a senior lecturer in the Department of Private Law and a senior researcher at the Centre for Law and Society at the University of Cape Town, where she worked in the Rural Women's Action Research Programme. Her areas of expertise include African customary law, women's rights, traditional courts, the relationship between culture and human rights, public policy, the institutionalisation of traditional authorities, the relationship between property and authority, the law of succession, and comparative epistemology. Dr. Mnisi Weeks received her BA and LLB from the University of Cape Town and her doctorate in socio-legal studies from the University of Oxford, where she was a Rhodes Scholar.



Thandabantu Nhlapo retired as senior Deputy Vice-Chancellor at the University of Cape Town after an academic career spanning over three decades. He is a former full-time member of the South African Law Reform Commission, and former Chairperson of the Commission on Traditional Leadership Disputes and Claims ('Nhlapo Commission'). He was also Professor and Head of the Department of Private Law at the University of Cape Town, and held the role of expert advisor to the Constitutional Assembly on matters relating to customary law and to traditional authorities. His research interests include African customary law and gender, women's human rights in family law, traditional values and modern constitutions, and cultural diversity under the South African Constitution. Dr. Nhlapo holds a BA (Law) from the University of Botswana, Lesotho and Swaziland, an LL.B (Hons.) from the University of Glasgow, a DPhil in Family Laws from Oxford University, and an honorary doctorate from Glasgow University.



Janine Ubink holds a law degree and PhD in legal anthropology from Leiden University in the Netherlands. Prior to joining University of California Irvine Law School in 2013, she worked at the Van Vollenhoven Institute at Leiden Law School. She is also President of the International Commission on Legal Pluralism, and works as a consultant in her fields of expertise, most recently serving as an advisor to the Ministry of Justice of Somalia. Her research focuses on legal pluralism, customary law and its relation with state law, traditional authorities, transitional justice, rule of law reforms, gender, and land management, with a regional focus on Africa, particularly Ghana, Namibia, Malawi and Somalia. Her future projects will focus on land management, customary law and traditional authorities in South Africa.

Research Associates



Michael Clark is a legal and research consultant and research associate at LARC. Prior to his work at LARC, Michael conducted legal research at the Socio-Economic Rights Institute of South Africa (SERI) as a research and advocacy officer. Michael has considerable experience in legal and participatory action research in the areas of socio-economic rights, housing, land and property rights. He holds an LLB from the University of Stellenbosch.



Tara Weinberg worked at LARC as a researcher before starting her PhD in History at the University of Michigan in 2015. Her dissertation looks at a history of claims on and struggles over land in 20th century South Africa. She is broadly interested in issues of property, gender and citizenship. She has done work in the area of contemporary land reform, land restitution, communal land tenure and communal property associations. She has a BA (Hons) from University of Cape Town and an MA from the University of Chicago



GOVERNANCE

A series of recently proposed laws and policies attempt to give traditional authorities unaccountable powers to administer justice, manage natural resources like land and minerals, and control development in the former homeland areas of South Africa. The laws build on provisions in the Traditional Leadership and Governance Framework Act of 2003 that convert the boundaries of former ‘tribal authorities’, created under an apartheid law called the Bantu Authorities Act of 1951, into jurisdictions for traditional councils today. Eighteen million of the poorest South Africans live within these boundaries. LARC’S governance project endeavors to prevent the irrevocable damage to rural democracy that the enactment of bills such as the Traditional and Khoi-San Leadership Bill would cause. We also continue monitor the implementation of existing laws.

Our work examines the ways in which the envisaged laws would further tilt the balance of power in favour of elites in the former homeland areas of the country. In contexts where traditional institutions exercise autocratic or patriarchal power under the current legal framework, our aim is to expose these abuses, support local struggles against such practices and facilitate solutions that promote accountable and legitimate forms of traditional governance. By highlighting examples of inclusive and accountable living customary law, the research and inputs of the governance team provide an alternative viewpoint to the dominant narratives of traditional leadership and customary law that build on distortions entrenched during apartheid.

The Governance team’s work covers a range of subject areas, including involvement in a case challenging the authorisation given to build a toll road in Xolobeni, along the Wild Coast (read more in our “Feature Article” on page 03 -05). We are also engaging in research and advocacy in matters relating to specific pieces of legislation and their mechanisms:

Disputes Commission

Mechanisms in the Framework Act aimed at democratically transforming traditional institutions, including traditional council elections and a Commission on Traditional Leadership Disputes and Claims to deal with disputes emanating from historical interventions by the apartheid government, have been poorly implemented. LARC has followed the Commission’s processes in the past, participating (then as part of the Centre for Law and Society) as a friend of the court in a 2013 challenge against the Commission’s findings on the kingship of AmaMpondo (Sigcau v President of the RSA). More recently, **LARC has tracked certain findings made by the Commission’s provincial committees and commented on a lack of transparency** surrounding committee reports and the apparent reluctance of Premiers to implement committee findings where these will affect substantial vested interests. The Premier of North West, for example, has ignored the Commission’s findings for both the Bakgatla ba Kgafela and Bapo ba Mogale traditional communities, and instead established a new Commission of Inquiry to re-investigate ongoing leadership disputes.

Traditional and Khoi-San Leadership Bill

The Traditional and Khoi-San Leadership Bill (TKLB), introduced in Parliament in 2015, aims to replace the Framework Act and introduce legal recognition for Khoi-San communities and leadership structures. LARC’S extensive analysis of consecutive drafts of the TKLB has revealed that many of the serious problems arising from the implementation of the Framework Act are retained in the TKLB. **The TKLB maintains the geographic jurisdictions derived from past distortions of customary governance systems.** This locks people living in the former homelands into identities and authorities that they may not choose to affiliate with. Provision is also made for traditional authorities to have



potentially far-reaching powers without corresponding measures to ensure accountability, or to improve on mechanisms for transforming traditional institutions. LARC submitted its views on the bill to Parliament's Portfolio Committee on Cooperative Governance and Traditional Affairs at stakeholder hearings in February 2016, and has also participated in information-sharing sessions on the bill with the Alliance for Rural Democracy.

A new law on traditional dispute resolution

In the past, LARC's work focused on certain laws emanating from the Framework Act. One of these laws, the Traditional Courts Bill (TCB) of 2008/2012, attempted to give traditional leaders far-reaching powers as 'presiding officers' to summon persons to appear before them in disputes and then bestow punishments such as fines or forced labour. The TCB was met with resistance from rural citizens, communities and civil society, resulting in the bill failing to garner majority provincial support in Parliament. **Despite this victory the threat of unaccountable power entailed in the law remains.**

Since December 2015 **LARC has been monitoring the Department of Justice and Correctional Service's process for drafting a new law to replace the failed TCB.** The Department has publicly stated that the new draft will address the criticisms previously raised against the bill during consultation processes. LARC played a key role in campaigning against the bill as part of the Alliance for Rural Democracy, and researchers affiliated with LARC recently published an analysis of parliament's consultation process on the bill in a special edition of the New York Law School Law Review. LARC has also provided public commentary on the conviction and imprisonment of AbaThembu King Dalindyebo and implications for the statutory recognition of traditional dispute resolution forums. We eagerly await the introduction of a new bill version into Parliament to find out whether the Department has actually taken public, parliamentary and civil society input into consideration. ☰

The following key resources are available online:

- 01. Submission on the Traditional and Khoi-San Leadership Bill, 2015 – February 2016**
(http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/Submission%20on%20TKLB_LARC_20160202.pdf)
- 02. Notes on the Traditional and Khoi-San Leadership Bill [B 23 – 15] – October 2015**
(<http://www.customcontested.co.za/notes-on-the-traditional-and-khoi-san-leadership-bill-b-23-2015-october-2015/>)
- 03. Thuto Thipe, Monica de Souza and Nolundi Luwaya “The Advert Was Put Up Yesterday”: Public Participation in the Traditional Courts Bill Legislative Process, New York Law School Law Review Vol 60 Number 2, 2015/2016** (<http://www.nylslawreview.com/wp-content/uploads/sites/16/2016/04/Volume-60-2.Thipe-DeSouza-Luwaya.pdf>)
- 04. Thiyane Duda “Bill could’ve made all Dalindyebo’s acts legal” Daily Dispatch, 8 October 2015**
(<http://www.dispatchlive.co.za/bill-could-have-made-all-dalindyebos-acts-legal/>)
- 05. Monica de Souza Louw “Will North West premier depose tainted tribal leader?” Ground Up/Daily Maverick, 25 January 2016** (<http://www.groundup.org.za/article/will-north-west-premier-depose-tainted-tribal-leader/>)
- 06. Phiwe Ndinisa “New bill leaves communities at leaders’ mercy” Business Report, 30 August 2015**
(<http://www.iol.co.za/business/opinion/new-bill-leaves-communities-at-leaders-mercy-1937965>)
- 07. Nolundi Luwaya “Response to king’s actions may shape customary law” Daily Dispatch, 23 March 2016**
(<http://www.dispatchlive.co.za/response-to-kings-actions-may-shape-customary-law/>)
- 08. Philile Ntuli “Modern law in conflict with customary law” Sunday Independent, 31 January 2016**
(<http://www.iol.co.za/sundayindependent/modern-law-in-conflict-with-customary-law-1977797>)
- 09. Thabiso Nyapisi “Traditional bill strips people of their rights” Sowetan, 6 January 2016**
(<http://www.sowetanlive.co.za/news/2016/01/06/traditional-bill-strips-people-of-their-rights>)
- 10. Thiyane Duda “Community hall row sparks tensions” Daily News, 15 August 2016** (<http://www.iol.co.za/dailynews/opinion/community-hall-row-sparks-tensions-2057222>)



LAND

The land project at LARC researches and documents current practices in respect of land rights in the former homelands, paying particular attention to how and by whom decisions are taken with regard to who gets land, how it is used and by whom, and in respect of transactions and inheritance. We work in a variety of contexts, including for example with the descendants of syndicates who bought land at the turn of the last century, villages of evicted farm workers living on South African Development Trust land, rural communities in the border area of the former Ciskei, rural areas in KwaZulu-Natal, and villages in Limpopo and North West.

Through thick descriptions of current and past systems of land rights, the land project problematises the static and autocratic version of tribal ownership contained in past colonial versions of customary law, that have ironically been used to justify current policy. This enables us to highlight instances in which traditional leaders purporting to represent ‘customary communities’ but failing to consult those whose land rights are at issue, breach both customary law and the Interim Protection of Informal Land Rights Act of 1996 (IPILRA) in signing investment deals with outsiders, including mining companies. Our research reveals a very different picture from the one-size-fits-all version of custom embodied in current policy.

Section 25(6) of the Constitution creates a right to tenure security for those whose rights are legally insecure as the result of past discrimination. IPILRA provides that the holders of informal rights may not be deprived of land except with their consent or by expropriation. Despite IPILRA and the fact that the Constitutional Court declared the Communal Land Rights Act of 2003 (CLRA) invalid, **current land policy nonetheless remains premised on vesting ownership of land in the former Bantustans in ‘traditional communities’ or tribes.** As an illustration, the recent draft Communal Land Bill seeks to transfer title and control over ‘communal’ land in the former homelands not to the 18 million ordinary people who have occupied it over generations, but to ‘tribes’ headed by traditional leaders.

Furthermore, in pursuance of policies that foreground the interests of traditional leaders over those of ordinary citizens, the Department of Rural Development and Land Reform (DRDLR) has failed to implement and enforce land reform laws passed after 1994 – such as IPILRA – that uphold and protect Constitutional land rights. **LARC’s role is to document the flouting of both the requirements of laws such as IPILRA, and customary consultation requirements.** We also document the failure of provincial governments to enforce the financial oversight and accountability mechanisms contained in provincial laws, when requested to do so by community members.

HIGHLIGHTS OF SOME CURRENT PROJECTS:

Ingonyama Trust

We are involved in intensive research in parts of KwaZulu-Natal, where **we have interviewed families, individuals and groups about the nature of their historical land rights, and the circumstances under which they have entered into leases with the Ingonyama Trust** in respect of residential land and some business deals. We have been monitoring statements made by the Trust in Parliament and its Annual Reports to compare the statements made by the Trust in respect of its modus operandi, and actual practice on the ground. We have also monitored and documented areas in which prospecting and mining has taken place without prior consent by people whose land has been damaged in the process. This research will be used in both litigation and in academic articles. A key constraint we face is that of severe intimidation and fear of exposure by the people whom we interact with.

Communal Property Associations

The land team continues to work with specific Communal Property Associations (CPAs), such as the Mawubuye in Mpumalanga, who approached us for support and research in the past, although



we are no longer taking on new cases. **Our research aims to illuminate overarching patterns in the problems facing CPAs across the country**, and thereby illuminate specific structural patterns in how the Department treats CPAs, as well as underlying problems, and the policy implications. We highlighted these in an affidavit when we applied to be an amicus in the Bakgatla CPA case before the Constitutional Court. Our involvement has contributed to a new draft CPA Amendment Bill that the DRDLR has produced for public comment. LARC worked with various individuals and organisations in the land sector to develop a coherent analysis of the Bill, and made a submission to the Department about our concerns in June 2016.

Communal Land Tenure Policy

We continue to closely monitor the proposed 2016 Communal Land Tenure Bill, which was recently made public. In our view, in several respects **the present draft offers little divergence from the CLRA that was declared unconstitutional in 2010**. One concern with the 2016 draft Bill is that it purports to introduce a choice between CPAs, Traditional Councils and Trusts, but on terms that entail procedures that cannot translate into real choice on the ground. It similarly proposes some measure of registration of ownership for residential sites, but also on the basis of expensive conveyancing procedures that are unlikely to yield concrete results except for a privileged few. Overall, the model opens the way for powerful groups to negotiate deals with external parties in respect of all land other than household plots, without consulting those who will lose access to key customary entitlements.

The following resources relating to LARC's recent land work are available online:

- 01.** Aninka Claassens, LARC Presentation to Parliament Land Portfolio Committee on Land Tenure in Communal Areas, 2-3 February 2016 (pmg-assets.s3-website-eu-west-1.amazonaws.com/160202larc.ppt)
- 02.** Philile Ntuli "KZN land tenure is injury and insult" Business Day, 24 June 2016 (<http://www.bdlive.co.za/opinion/2016/06/24/kzn-land-tenure-is-injury-and-insult>)
- 03.** Land Rights Under the Ingonyama Trust, February 2015 (http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/FactSheets/FactsheetIngonyama_Final_Feb2015.pdf)
- 04.** Aninka Claassens "Dispossession is not land reform" City Press, 8 June 2015 (<http://city-press.news24.com/Voices/Dispossession-is-not-land-reform-20150605>)
- 05.** Communal Land Tenure Policy and IPILRA, February 2015, (http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/FactSheets/Factsheet_CommunalTenure_IPILRA_Final_Feb2015.pdf)
- 06.** Philile Ntuli "Flames of SA's apartheid past broil Vuwani" Business Day, 11 May 2016 (<http://www.bdlive.co.za/opinion/2016/05/11/Flames-of-SA's-apartheid-past-broil-Vuwani>)
- 07.** Communal Property Associations (CPAs), February 2015 (http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/FactSheets/Factsheet_CPAs_Final_Feb2015.pdf)
- 08.** LARC submission on CPA Amendment Bill http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/Submissions/LARC%20Submission%20CPA%20Amendment%20Bill_FINAL%20SUBMITTED1.pdf
- 09.** Claassens, A & Budlender, G. 'Transformative Constitutionalism and Customary Law,' Vol 6, 2016, Constitutional Court Review http://www.larc.uct.ac.za/sites/default/files/image_tool/images/347/JournalArticles/CCR-VI.pdf

MINING & TRUSTS

The mining project was launched in 2014 to assist mine-hosting communities in the former homelands who have not received meaningful benefits from mining taking place on their land. In particular, the programme aims to help these communities to expose and reverse the capture of benefits flowing from mining operations by politically connected elites working with autocratic traditional authorities. **The programme was created in the context of emerging policy and legislation that serves to entrench elite control of revenues and benefits meant for the affected communities.** Traditional leaders and councils routinely ignore statutory and regulatory obligations to account to ordinary people for the management and application of funds held in their name, while the state has failed at local, provincial and national levels to enforce oversight and audit obligations. Moreover, **local courts regularly block efforts by individuals and groups to call leaders to account**, forcing them to litigate sometimes as far as the Constitutional Court, to claim even their most basic constitutional rights of tenure security and freedom of speech and association.

This work of LARC's mining team includes action research with communities on the ground; in-depth analysis of policy and legislation; advocacy at all levels, from mine-shaft gate to Parliament; and extensive multi-media publicity to keep the issues facing mine-hosting communities on the public agenda. The team also works with other civil society organisations to influence the development of mining law and regulations in favour of communities who bear the brunt of the industry's operations on the ground.

Work with communities on the Platinum Belt

Since establishing the programme, the mining team has worked predominantly with two mine-affected communities on the platinum belt: the Bapo ba Mogale community in the North West, and the Mapela community located in Limpopo. **The team helped the Bapo ba Mogale community to launch an application for a review of a controversial 2014 deal**

between Lonmin plc and the Traditional Council to swap their statutory right to royalties, as well as rights in land, for cash and equity controlled by the disputed leader of the community and his supporters.

In Mapela, the team is currently working closely with the community to bolster their challenges against deals struck between their kgoshi (Chief), David Langa and Anglo American Platinum (Amplats) concerning the Mogalakwena platinum mine. The community has been excluded from negotiations between Amplats and Kgoshi Langa, and has also been denied the benefits of mining activities that have severely impacted on and displaced many families and their graves, and dispossessed many residents of their land. In particular, **LARC is assisting Mapela residents with an ongoing dispute relating to a "Settlement Agreement" worth R175 million offered by Amplats and signed by Kgoshi Langa** purportedly on behalf of the Mapela community, but without adequately consulting the community. The trust structure fails to recognise the importance of community participation in decision-making at all levels and concentrates the power of Kgoshi Langa by, amongst other things, making him the chairperson of the trust.

In addition to providing ongoing support to the Mapela community, LARC also brought the issue to the public's attention through opinion pieces published in the media. Further, working with law firm Richard Spoor Inc, LARC is assisting the community with the preparation of a potential court application to review the Settlement Agreement on the basis that customary law consultation procedures were not followed. Due in part to LARC's interventions, Amplats and the Kgoshi's legal representatives have agreed to enter into a process of negotiation around the Settlement Agreement, with a view to resolving the dispute. LARC was recently invited by Amplats to engage in this process and submitted a memorandum detailing our research on the consultation procedures required by customary law in Mapela, as well as our primary concerns with the Settlement Agreement. 🇷🇸

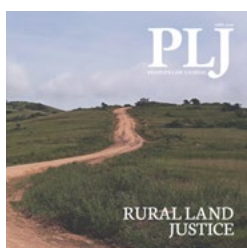
The following online resources highlight the recent work of LARC's mining team:

01. Brendan Boyle "Mining communities out in the cold over compensation" Business Day, 5 February 2016 (<http://www.bdlive.co.za/opinion/2016/02/05/mining-communities-out-in-the-cold-over-compensation>)
02. Thabiso Nyapisi "Community kept in the dark over Amplats mining deal" Sowetan, 3 May 2016 (<http://www.larc.uct.ac.za/news/community-kept-dark-over-amplats-mining-deal>)
03. Joanna Pickering and Thabiso Nyapisi "Amplats premature to trumpet settlement with Mapela" Business Day, 28 April 2016 (<http://www.bdlive.co.za/opinion/2016/04/28/amplats-premature-to-trumpet-settlement-with-mapela>)
04. Joanna Pickering "Black people on communal land at mercy of mining firms" Business Report, 20 July 2016 (<http://www.customcontested.co.za/black-people-communal-land-mercy-mining-firms/>)
05. Sifiso Dladla "Community celebrates as iron mine plan shelved" Ground Up, 26 July 2016 (<http://www.groundup.org.za/article/kwazulu-natal-community-celebrates-mining-companys-withdrawal/>)
06. Brendan Boyle "Foxes left to guard the hens that lay community nest eggs" Business Day, 10 August 2016 (<http://www.bdlive.co.za/opinion/2016/08/10/foxes-left-to-guard-the-hens-that-lay-community-nest-eggs>)
07. Sobantu Mzwakali "Radio debate on Lonmin deal shut down" Ground Up, 22 July 2016 (<http://www.groundup.org.za/article/radio-debate-lonmin-deal-shut-down/>)
08. Aninka Claassens "Hope for battle-weary mining community" Business Day, 20 July 2016 (<http://www.bdlive.co.za/opinion/2016/07/20/hope-for-battle-weary-mining-community>)
09. Nyasha Karimakwenda "The special hell of Marikana's mining women" Sunday Times, 21 August 2016 (<http://www.larc.uct.ac.za/news/special-hell-marikanas-mining-women>)

MEDIA AND ADVOCACY CIRCLE

An integral component of LARC's work is the strategic use of various forms of media to support our aims. Through our diverse media

platforms we generate knowledge, publicise critical themes, as well as influence and analyse ongoing developments and discourse on matters of land, mining and governance in the former Bantustans. This is a key aspect of our efforts to foster more progressive interpretations of customary law and traditional leadership, and to help shape policy, law and accountability in our substantive focus areas.



People's Law Journal

The most recent edition of the *People's Law Journal*, published in 2016, is the result of a collaborative effort between LARC and partner organisations. This edition, titled *Rural Land Justice*, takes stock of the importance of land rights in building a more equal society. It focuses on historically marginalised people in South Africa with particular emphasis on their lack of access and rights to land. A number of articles examine the extent to which post-apartheid laws have addressed the legacy of past administrations. Others reveal the ongoing challenges facing residents in former Bantustans. An online version of the journal can be accessed at: <http://nu.org.za/wp-content/uploads/2016/04/Peoples-Law-Journal-vol-IV-Digital-1.pdf>.



Custom Contested

One of LARC's central concerns is to challenge official and stagnant iterations of customary law that are inconsistent with living customary law, and detrimentally impact communities. LARC's blog, Custom Contested, addresses the ever changing and continuously debated nature of customary law. Custom Contested provides news, information and analysis on laws and policies affecting custom, 'tradition' and citizenship rights, exploring what is at stake for ordinary South Africans. Its features include a law and policy tracker, opinion articles written by researchers, activists and thought leaders, and action alerts. This site can be viewed at: www.customcontested.co.za.



Other Media

More information about LARC can be found by visiting our website: www.larc.uct.ac.za. LARC also engages with the public via its Twitter account: @LarcUCT. Additionally, we regularly publish and feature in national and local news outlets using digital, print, audio and visual media formats.

For updates on our work, please follow us

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