REPORT 2023

LAND CONFERENCE 2022

The Failed Promise of Tenure Security

Customary Land Rights and Dispossession

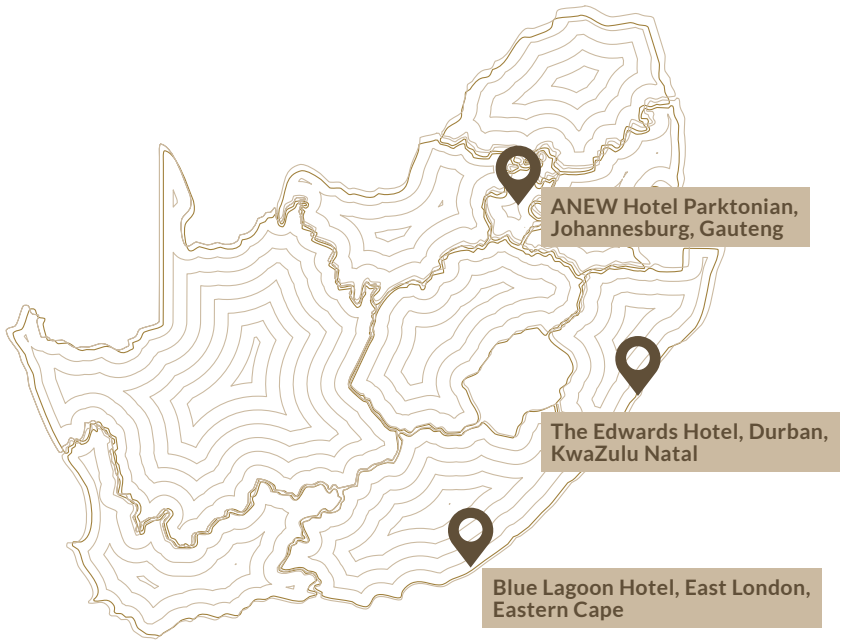
CONFERENCE WEBSITE:

www.plaas.org.za/land-conference-2022

17 - 19 August 2022

A HYBRID CONFERENCE

Online participation and physical conference venues for rural communities



ACKNOWLEDGEMENTS

This conference would not have been possible without the dedication and commitment of so many people, to whom we extend our unending thanks! We would like to make a few special acknowledgements to various colleagues and organisations for the role that they played.

We would like to acknowledge all of the conference participants, those who presented and attended from across South Africa and other parts of the world, without your engagement there would not have been a conference at all. We would especially like to acknowledge the various community activists who, despite the personal risks to their safety and well-being, participated in the conference and continue to champion the rights of their communities, despite the cost. Aluta Continua comrades!

We are grateful to all of the colleagues who assisted with the logistics for the in-person venues in three provinces in South Africa and who also took on the role of translator. A demanding role that was central to making the conference accessible to a wider audience. We also thank the organising committee (whose names appear further in the report), especially Sienne Molepo who served as conference coordinator and held together an ambitious and demanding event with grace, patience and a firm hand. Thank you, Sienne!

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Finally, a big thank you to the communications team and the collective of dedicated rapporteurs whose work is what made this report possible. Thank you for putting the in the time both during and after the conference.

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BACKGROUND CONTEXT

The following served as the motivating context for conference and influenced the conference themes and topics:

The Communal Land Tenure Bill (CLTB) is expected to be tabled in Parliament according to statements made by the Department of Agriculture, Land Reform and Rural Development in recent parliamentary committee meetings. The CLTB comes hot on the heels of the enactment of the Traditional and Khoi-San Leadership Act (TKLA)[1] and the resuscitation of the controversial Traditional Courts Bill, 2017. These laws revert to and entrench colonial and apartheid approaches to land holding and administration that weaken or erase existing rights to land. They bolster the unaccountable operation of traditional governance institutions that violate the constitutional rights of rural communities.

Recently the President has made a number of pointed statements about the centrality of the institution of traditional leadership in land matters - including, at the opening of the House of Traditional Leaders and the funeral of King Goodwill Zwelithini. Ownership of 'communal land' has always been the jewel in the crown for those traditional leaders claiming increased powers after 1994. This is illustrated by the fact that opposition by the traditional leader lobby to the Traditional Leadership and Governance Framework Act of 2003 was withdrawn after last minute changes were made to the 2004 Communal Land Rights Bill to vest ownership and control over communal land in traditional leaders and councils. The Communal Land Rights Act (CLRA)[2] was, however, ultimately struck down by the Constitutional Court in 2010. Despite this, the government continues to treat 'communal land' as the de facto property of traditional leaders.

Policies and laws that seek to transfer ownership and control of 'communal' land to traditional leaders would undermine the pre-existing property rights and decision-making authority of families and individuals with established customary rights over their land. Many of these customary rights have existed over generations, some are well documented while others may not be recorded in written form despite strong forms of oral evidence.

Despite the fact that the CLRA did not make it into operation, and was struck down by the Constitutional Court, the government began to treat communal land as de facto owned by traditional leaders after 2003. This has had serious consequences for land rights holders. Examples include the 2013 Regulations to the Spatial and Land Use Management Act (SPLUMA)[3] requiring proof of land allocation by traditional leaders before any development can take place on 'communal land'. This has created a bottleneck enabling traditional leaders to extort money or portions of land from people desperate to have services installed on their land. Another common practice is traditional leaders demanding payment or levies for long-occupied 'communal' land and threatening those who refuse or cannot pay with eviction as evidenced by recent court judgments. A common feature of such cases is that the police refuse to provide protection to vulnerable rights holders or to prosecute cases of wrongful eviction. Another glaring example of traditional leaders being treated as the de facto owners of 'communal' land is that of the Ingonyama Trust and its practice of converting residential PTO certificates into leases.

A particularly urgent aspect of failed government policy relates to external investments within the former homelands, including the expansion of extractive industries such as mining. Most mining, agricultural and tourism projects take place on land that already vests in people with customary land rights. Yet prevailing government practice is to ignore customary law and tenure rights protected by the Interim Protection of Informal Land Rights Act (IPILRA)[4] and instead advise mining and investment companies to negotiate access and compensation (such as it is) exclusively with traditional leaders. Ongoing processes of dispossession arising from mining and other investments on 'communal' land are exacerbated by the continued uncertainty around how IPILRA is to be properly complied with and how it relates to other laws like the Mineral and Petroleum Resources Development Act (MPRDA)[5], or National Environmental Management Laws Amendment Act (NEMA)[6]. The 2018 Maledu[7] and Baleni[8] judgements upholding IPILRA rights are powerful tools but don't go far enough in relation to describing the specific rights requiring protection within 'communal areas'.

A new and serious threat is the recent redistribution policy that targets heavily settled South African Development Trust (SADT) land for redistribution to new stakeholders. This introduces new and serious external conflicts of interest in areas where land rights are already historically vulnerable and subject to multiple overlapping historical claims. Government appears oblivious to the history of this land and the imperative of securing current land rights before introducing external stakeholders and counter-claims.

Insofar as we critique current policies, we need to put forward viable and enforceable alternatives. The body of work generated in support of the 2017 High Level Panel proposals provides a useful starting point that requires further development.

Policies and laws that seek to transfer ownership and control of 'communal' land to traditional leaders would undermine the pre-existing property rights and decision-making authority of families and individuals with established customary rights over their land.

1. Act 3 of 2019.
2. Act 11 of 2004.
3. Act 16 of 2013.
4. Act 31 of 1996.
5. Act 28 of 2002.
6. Act 107 of 1998.
7. Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2019 (2) SA 1 (CC).
8. Baleni and Others v Minister of Mineral Resources and Others 2019 (2) SA 453 (GP).

TIMELINE OF KEY MOMENTS IN THE STRUGGLE FOR CUSTOMARY TENURE SECURITY

1993	The Interim Constitution is passed.
1994	The Restitution of Land Rights Act is passed by parliament.
1996	The Constitutional Court rejects the appeal against certification of the Final Constitution and the complaint from traditional leaders that it merely 'acknowledges' rather than 'protecting' it; and that no role is created for traditional leaders in government.
	The Final Constitution of the Republic of South Africa is certified and becomes law.
	The Interim Protection of Informal Land Rights Act is passed.
1998	The Status Quo Report on Traditional Leadership commissioned by the Department of Provincial and Local Government is published.
2000	The Department of Provincial and Local Government publishes Discussion Document for comment on how traditional leaders "will promote constitutional democracy"
2002	The Draft Communal Land Rights Bill is published providing a role for traditional leadership in the administration of communal land, but no executive power.
	The Draft White Paper on Traditional Leadership notes that a split in opinion exists as to whether traditional leaders should be accountable to the community or to the government.
2003	The Final White Paper on Traditional Leadership is published, proclaiming that traditional leaders will be accountable to the government.
	The Constitutional Court passes judgment in the Alexkor Ltd and Another v Richtersveld Community and Others case. It confirms the recognition of customary law as an independent and evolving source of law protected by – and subject to – the Constitution
2003	The Communal Land Rights Bill is introduced in parliament, giving traditional councils power to replace and perform the functions of a land administration committee.
	The Traditional Leadership and Governance Framework Act is enacted.
2004	The Nhlapo Commission on Traditional Leadership Disputes and Claims is constituted.
2005	The Communal Land Rights Act is signed into law.
	The Constitutional Court rules on the Bhe case, arguing that it was "the fossilisation and codification of customary law which in turn led to its marginalisation", constraining its evolution and adaptation, and that its development should be allowed, subject to the Constitution.
2008	The Constitutional Court rules in the Shiubana case that the contents of customary law must be established as a matter of fact by looking at historical and current practice.
	The Traditional Courts Bill is introduced in parliament for the first time. The Bill is defeated through a civil society outcry about the Bill's centralisation of power in the hands of traditional leaders and its distortion of traditional justice systems.
	The Expropriation Bill is introduced in parliament.
2010	The Constitutional Court declares the Communal Land Rights Act unconstitutional on procedural grounds in the Tongoane case.
2011	The Traditional Courts Bill is once again introduced in parliament.
2012	The Constitutional Court hears two cases on customary law - Sigcau and Pilane. In both, the court finds in favour of democratising customary law and empowering community voices.
2014	The Traditional Courts Bill is defeated in parliament once more.
2015	The Expropriation Bill is again introduced in parliament.
	The Constitutional Court finds in favour of the Bakgatla CPA against senior traditional leader Nyalala Pilane and calls the CPA Act "a visionary piece of legislation passed to restore the dignity of traditional communities. It also serves the purpose of transforming customary law practices".

2015	The Eastern Cape High Court finds in favour of the Cala community that their customary law allows for the election of their headman.
	The Traditional and Khoi San Leadership Bill is introduced in parliament.
2016	The Traditional Courts Bill introduced in parliament again.
2017	The Traditional Courts Bill introduced in parliament again.
2018	The North West High Court finds that the Royal Bafokeng Nation traditional council did not have the power to institute legal action concerning the community's land without the community's consent.
	The Supreme Court of Appeal finds that customary law is not subject to legislation that does not specifically deal with it - and therefore customary fishing rights exist alongside statutory fishing rights if the statute ignores customary rights (Gongqose).
	The North Gauteng High Court finds that a mining company had to seek the Xolobeni community's consent w, in terms of IPILRA and customary law, to the use of their land before a mining right can be granted.
	The Constitutional Court finds, in the Maledu judgment, that the Wilgespruit community's deprivation of their land for mining purposes was unlawful as their consent had not been sought (and a traditional community resolution was not sufficient).
	Expropriation Bill is again introduced in Parliament.
	Parliament approves recommendation to review Section 25 of the Constitution.
2021	The Bill amending section 25 of the Constitution fails in parliament.
2022	The Traditional Courts Bill is passed by parliament.
	The Land Court Bill is passed by the National Assembly and referred to the National Council of Provinces.

PURPOSE OF THE CONFERENCE

The conference was an urgent intervention to expose the ongoing and mounting threats to rural land rights in South Africa, and to prepare to scale up defence of such rights, in the face of proposed new legislation. The stakes are high, as some of the poorest communities in the world's most unequal country face off against the state and against private companies, both domestic and transnational.

The Constitutional Promise

Section 25(6) of the Constitution promises tenure security as one of the three components of land reform, the others being restitution and redistribution. Section 25(9) enjoins Parliament to enact legislation to give effect to the right to tenure security. Twenty-five years after the Constitution was adopted the 18 million South Africans living in the former homelands have limited recognised tenure security.

The Troubling Context

More than twenty-five years after South Africa's Constitution was adopted, the 18 million South Africans living in the former homelands have limited recognition of their tenure security, land and livelihood rights. Instead, their customary and informal land and resource rights are directly and systematically under threat from laws, policies and practices that abrogate these rights. Inadequate tenure security also impacts on the outcome of the redistribution and restitution programmes as beneficiaries are often unable to defend the land rights they acquire against predatory elites and find themselves threatened with exclusion. This is highly visible in cases like Xolobeni on the Wild Coast, but also elsewhere, where conflicts emerge, violence ensues, costly litigation pits citizens against our government, and development is offered only on terms that involve dispossession.

The Legal Gap

Rural land rights holders still await the passage of a robust law designed to protect communal land rights more than 10 years after the striking down of the Communal Land Rights Act of 2004, which sought to privatise customary land under titles to be held by traditional councils. Yet instead of recognising informal rights, a mooted Communal Land Tenure Bill which is expected to come to Parliament later this year could instead shore up control of community land in the hands of state officials, or traditional authorities, or both — rather than vesting rights in the people whose land it is. This would mean a dispossession of customary rights — ironically, after a quarter century of democracy.

Conference Purpose

Delegates attending from the Johannesburg venue

The conference convened activists, academics and allies to draw attention back to the urgent need to secure the tenure, land and resource rights of vulnerable communities — as a precondition for development, and not as a trade-off for it. We sought to inform and enrich the public, academic and political discourse about land tenure rights, ongoing threats to these rights, and the urgent need for legal measures to protect and enhance tenure security in line with the Constitution. By interrogating past and current contestations over property and authority in the former homelands and on land reform land, the event shone a light on the vested interests at stake. We interrogated how and why the state has (again) chosen to pursue policies and enact legislation that favour particular elites, including traditional leaders. Through the conference, we aimed to contribute to strategies and practices of community mobilisation, policy initiatives and litigation approaches to resist and defend tenure security in the former homelands, South African Development Bank (SADT) land and on land reform land more generally.

Who Attended

The hybrid nature of the conference allowed a wide range of attendees to join — rural communities as well as academics, lawyers, activists and policy makers. The in-person venues located in the Eastern Cape, Johannesburg and KwaZulu Natal, enabled many members of affected communities and community-based organisations to participate. The use of a virtual platform also meant that allies and colleagues from outside South Africa could take part in the conference discussions. Over 700 participants registered to attend the conference and over 150 attended daily online while over 120 attended in the in-person venues.

Convening Institutions

The conference was jointly convened by the Land and Accountability Research Centre (LARC) at UCT, the Legal Resources Centre (LRC), the Institute for Poverty, Land and Agrarian Studies (PLAAS) at UWC and the Society, Work and Politics Institute (SWOP) at Wits. We joined forces as three respected and specialised university centres together with the LRC which has a formidable track record in defending land rights and connecting social movements and litigation, and with the Alliance for Rural Democracy (ARD) a social movement anchored in communal areas and local struggles.

DAY ONE: Describing the problem

The theme for Day 1 was 'describing the problem'. Speakers and participants were asked to set out the various challenges emanating from the failure of securing customary rights to land. The overwhelming message that emerged is that the failure of securing customary tenure rights leads to dispossession. Dispossession is not a historical fact, participants said, it is a present-day reality.

Welcome & introduction

The conference convenes activists, academics and allies to draw attention back to the urgent need to secure the tenure, land and resource rights of vulnerable communities — as a precondition for development, and not as a trade-off for it. Question why a democratic government, in the draft Communal Land Tenure Bill - again seems to be siding with vested interests particularly elite and corporate interests, against those of rural communities who hold informal and customary rights to land - and to other natural resources. Irony that government and traditional leaders are aiming, in the name of custom, to transform customary rights into a western form of property. The conference brings us together to support exchange of knowledge and experience in a space of solidarity among activists, leaders, lawyers, researchers and others allies. We aim to contribute to strategies and practices of community mobilisation, policy initiatives and litigation approaches to resist and defend tenure security in the former homelands, but also elsewhere on Trust land and on land reform land more generally.

Remembrance ceremony - Nokwanda Sihali

"In this remembrance ceremony we pay tribute and commemorate land defenders who passed away in the last several years. They were visionaries in their communities and across the rural landscape. Visionaries who championed the struggle for land, with powerful women also leading these struggles for land. Many have lost their lives at the frontline of resistance, in South Africa but also elsewhere. According to last year's Global Witness Report, 2020 was the deadliest year recorded for the murders of grassroots land and environmental activists: globally, 227 of these activists were killed. The majority of those killed were land activists who opposed the economic interests of corporations and individuals in mining and other extractive industries.

Violence does not end with mining and other corporations taking over community land. Those displaced from their land are recruited as cheap labour. Land struggles are connected to labour struggles - especially here in South Africa. We therefore also acknowledge yesterday as the 10th anniversary of the massacre of striking workers at Marikana on the 16th of August 2012 - a massacre that took place on communal land, in a struggle for decent wages by those working to extract mineral wealth.

Nokwanda Sihlali, Larc, UCT

We recognise that violence is a tool used and misused by those who have power in its different forms. Power to silence those who defy and weaken those who resist. Having suffered enough under Apartheid, we cannot replicate the same pain and devastation as was caused before - yet this is what is happening. We see ongoing assassinations of land rights defenders even now, under a democratic government - in communal but also urban areas, as the dispossessed struggle to find a place in the city. We do not see those responsible being prosecuted and convicted. We plead with those in power to protect rural citizens in the former homelands and take learnings and lessons from this conference forward for wider societal change, reimagining the rural landscape, and confirming the land rights of all.

We therefore remember and honour those land rights defenders who have passed away, across the provinces in our sector.

On the 20th of August, a day after our conference had ended, another life of a land defender belonging to the Abahlali baseMjondolo had been brutally taken away. Having ended the conference on such a positive outlook, we are devastated that yet again, those fighting for what is just have to be mercilessly gunned down in their homes. We reiterate that we cannot replicate the same pain and devastation as was caused before."

"We plead with those in power to protect rural citizens in the former homelands and take learnings and lessons from this conference forward for wider societal change, reimagining the rural landscape, and confirming the land rights of all."

PLENARY 1

OPENING PLENARY

GRACE MALEDU

I grew up eating food from the soil, drinking fresh milk from the cow. When our land was being taken, I refused to be moved. They wanted to mine our land and even started mining through open cast mining. Can we teach our children to work the land? Women can you fight for our children and the land that they will have to grow from. Let's plant and live off the land. They can give you money, cars and all the resources but without the land where will we stay.

"To the women of our country, forward we go, forward we go!"

SINDISO MNISI-WEEKS

Customary law can be supported and developed as living customary law, without being sidelined, defined as parallel to common and statutory law, or codified and therefore fixed into one version. Sindiso set out 3 options:

- First, to combine customary and common law, and thereby codify the content of customary law. That is not a preferable route, because by codifying customary law, you turn it into official static customary law, and kill 'living' customary law, because it is a system that is flexible and living. You fix it and limit its ability to evolve and be flexible. "Customary law ceases to exist" isn't realistic because living customary law's existence defies any attempts to abolish it. [You can't abolish customary law!]
- Second, to treat customary law and common law as two parallel, separate systems, and to apply them separately. When we do this, it does allow the living customary law to evolve and be flexible, but this means that you do not infuse common law with customary law principles. This is when you can get common law decisions that make customary rights inapplicable. So this is also not a preferable route. Customary law develops as a separate law; that is always going to be the case. The legislature and courts do have a choice as to whether to incorporate customary law.
- Third, amalgamation of customary law and the common law would mean that customary law principles and rules infuse the common law. This is what we see, in any event. There is a limitation, as it means that some aspects of customary law will be codified, but within the transformative vision, this is acceptable. Customary law is united with common law - this would be amalgamation rather than harmonisation. This is possible.

SONWABILE MNWANA

Collusion between mining capital, chiefs and the state. If one observes life in the platinum belt, it is an existence of precarity. Colonial officials perceived land rights to be communal in nature - and because natives were seen as being at a lower evolutionary level, and private property a mark of civilization. This was a process of disempowering Africans through indirect rule. We need to shift from defining communities - to understanding where the principle of community lies. The fact that rural residents are consistently defined as homogenous tribal groups whose interests are controlled by chiefs is problematic.

PANEL 1A

DISPOSSESSION AND MINING THE SACRED

CHAIR: MBONGISENI BUTHELEZI
Public Affairs Research Institute

In mining-affected communities the following legal frameworks - the Mineral and Petroleum Resources Development Act of 2002; the Interim Protection of Informal Land Rights Act of 1996, the National Heritage Resource Act of 1999, the National Environmental Management Act of 1998 - often intersect in contradictory ways. Head-to-head, the market-driven mineral law trumps the protection of tenure rights, the environment, heritage, as well as spiritual connections to the land and ancestors. These are aspects of loss which the historical theoretical framework of land dispossession has previously neglected. The term dispossession is synonymous with the loss of land, but what else was historically and is currently lost when communities are dispossessed? And what are the similarities, differences and continuities between colonial and apartheid state-led dispossession and mining-induced dispossession?

No last place to rest: Grave Matters

DINEO SKOSANA, SWOP, *University of the Witwatersrand*

In a presentation titled 'No last place to rest', Dineo argued that we do not have a concept that a person is being laid at their last place to rest. 2 key areas: White Agri farmland and dispossession on tribal land. Presentation will speak specifically to KZN. Coal mining takes place in different provinces across South Africa. Limpopo: particularly in Waterberg. Also in Mpumalanga province and in parts of KZN. Case study specifically looks at Somkhele (near Richard's Bay). Standard contracts: offer small cash payments, as if it is a choice, as if is bears any relation to the loss. Main point is that "Dispossession continues to take place today: dispossession is not merely a colonial or apartheid phenomenon." Loss of land - a place to live, resources for livelihoods. But dispossession doesn't end with death. Loss of graves. And intangible loss is that which we do not see. Which are people's connections to the land.

Whose eyes are looking at the history of dispossession?

MBUSO NKOSI, *University of Pretoria*

Mbuso encouraged archaeology and historical study to understand the political and social context of unmarked graves, citing case studies. Sol Plaatjie's story about how, just after the 1913 Natives Land Act, the Gobadi family of sharecroppers were evicted from their land, carried their children and possessions through the night, and how a sick baby died on the road - and there was nowhere to bury it. White farmers using prison labour led to the potato boycott in 1959. Land dispossession leads to the criminalisation of people, and how criminalisation and even in black people's death they could not find peace. Dispossession today is also a spiritual question. To use different eyes to free ourselves, the past and our land. What kind of freedom do the dead demand?

Working the Land: The contemporary problems of restitution

SIMON GUSH, ARTIST AND FILMMAKER

Three short films were presented, about land claims in Salem in the Eastern Cape, outside Makhanda, which showed how land dispossession happened but also how land restitution asks people to live and hold land together - often in ways that are inconsistent with how people actually live, and social relations now.

Loss of land - a place to live, resources for livelihoods. But dispossession doesn't end with death. Loss of graves. And intangible loss is that which we do not see. Which are people's connections to the land.

PANEL 1B

DISPOSSESSION DISGUISED AS REGULATION

CHAIR: ZENANDE BOOI
Center on Race Law and Justice, Fordham University

This panel explored how the operation of seemingly neutral laws and their administrative processes, even laws with purportedly virtuous objectives, continue to revert to and entrench inaccurate and distorted ideas about the nature of customary and other property rights held by people living in the former homelands of South Africa. In the absence of constitutionally mandated laws that comprehensively deal with the impact of colonial and apartheid's racially discriminatory laws that rendered these rights to property legally insecure, the result is that holders of these rights are even more susceptible to dispossession. These laws operate in a context where the existence, validity and strength of these rights continues to not be recognised and protected. The holders of these rights, poor and Black rural people and communities, are still not recognised as valid holders and decision-makers. Thus, laws in context such as conservation, mining, and even land reform operate with no regard for such rights — leaving people and communities vulnerable to dispossession with no recourse.

Panel 1B: Breakaway session in Durban

The failed promise of remedies: A political analysis of the Trust Property Control Act

KOLOSA NTOMBINI, ***University of Cape Town***

One of the important cases of partnership between rural communities and a mining company is the Richtersveld case which found that customary rights to land are actually ownership. Kolosa Ntombini's work shows that the history of trusts is complex - and historically they were used in dispossession. Problematic notion that African property rights must be supervised. Has the nature of trusts changed? The Trust Property Control Act means that, even though now people can control their own trusts, arrangements are so complex, there is so much dysfunction among trusts and the inability of the Master to intervene, that powerful partners like Alexkor can overpower community trusts. Where there are problems are so far-reaching the 'exclusion is by design'.

iSimangaliso Wetlands: unravelling the complexities of plural governance systems in coastal conservation

PHILILE MBATHA, UNIVERSITY OF CAPE TOWN

Like other papers on this panel, Philile focused on how the operation of seemingly neutral laws have the effect of dispossessing people living under forms of customary tenure. Environmental regulations, and the creation of the iSimangaliso wetland park at Kosi Bay, have actually dispossessed people of rights - even if they remain on the land, the range of their uses of the land, the forest, the sea, are constrained, which amounts to dispossession even without expulsion. While theoretically there need not be a conflict between protecting the environment and defending land rights, regulation has done precisely this.

The tensions between the CPA Act and TKLA: the Khomani San experience

COLIN LOUW, ***Khomani San community leader***
CECILE VAN SCHALKWYK, ***Legal Resources Centre***
DAVID MAYSON, ***Phuhlisani Solutions***

Where does power lie: with the CPA Committee or the traditional leader? In one of the first successful land claims, the Khomani San got 8 farms back from the government, and owns this as a Communal Property Association (CPA), under a democratically elected committee. Now a more recent law, the Traditional and KhoiSan Leadership Act (TKLA) indicates that traditional leaders that are recognised will hold and administer land. So, there's a tension between the CPA and the leader which is now conceived in the TKLA as taking over . Effectively, "we are now under two acts". The CPA Act doesn't make provision for any traditional leader. The land was given to the community - not to a traditional leader. But now, if the government scraps the CPA Act, then we will have a problem because there are 8 bloodline leaders. In short: the TKLA is superimposed in a context where people already hold land as CPAs.

PLENARY 2

THE UNCONSTITUTIONALITY OF THE COMMUNAL LAND TENURE BILL

CHAIR: NOLUNDI LUWAYA
LARC, University of Cape Town

This plenary addressed how the current draft Communal Land Tenure Bill (CLTB) and its associated policy approach entrenches rural land tenure insecurity and conflicts with the Constitution. Presenters discussed typical examples of land tenure insecurity in the former KwaZulu and the devastating consequences for rural people, their livelihoods, and for rural development - and showed how the CLTB would fail to address these, and could aggravate them. While the case studies described are all situated in KwaZulu-Natal, similar issues and problems arise in all former homeland areas where over 18 million South Africans reside. Presenters explored the nature of the problems created by the Ingonyama Trust across the province and presented three specific case studies researched by LARC: on farms near Newcastle, at Umnini on the south coast, and in the Dinabakubo area adjacent to the Inanda dam. The case studies illustrate the extraordinary efforts by ordinary people to obtain written proof of their land rights and the structural problems making this impossible. These range from discrepancies and disjunctures in land recordal systems, including the Deeds Office, to policies that favour predatory elites over ordinary citizens. Government policy, including the CLTB, undermines the right to tenure security enshrined in Section 25(6) of the Constitution. The 2021 Ingonyama lease judgement confirms this interpretation of the Constitution, and reaffirms that ownership rights vest in customary holders of land rights as opposed to 'traditional' elites or institutions such as the Ingonyama Trust.

Proclamations, regulations, vestings and the power of traditional leaders: impacts on the land tenure security of ordinary people in the former homelands

SITHE GUMBI AND JANET BELLAMY, *LARC, University of Cape Town*

tation focussed on examples of communities who have been adversely impacted by traditional leaders. It outlined the history of the amaThuli community – and how they continually are unable to access security of tenure in land that was historically belonging to them. This is due to the complete failure of land administration and the failure of Cogta to hold the traditional leadership structure to account. The crux of the matter is that although it is clear that the dispossession can be tracked - through proclamations and statutory vesting - the communities' tenure rights in the land remains insecure.

The Ingonyama leases judgement - implications for customary ownership and the Communal Land Tenure Bill policy approach

ANINKA CLAASSENS, *LARC, University of Cape Town*

The Richtersveld case said customary land rights are property rights - they are ownership - held by a community. The Maledu (maGrace) judgement upholds customary rights - against the assertion that mining takes precedence over land rights, even over the Constitution. The Ingonyama Trust judgement talks about individuals and families within communities - and who has decision-making authority. The ITB judgement proves that there are pre-existing property rights on land, customary rights. If you are not in a position to exercise decision-making authority, then your property rights are not being respected. Taking the decision-making powers of owners and giving these powers to an institution is a dispossession of property. Consent to stop deprivation is the most basic of property rights. Yet the CLTB debate has been presented as being about the status of chiefs and amakhosi - rather than being actually about the nature of property and the ability of people to protect their property from arbitrary deprivation. It is ironic that those who claim to be defending custom are actually promoting titling and privatisation of land in the name of custom - so they are trying to use the constructs of western property law to usurp and dispossess customary land rights. The Ingonyama Trust judgement is a refreshing judgement, saying "custom cannot be a blanket to obscure ongoing processes of dispossession". The arbitrary deprivation of property is a violation of theTrust Act, IPILRA and the Constitution.

Why and how the CLTB approach conflicts with the requirements of section 25(6) of the Constitution

TEMBEKA NGCUKAITOBI *SC, Johannesburg Bar*

The Draft bill in its current form will be unconstitutional. We must look at the theory underpinning section 25(6) of the constitution. The first is that it is an equalising right. The second is that it is located in s25(5) – which is intended to transform property relations. The Bill believes that the land in communal areas is actually state land, and that it can be controlled through traditional institutions. Historically, the state has entrusted chiefs to 'control' land. The true political power is inseparable to control over land. Instead of transforming existing colonial relations, the risk is that this bill will entrench them. It is a regressive law. The Bill further uses a vague notion of 'community'. This renders the individual and the family invisible. Decisions could be made by a large group on behalf of individuals - this is a colonial construct toward native land. It never regarded it as being capable of having individual control. The power relations have calcified over time - in favour of men and traditional leaders. The third problem is the actual day - to - day operation of the Bill. The community may make a choice on how to administer the land - either through a traditional council, CPA or other entity as approved by the minister. There is thus ongoing control of traditional institutions. The Bill is neither equalising nor transformational. The ITB judgment gives effect to living customary law - it is modern. We must be explicit in rejecting the Bill. Community views must be reflected in it. We must also build robust institutions that support community structures. Resources should be made available to strengthen community associations. IPILRA sets out basic protections, and its starting point is the individual - IPILRA needs to be built up/made permanent.

Tembeka's 5 steps:

- Step 1: The Bill needs to be scrapped and re-written. Communities don't want a Bill drafted for them by the government. They want a Bill in which their views are reflected.
- Step 2: A new Bill that is not going to be drafted from the top-down but will be drafted from the bottom-up. The law's duty is to reflect what the people say - not what the politicians say.
- Step 3: Is building robust institutions of customary law that support community structures.
- Step 4: We do have an alternative piece of legislation. It's called IPILRA. It was done on an interim basis. But it sets out very basic provisions. Its starting point is the individual. Building IPILRA up, making amendments to it and making it permanent. But it is not up to us, the elites, to decide.
- Step 5: Is winning our case at the Supreme Court of Appeal.

We must be explicit in rejecting the Bill. Community views must be reflected in it. We must also build robust institutions that support community structures. Resources should be made available to strengthen community associations.

DAY TWO:
Responding to the problem, here and now

The theme of the second day related to responses from communities, lawyers, researchers and civil society in general thus far to the challenge of dispossession through the failure of tenure security. How have we tried to address this challenge? What has been effective?

KEYNOTE SPEAKER

Defining a community: pushing back against colonial logic

MAHMOOD MAMDANI, MAKERERE UNIVERSITY, UGANDA

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

CHAIR: CONSTANCE MOGALE

Alliance for Rural Democracy

Although the new dispensation's democratic promise was that of equality and social justice, many people living in the former Bantustan villages are now confined to smaller spaces due to encroachment of their land for business interests. These ongoing attacks against customary land rights have not rendered rural activists helpless. They are pushing back against the attempted legalising of these encroachments by resisting draconian bills which they call 'Bantustan' laws every day, for over a decade. They are not waiting for any messiah to save them from anyone. ARD's organisational strategy (realised through advocacy research, mobilisation, and communications plans) relies on a groundswell of active mobilisation from below and has been the most effective in terms of advancing land governance of the rural poor. Although Covid-19 had far-reaching implications for rural communities that are already on the margins of the policy bench, activists pushed back against all odds to make their voices count. The former homelands are home to more than 18% of South Africans. This threat comes from the covenant between our democratic government, big mining companies, and traditional leadership. The government introduced policies and laws that sought to set the former homelands (Bantustans) apart from the rest of South Africa as zones of chieftainship sovereignty, undermining and reducing the citizens to merely subjects without a voice. Practically they have not succeeded, all thanks to the efforts of activists organised under the Alliance for Rural Democracy (ARD) and its alliance partners, The interventions to defend their customary inherited land rights and avoid irreversible dispossession are visible, and credit should go to the activists themselves together with their support organisations, e.g. the researchers and lawyers within the alliance have always simplified technical documents for activists to understand contents and ready to advise on legal matters, this convergence of different capacities has proven to be an effective strategy in pushing back against the Bantustan mentality. The ARD arose as a loose alliance during the campaign against the Traditional Courts Bill (TCB) and has since established a coordination office mobilising in response to moments of crisis. This panel intends to listen to some elder leaders who were active in rural struggles against the forced removals in the 1980s and 1990s as well as youngsters who have cut their teeth more recently.

As the national coordinator of the Alliance for Rural Democracy, Constance 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.

Plenary Session Chair Constance Mogale attending at the Johannesburg venue

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 democratisation 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.

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'.

SESSION 2A

COMPARATIVE AFRICAN EXPERIENCES WITH FORMALISATION

CHAIR: ADMOS CHIMHOWU
University of Manchester

The drive toward the formalisation of customary land, driven by the promise of improved tenure security, is in full effect in many sub-Saharan African countries. Various civil society organisations and international donors are engaged, at different scales, in formalisation processes for the registration of customary land rights. The process is undertaken on the premise that individual ownership of land provides better tenure security than 'communal' landholding. This neoliberal argument also holds that individualistic landownership provides rightsholders with the opportunity to access credit, thus incentivising investments in land and leading to better economic outcomes. Proponents of formalisation argue that in its customary state, land is 'dead capital' whose potential can only be fully realised if titled or formalised. However, the discourse on the formalisation of customary land and its promise of improved tenure security is contested. Some studies have shown that the formalisation of customary land worsens the livelihoods of rural communities as many become dispossessed of their land, agricultural activities become disrupted, and cultural practices are discommoded. Women, already disadvantaged by legal and customary practices in land access and ownership, are most susceptible to the vulnerabilities presented by these processes. The formalisation of customary land often leads to the concentration of land in community leaders and political and urban elites, primarily men, who then reinforce exclusionary practices in land access and use. The introduction of capitalist market structures further buttresses patriarchal practices when economically disadvantaged women cannot compete with political elites or male leaders who hold more economic, political, and in many cases, social power. Formalisation processes, therefore, do not fulfil their promise of improved tenure security as women are left in more vulnerable situations through land dispossessions and livelihood disruptions.

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, *Livaningo, Mozambique*

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.

The impact of formalisation on women's land rights

PHILLAN 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. Formalisation 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 Zimbabwe and South Africa, 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.

Land Law Reform, Land Titling Registration, and Tenure Security in Ghana

AUGUSTINE FOSU, PLAAS, *University of the Western Cape*

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.

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.

SESSION 2B

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

CHAIR: NOLUNDI LUWAYA LARC
University of Cape Town

This panel brought together papers and presentations that deepen our understanding of the factors that have shaped customary land rights. Panellists discussed the historical classification of cases dealing with customary land rights and how that has shaped our understanding of customary law. They also looked at the current struggles that shape how we think about customary tenure, take place at the interface of municipalities and customary land governance structures and those facing communal property institutions.

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

DERICK FAY, ***University of California, USA***

'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.

"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 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

JAMES CHAKWIZIRA, ***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.

CPI's/Alternatives to CPAs

TARA WEINBERG, ***University of Michigan***

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 according to the people we engage with.

SESSION 3A

THE PROBLEM OF LEGISLATING CUSTOMARY LAW

CHAIR: WILMIEN WICOMB
Legal Resources Centre

The Constitution, in s211(3), provides that customary law is subject to the Constitution and legislation that specifically deals with customary law. In the Gongqose court judgement, the Court confirmed the implication that if state regulation does not explicitly deal with customary law and rights arising from it, then those rights are not subject to the statutory regulation. The rationale is to force the legislature to recognise customary law and ensure that legislation regulates it, where necessary, in an appropriate way. The panellists looked at the record of parliament in legislating customary law and how this has served to dispossess people of their rights and empower elite structures. Presenters and participants debated the question of what s211(3) of the Constitution requires of parliament and what that means in practice. The debate focused on existing and draft legislation across private and public law spheres, as well as the jurisprudence and the principles of finding the contents of customary law as these have emerged.

Asserting customary fishing rights in South Africa

MICHAEL BISHOP, *SC, Cape Town Bar*

Customary fishing rights are property rights - like land rights. Michael focused on the Gonqose 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?

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. 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.

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

JACKIE SUNDE, *One Ocean Hub, University of Cape Town*

WILMIEN WICOMB, *Legal Resources 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 prove 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 customary 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 and customary tenure systems 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

CHAIR: NOKWANDA SIHLALI
LARC, University of Cape Town

This panel explored the nexus between community activism and the law in trying to protect and secure customary rights. Concepts such as "community activism lawyering" and "legal mobilisation" allow us to perceive the practice and utilisation of law from a different lens. The panellists called for a move from individual clients and cases and instead a shift into partnerships between lawyers and activists. Such partnership should proactively seek to make a larger societal change that works to prevent future crisis through implemented legislation. However, on numerous occasions we have found that legal solutions to community's long-standing rights-based issues only come in at the tail end of their struggles. Legal solutions do offer an ultimate resolution as well as an accountability mechanism to issues that communities are facing, but often than not the victories won, especially those won in these past several years, have not been implemented nor respected by the government departments and their institutions. Participants and presenters drew attention to the practical usefulness of legal solutions for community issues, but also the need for community members to drive and direct their struggle, including litigation where needed.

Conceptions of Justice: Obstacles to land restitution in South Africa's Putfontein Community

BABY MAKGELEDISA, ***Land activist, North West***
ALEX DYZENHAUS, ***Cornell University, USA***

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 Batloung CPA. But those claimants had their own CPAs registered. Up to today, those people's land is still incorporated under Batloung 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 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

KEARABETSWE MOOPELA, ***land research anthropologist and ethnographer***
DAVID COPLAN, ***University of the Witwatersrand***

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.

Land first and the rest followed: Reflecting on lawyers' modest role in the Amadiba struggle

NONHLE MBUTHUMA, ***Amadiba Crisis Committee***
JOHAN LORENZEN, ***Richard Spoor Attorneys***

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.

DAY THREE:
Where to from here in addressing the problem?

On day 3, with a shared understanding of the nature of the problem and the effectiveness of existing strategies to bring change, the conversation turned to what we should do differently in ensuring tenure security becomes a reality.

PLENARY

POTENTIAL CHALLENGES TO THE FORTHCOMING COMMUNAL LAND TENURE BILL

CHAIR: JOHAN LORENZEN
Richard Spoor Attorneys

Section 25(6) of the Constitution provides that "[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress". When the Communal Land Rights Act (CLaRA) was promulgated in 2004 despite intense opposition from rural communities, it did the exact opposite - it simply re-entrenched the inaccuracies and distortions of colonialism and apartheid. It became necessary to challenge the law in court to have it declared unconstitutional - which it eventually was. With the impending adoption of the Communal Land Tenure Bill (CLTB) - touted as replacement of CLaRA, this panel will explore and engage with potential gaps and problems with the iterations of intended laws and policies purporting to give effect to section 25(6) - do they repeat the mistakes of CLaRA?

Protection gaps illustrated in previous Communal Land Tenure Bill

ZENANDE BOOI, ***Center on Race Law and Justice, Fordham University, USA***

The Communal Land Tenure Bill released in 2017 has not realised the hopes of the people that their various challenges in respect of communal land rights be dealt with - this is in part due to the fact that there is no comprehensive legal framework in existence, as per the requirement in section 25(6) of the Constitution. Other than the procedural issues with CLRB, there were also many substantive problems identified. Zenande also shared the problems where although communities have protections from IPILRA and ULTRA - their rights also are eroded, in many cases without the community even being aware of these dispossessions.

If the CLTB is adopted, it will repeal ULTRA sections 19 and 20, but will provide no remedies or recourse to communities. And we are not even talking here about the dispossession in terms of the MPRDA. Maledu and Baleni judgments have been very important, but do not create remedies for communities who were dispossessed. The legislature is not dealing with the reality that exists on the ground. Nothing in CLTB will provide any recourse to communities. What does this mean for strategy? The problem is not only about what exists in the law. "We can't just rely on the state to give people what they are entitled to. People's rights aren't protected. We need to think of new ways that don't rely on the state doing its job".

Tenure reform 'from below': The politics of communal land rights in South Africa in an era of state dysfunction

BEN COUSINS, ***PLAAS, University of the Western Cape***

Our focus has been on tenure reform policy – this is unlikely to succeed if we don't tackle the political context of elite capture and state dysfunction. Customary law is adaptable and flexible. The Bhe judgement refers to living customary law. It is clear that the ruling party are pro-chief in rural areas and pro-titling in urban areas. We have had some successes – but has policy really shifted? Legal challenges are costly and long-winded. We have to rethink our mindset. Consider law - all law - as politics by other means. The further removed the formal law and policy is from nuanced practice at local level the less relevance and legitimacy it will have in people's lives. People don't see a contradiction with custom and democracy – both have requirements for accountability and participation. Our struggles should have a wider ambition to transform society more generally. It should be combined with other issues. We should not have to choose between law and policy on the one hand and local struggles on the other. We need to use law and policy to help people win local struggles. Emphasis now should be building from below. We need a broad social movement which should not only focus on land, but land for what? Our struggles must be transformative - and not only about land tenure - but "to transform society more generally, as we slide backwards into the rules of gangsters". "How can solidarity be formed across communities? ARD is a model here; how can the ARD model of organising around local issues be scaled up? Self-emancipation from below captures the urgent need of the moment. Key questions:

- Can a democratic politics be combined with one focused on rights derived from custom?
- What laws provide protection of land rights and guarantee the right to engage in political activity?
- What legal judgments and precedents can be brought to bear?
- Will struggles be defensive only or can they be transformative?
- Must struggles be focussed only on land, or combined with other issues?
- What forms of organisation are most effective at the local level
- How can solidarity alliances be forged across different communities? ARD is a model, or other formations have potential to grow given the crisis in society?
- How are leaders to be kept honest and accountable? Important lessons from the trade unions.

Discussant

DIMUNA PHIRI, ***Land Equity International***

Other countries are going through similar challenges. In Zambia, a number of communities on customary land have suffered dispossession due to mining, commercial agriculture and other ventures that aim to address economic development. In Australia, indigenous people continue to face dispossession and recently a mining company destroyed a cultural heritage site. There is limited engagement with customary rights holders. A common mistake is seeing customary law through the lens of state law.

We should not have to choose between law and policy on the one hand and local struggles on the other. We need to use law and policy to help people win local struggles.

PANEL 4A

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

"Free prior and informed consent" (FPIC) is a right conferred upon indigenous communities to give consent for development projects on land they hold rights to, particularly informal rights held under customary tenure. The idea is to establish a bottom-up participation and consultation with indigenous communities before the inception of development projects, where communities have a right to give consent, including the right to say no. The concept derives from international law, composed of hard and soft laws that provide guidelines on consultation and informed consent such as the UN Declaration on the rights of indigenous people (UNDRIP) of 2007. However, in practice FPIC is contested and fragmented in domestic contexts. The idea of informed consent and the right to say no are not always applicable, instead investors, the state and development companies tend to deliberately reduce FPIC to mere consultation. This panel drew from experiences and struggles of mining communities in South Africa who leverage different pieces of existing law to enforce FPIC. Second, they contrasted legal arguments about FPIC as a concept deriving from international laws and treaties with actual experiences and insights from implementation practice. What is the nature of FPIC in practice, is it informed consent or just consultation? What are those social movements in the global South who lobby and advocate saying about whether and how it has been possible to achieve FPIC?

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, UK***

From 2009 until 2015, Namati and its partners the Land and Equity Movement in Uganda (LEMU), the Sustainable Development Institute (SDI) in Liberia, and Centro Terra Viva (CTV) in Mozambique supported more than 100 communities to document and protect their customary lands rights. In late 2017, after at least two years had passed since the last communities had completed the process, Namati evaluated the impacts of its work on communities' responses to outsiders seeking community lands and resources.

Of the 61 communities assessed, 46% had been approached by outside actors seeking community lands and natural resources since completing their land protection efforts. In 24 out of the 35 instances described, the community either accepted the investor's request or reported that they were "not consulted" or "were forced" to accept the request. Egregiously,

not one community signed a contract or was left with a written copy of any agreements. Together, the communities' stories illustrate how government officials leverage their power and influence to override citizens' land rights in order to:

- Claim land owned by villagers for state projects without paying compensation;
- Support bad faith land grabs/dubious "consultations" for international investors; and
- Facilitate land grabs for investments that they or their families/cohorts have a personal stake in.

Overall, the stories of these interactions suggest that community land documentation initiatives do not, on their own, sufficiently balance the significant power asymmetries inherent in interactions between rural communities and government officials, coming on their own behalf or accompanying potential investors.

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***

Aubrey Langa highlights his struggles in fighting for his land rights and the ways he has been able to use different strategies to push back against the mines. HIs community is being threatened by Anglo. Their main concern is that Anglo is not complying with IPILRA, even as they prepare to relocate hundreds of households. Since the Maledu judgement, they are able to insist that the MPRDA must be read with IPILRA. They have used direct action such as protest, but have also approached the Regional Manager, Public Protector, Water Tribunal and any mechanism they could use.

FPIC and natural resources: Lessons from Nigeria

DAYO AYOADE, ***University of Lagos, Nigeria***

FPIC is based on people's right to own their land, natural resources and the right to self-determination. In Nigeria, there is a struggle based on the oil industry which has resulted in degradation of community lands. Elements of FPIC are (a) Free: must be voluntary and free of intimidation, coercion, bribery or manipulation; (b) Prior: permission obtained before any authorisation or commencement activity; (c) Informed: community should have access to objective information and proper data and understand the implications of the decision; (d) Consent: collective decision making by the customary processes of impacted communities. There is no single internationally agreed definition of FPIC which is problematic as governments have discretion on how to formulate the application of FPIC. FPIC may conflict with national sovereignty over natural resources. In Nigeria, the federal government owns all natural resources in the country. The government must carefully design and implement an appropriate FPIC/community engagement regime in order to give a robust voice to indigenous communities. This applies to every country.

PANEL 4B

THE INTERFACE BETWEEN LAND TENURE SECURITY AND LAND ADMINISTRATION

CHAIR: WILMIEN WICOMB
Legal Resources Centre

This panel centred around the problem of how to legalise off-register, customary or informal land rights through an inappropriate land administration framework so as to secure people's tenure. In South Africa non-formalised land rights carry the legal mantle of protection since they mostly qualify for procedural protections in terms of statute law that ensures, on paper, that these rights holders cannot be evicted arbitrarily. These rights nevertheless remain vulnerable but have proved difficult to formalise. The panellists argued that the obstacles to legal certainty go beyond the contestation around tenure laws by drawing attention to the need for stronger policies and institutions of land governance to support, sustain and maintain tenure security. There is a mismatch between land administration institutions and non-formalised or newly formalised land rights as they manifest currently, as well as through their transition to formalisation and post-formalisation. Evidence shows that land rights formalised in terms of existing formal property law almost invariably run into new problems of tenure security. The Constitution clearly articulates a commitment to secure tenure that goes beyond conventional legal constructions of formality. How can this be achieved? Referencing some 'trouble cases', the panel illustrates the struggles by rights holders for formal and legal recognition in the face of these institutional constraints. A potential solution to the impasse requires a shift in thinking towards acknowledging the significance of appropriate land administration institutions and systems of authority to underpin secure tenure.

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

NOKWANDA SIHLALI, ***LARC, University of Cape Town***

The current methodology and tools used for Land Administration are unable to address the issues of the racialised spatial boundaries, as they fail to include tenure systems that are considered to belong to the informal system4. The International Federation of Surveyors describe a cadastre "as a parcel based and up-to-date land information system containing a record of interests in land (e.g. rights, restrictions and responsibilities). It usually includes a geometric description of land parcels linked to other records describing the nature of the interests, and ownership or control of those interests, and often the value of the parcel". However, the cadastre has been criticised for its inability to effectively capture informal land rights. Westernised land administration systems operate better for private property systems that are market driven, however we find that the formal land administration system in South Africa took much of its rationale and shape from this model. Over the last decades Land Administration and Land Governance in South Africa has been taken over by inconsistency with policy frameworks and misaligned departmental objectives (Kingwill, 2020)iv. The current system favours registration through formalisation into the existing legal-administrative framework. And that needs to change!

The Gwatyu problem

SIPHESIHLE MGUGA, ***Legal Resources Centre***

THEMBAKAZI MATSHEKE, ***Chairperson of an "unregistered" Gwatyu CPA***

Sipesihle and Thembakazi discussed the longstanding problems experienced by the Gwatyu community. The Gwatyu people were farm workers on white-owned farms when they were expropriated to be incorporated into the Transkei in the 1970s. They were never removed, but stayed on and started farming. Their problems were exacerbated during Matanzima's reign when he placed lessees on the land. Today, despite the fact that the Gwatyu people have beneficial occupation rights in terms of IPILRA, the state is oppressing them. They cannot be removed, but they are receiving no recognition, service, or support to stop land invasions and are in fact under constant threat of the state wanting to give the land to the neighbouring and well-connected traditional council, the Amatshatshu. Sipesihle explained that IPILRA is only serving to keep the people on the land, but that is not the realisation of the right to tenure security. In this way, the State is failing in giving effect to s25(6) and 25(9) of the Constitution. This is the basis for a legal strategy to support the community.

Nesting land tenure in land administration

ROSALIE KINGWILL, ***independent researcher***

Tenure is not a single idea or event. Tenure is a set of associations and we must shift our focus to the multiplex of institutions required to secure tenure. For example, the Gwatyu example is one of overlapping claims and rights. Because we have no adjudication system to deal with such conflict - which would be one element of the multiplex required - we are unable to deal even with these conflicts which in turn exacerbates tenure security. In the absence of a system, it is simply the most powerful player that wins. The categories of land administration can be divided thus: (i) Juridical/Administrative/Technical = allocation of rights to land, delimitation of the parcel, adjudication and conflict resolution, registration; (ii) Regulatory = land use management (zoning etc); (iii) Fiscal = property values, property taxation, compensation; (d) Information Management = land info systems. None of this is functioning properly in South Africa. What we need to work towards is a universal infrastructure that incorporates local and national levels to ensure that community members can assert their rights not only at the local level but against the whole world.

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CLOSING PLENARY

CHAIR: DINEO SKOSANA
SWOP, University of the Witwatersrand

SINDISO MNISI-WEEKS, ***University of Massachusetts Boston, USA***

A theme which stood out is the failed impact of the transformative vision of the Constitution when it comes to land and rural spaces. Traditional leaders use their power and unaccountability to stand in the way of democratic / economic advancement. There is spiritual significance of the land and what is buried in the land. Bottom-up arrangements have legitimacy and should not depend on formal structures or law. When rights are not protected, this is tantamount to dispossession. We need to undo the effects of two colonial legal principles that remain with us today: terra nullius (no man's land) and lex nullius (an absence of law), the colonial notions which rendered people without land or law. This requires us to pay attention to the ways in which these depend on one another. SA constitutionalism has not adequately addressed these concerns. The colonial authorities constructed this notion of the 'natives'... But we still live with this. We need now to envisage an 'ALTER-native' form of social and political existence." We must rely on the understanding of 'personhood' in ubuntu in the robust sense - from a pretense of 'unknowing' the humanity of people into re-humanisation or what Tshepo Madlingozi calls "Go mothofatsa".

CONSTANCE MOGALE, ***Alliance for Rural Democracy***

A key question which emerged from the conference is how should customary law and the community be defined? The answer lies with the people this affects. We need to start at the village level.The Expropriation Bill will be debated soon, and we must ensure that customary land rights of people are protected in this Bill. Any laws which deal with governance must be applicable to the whole country – not just to black people who live in homelands. We challenge you to mobilise across sectors, we must find a new way of organising in the era of technology – we must focus on capacity building of our activists. Immediate actions we can take is to publicise content – produce fact sheets, resource guides and simple booklets. We need to capture the reaction to what is happening around us. Invite us to community meetings and record and document meetings which are being held.

NOMBONISO GASA, ***Independent Researcher***

We have failed to articulate what a post-Bantustan post-apartheid South Africa would look like. What would this look like for people in former homelands? All the debate at the summit government convened earlier this year, it appeared as if they were in 1994, referring only to the colonial past - as if the past 28 years of law, policy and politics had never happened. The ANC has never had a resolution as to how to have traditional leaders in a democratic South Africa; they have been silent about what happened in the mid-20th century. They have been silent about what happened since 1994. The space is becoming more limited because the government does not respond to court rulings and they are overtly siding with these conglomerates. We have a situation where tax money is being used against taxpayers. It is becoming clear that the space of constitutionalism is shrinking globally. There are going

to be more challenges to this as more right-wing politicians sprout here in SA, amidst our deep crisis - as is happening elsewhere around the world. We need to restate the problem, comparing how people lived under the Bantustans and how they live now; and put forward our vision of what a democratic society looks like with traditional leaders. The problem is essentially a political problem. We need to take it to the theatre that is the political space and make it an issue for upcoming elections.

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CONFERENCE CONCLUSIONS

1. Black people in rural areas are still being treated differently to other South Africans.
2. One of the most important disagreements between rural citizens and the government is that, while the government says that communal land belongs to the people, when it comes to decisions over that land, we are never included. The state, traditional leaders and companies decide. That makes our rights meaningless. We do not need someone to supervise our land rights.
3. Dispossession happens in many ways: by mining, agribusiness, traditional leaders and municipal councillors. The dispossession is also not only of physical land, but the grabbing of water and soil quality, biodiversity, spiritual connections and the dignity of our people.
4. Women are the majority in rural areas and the most negatively affected by these dispossessions. Once they lose access to land, they suffer the most. Women lack access and participation in local structures, and any participation that is allowed is ineffective, their voices are not heard. Many traditional leaders still regard women as minors, just like during apartheid.
5. There is very little understanding of our beliefs and spiritual connection to the land. Our culture doesn't exist for developers. They see land only for profit. It is easy for them to bulldoze. We need to explain ourselves to them and force them to listen.
6. Legislation that is written without the participation of rural citizens from the start continues to dispossess us even when it pretends to help us.
7. We cannot see land struggles separately from a broader struggle for democracy. Land and livelihoods are inseparable from citizenship. In the same way, the struggle for climate justice is also a struggle for land rights and livelihood.
8. We can no longer rely on the state to give people what they are entitled to. We need to find new ways of realising our rights.

AREAS FOR FURTHER DEBATE AND INVESTIGATION

Throughout the conference, attendees from across the former Bantustans shared experiences and debated their views. This illustrates the difficulty in formulating a singular response to how to strengthen customary tenure and communal tenure. Under the theme Describing the Problem, many showed interest in the proposals from Prof Mnisi-Weeks regarding the amalgamation of customary law and common law, but worried that reducing customary law to writing might also open it up to misinterpretation. Others answered that we need to protect living customary law from public scrutiny because we often use the 'Eurocentric' lens to understand and explain it. Bonani Loliwe from the Eastern Cape stated living customary law will always be looked down upon especially when speaking about amalgamation and proposed that it may be better to develop living customary law as a separate goal and to interrogate some of the definitions of customary law that we presently hold.

Under the theme Responding to the Problem, women attendees questioned how to build on customary law when there are many traditional practices that still oppress them and deny them rights. Women cited clear examples. Linah Nkosi (from KwaZulu-Natal) observed that customary law is silent on the rights of women and in her community there are no women traditional leaders. Emily Tjale (from Mpumalanga) said she struggles with inheritance and property rights; in order to access land she went to the tribal office with her brothers as this is the 'custom'. Other women argued that some aspects of customary law are stagnant and that the idea of it evolving under living law is inherently western and far removed from the reality of rural households. Shirhami Shirinda (from Limpopo) questioned whether 'the community' is exclusively rural residents, or if it also includes traditional leaders who might not practice or believe in the same community sharing rules even though they also reside on the land.

The experiences from formalising land rights throughout Africa elicited debates on whether formal recognition in titling or even securing access to land alone will ensure women's economic inclusion. Nomonde Phindani (from Eastern Cape) cautioned against celebrating prematurely because market access would determine if women can translate recognized land ownership into economic participation. Fani Ncapayi (from Eastern Cape) also brought into focus that titling might deprive those who need access to land but do not hold any legally recognised rights – this was prompted by the instances where title holders are not primary land users. Bheksisa Nkanyeza (from KwaZulu-Natal) did not support any need for formalisation and stated that his very existence was proof: "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." And Nonhle Mbuthuma (from the Eastern Cape) was more worried about how titling may entrench patriarchal practices which deprives women of land and property rights.

Looking at the proposals for stronger protection under law, Shirhami Shirinda (from Limpopo) countered that even after IPILRA is made permanent, that might not be enough to bring an end to land rights deprivations. This was in response to the ongoing land rights violations experienced by customary landowners which has not prompted the government and the Minister of DALRRD to intervene. Zuziwe Sandlana (from Eastern Cape) pointed out that having a PTO is not the solution either as it too does not prevent land rights violations; in their community land rights violations are being carried out amongst the residents. Despite this, attendees like Mrs Khetshemiya (from Eastern Cape) wanted to strengthen their PTOs to also be transferred and inherited upon death to safeguard land rights of subsequent generations.

The final day's theme How to Address the Problem provoked several people to argue that it is wrong to think that 'living' customary law is always progressive. Elements of customary law are context specific and it is varied. Basil Sibiya (from KwaZulu-Natal) shared that in his experience the community does not participate in electing an induna and that all traditional leaders are imposed on rural people - unlike the experience of Cala community that democratically elects its own headman. Monwabisi Jende (from Eastern Cape) proposed that traditional leaders must be engaged directly instead of issues being raised at conferences but many attendees argued that communities have tried unsuccessfully to engage traditional authorities despite their best efforts. Attendees from Eastern Cape expressed that traditional leadership does not serve the interests of rural people and would prefer that it be abolished entirely. Conversely, Malatse Mampye (from North West) stated that he was born into a royal family, and it would be difficult to dissolve traditional leadership institutions; rather he hoped that they can be improved with input from community and civil society. This contrasted with many attendees' lived experience.

"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."

Press conference hosted by community members at the Durban venue

ACTION POINTS: WHAT IS TO BE DONE?

1. **Build on momentum.** Set up a working group to take forward this process and clarify its action points. Pool together the proposals that came up, not only from here but also from public debate.
2. **Build alliances with other progressive forces in society.** A delegation or committee of people should move from this conference and meet key stakeholders in society, especially ones that we want to build bridges and alliances with, like in the trade union movement, the social cluster at NEDLAC, climate change organisations, poverty and land organisations such as Abahlali and the Landless People's Movement. We also have to start building more awareness at a global level. I do think we need to build towards one massive campaign. Where we have a national shutdown that focuses on communal land. Include training to supplement activism. Look at the ways that successful movements are built.
3. **Seek common cause with Khoi and San movements:** We need to talk to the Khoi and the San, as fellow travellers in solidarity. In the next 3 months we need to have planning for all these processes and engagement with those who we want to join with in campaigns.
4. **Publicly and loudly reject the CLTB.** The CLTB will also marginalise people and suppress them - that is why it must be confronted. Launch a major publicity campaign to inform rural people about the CLTB and its implications; elect a committee to link people in rural areas with those who can assist with information. Some summarised this as: "A committee must be set up to facilitate the education of villagers about the Bill".

   As a participant from the Eastern Cape observed, "The book "Zemk'iinkomo magwala ndini"[9] was on to something. We are now ruled by children through the law made by the government. How I wish people from rural areas would also get the information on the Bill. May all necessary steps be taken to educate the villagers about this Bill. Let's elect a committee to ensure that this happens. The government is now making us all subservient to it. Let's take it seriously as it is a spiritual war. Land first and all shall follow. Please let us have a proper plan. Our chiefs have been brainwashed by these businesses and a government that arrives at night with promises that are always broken, we have to stand up."
5. **Advocate for law reform.** Take action to advocate for the 1927 Natives Administration Act and 1952 Bantu Administration Acts to be repealed, as recommended in the High Level Panel report. Expose the contradictions between the CPA Act and the TKLA; need to call the relevant departments and have them in these spaces, so as to challenge government officials and politicians directly.
6. **Build on our gains.** We have to build on the gains that we have made, firstly by getting IPILRA recognised as a basis to focus on the land rights held by families, and to distinguish these from 'the community'.. The struggles that people are facing on the ground are crucial. This is why there is always proof that what the govt is doing is unconstitutional
7. **Not get side-tracked by government 'consultations'.** Government consultations like its summits and indabas are usually badly organised, last minute, the programme is manipulated to silence rural people, and no meaningful exchange of ideas is possible. Even when people are heard, there is no impact on policy and law. As Advocate Tembeka Ngcukaitobi insisted, "The key is to always take the power back to the people."
8. **Defend rights.** "We need to have a litigation fund which at the moment is not there."
9. **Promote living customary law from the bottom up.** People's definitions of 'community' and 'custom' should be documented and supported, as a basis for rights in law. This should happen in specific places - and lessons drawn from this for the kind of law people want at a national level.

   Shirhami Shirinda from Limpopo said, "We should depart from the fixation with defining communities, and rather discuss how the principles of community apply in different areas of Africans' economic and social lives. Even today, rural communities have no power when the land is targeted for mining investments, because the state holds that land as a custodian, and the residents have weak rights."
10. **Draft a 'People's Land Rights Law'.** We should work together to draft a Section 25(6) law on tenure rights. IPILRA needs to be made permanent, and strengthened, and its application broadened to all informal land rights. This should be the focus of an education, mobilisation and participatory process, linking communities and moving from asking government for help to setting out an agenda around which people can build political people's power and challenge the state, companies and chiefs. Drafting must be from a bottom up approach, and should give women's voices and interests top priority. "There should be nothing for us, about us, without us."

9. See the transcript of the stirring speech, published by Sipho Pityana. https://www.ajol.info/index.php/na/article/view/148391

11. **Define an opt-out option so people can choose to withdraw from a traditional authority.** Build an alliance and participatory process to consider and develop a proposal for a process through which people can withdraw their status as a traditional community, or individuals or families can withdraw from traditional communities while retaining their land. Set out an option to be a group or community to withdraw from being led by a chief and to confirm which structure or land governance system they should establish once they have withdrawn. Invoke unitary citizenship of South Africa, regardless of the location or community into which people have been born.
12. **Use criminal law to contest abuse of chiefly powers.** Promote the option of people laying criminal cases against traditional leaders when they infringe on people's customary land rights by violating IPILRA.
13. **A campaign to reclaim what belongs to us and democratise it.** Strengthen our customary law and our focus can be how do we mobilise to reclaim our democratic rights and campaign to correct what is wrong with the current system of CPAs.
14. **Build the narrative that 'land is not a commodity'.** Promote the principle of Ubuntu; as applied to land, this means that land is not a commodity, but forms part of a different logic, of community and communalism, and sharing and responsibility among people and between the living, the dead and the yet-to-be-born. This is crucial for defending against the assumption that land rights can be overridden via consultation and compensation.
15. **Support conversation and exchange about intangible loss**. There was a call to bring communities, researchers and activist allies together to have exchange workshops to teach around the regulations so communities are aware of the laws, but not only 'rights awareness' but also learning about how dispossession affects people, how it impacts women.

    "Have workshops to try to build resistance within communities. We need to work together across disciplines - this is how we can build resistance", said Dineo Skosana of SWOP.
16. **Entrench land rights by marking territory.** Some participants advocated that people should "invest in graves that will not be easily destroyed" like those with a strong tombstone with all the names of those buried there.

    Mr Sishuba observed that "These would then be regarded as heritage sites. People can then go and pray and worship there. The new people would then be unable to destroy these. The next generation will then know where it's coming from."
17. **The choice to choose a chief.** Promote understanding and awareness of the Cala judgement, and provide support to communities who wish to assert their right to elect their leaders, including chiefs, and to define their custom in this way.
18. **Target unused land reform farms.** Define and propose a process through which people who need land can access unused land reform farms, and establish a partnership with researchers who can help to identify such farms.
19. **Mobilise around farming support for better land use.** Advocate for basic and immediate farming support - for those getting land reform land but also others in communal areas" said one person, while another participant urged that "NGOs and interested parties must come together to equip people who have been given land to work the land."

The window of opportunity for rural people to benefit from the decriminalisation of marijuana is being missed, as corporates cash in on the booming industry: "We need to look into how to capitalise on using marijuana for our economic development" said a participant from the Eastern Cape.

Programme

Land Conference 2022 Programme

REFERENCES AND RESOURCES

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https://pmg.org.za/bill/593/

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Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (CCT265/17) [2018]

Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others (12745/2018P) [2021]

Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others (3491/2021) [2022]

Videos and toolkits

YouTube links for selected conference sessions
Land conference 2022 – Mahmood Mamdani

Land Conference 2022- Zenande Booi

Land Conference 2022- Aninka Claasens

Land Conference 2022 – Tembeka Ngcukaitobi

For access to all the conference plenary and panel session visit the Alliance for Rural Democracy's YouTube page

Media Interviews

Land reform in SA | The failed promise of tenure security, customary land rights and dispossession- Constance Mogale

18 million SA citizens still have limited recognition of their tenure – Nolundi Luwaya

News articles co-authored op-ed by the conference organisers
'It is our land' – rural residents reject violent dispossession and call for society-wide solidarity

Land Conference delegates: Customary law should limit traditional leaders' powers

Activist tells of health issues and assault after removal from land by mining company

Government too dysfunctional to solve SA's land crisis — activists

SAfm Interview: Ahead of the National Land Summit

LRC Legal Resources Centre

LARC Land & Accountability Research Centre

UNIVERSITY of the WESTERN CAPE

PLAAS Institute for Poverty, Land and Agrarian Studies

SWOP University of Witwatersrand

Society, Work & Politics Institute
'the making and unmaking of social order'

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CONFERENCE WEBSITE:

www.plaas.org.za/land-conference-2022