LAND CONFERENCE 2022

17–19 AUGUST

The Failed Promise of Tenure Security

Customary Land Rights and Dispossession

Online participation

bit.ly/landconf22

Physical conference venues for rural communities

Blue Lagoon Hotel, East London, Eastern Cape
The Edwards Hotel, Durban, KwaZulu Natal
ANEW Hotel Parktonian, Johannesburg, Gauteng

CONTENTS

INTRODUCTION

This conference is 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

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. We seek 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 will shine a light on the vested interests at stake. We will interrogate how and why the state has (again) chosen to pursue policies and enact legislation that favour particular elites, including traditional leaders. 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, South African Development Bank (SADT) land and on land reform land more generally.

Conference Outcomes

In addition to publishing articles in a peer-reviewed journal we aim to produce a number of popular and accessible outputs to support political and community debates about the problems confronting tenure security in South Africa. These will include video and photographic outputs, short statements/testaments, infographics for community workshops and popular booklets.

Who Will Attend

The hybrid nature of the conference allows a 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 will ensure that members of affected communities and community-based organisations can participate. The use of a virtual platform means that allies and colleagues from outside South Africa can also take part in the conference discussions. At this point we have over 300 participants registered to attend the conference.

Convening Institutions

The conference is 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 have 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.

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'

Alliance for Rural Democracy

LAND CONFERENCE 2022 PROGRAMME

DAY 1
Describing the problem

09.00 – 09.30	**OPENING AND WELCOME** Nolundi Luwaya, *LARC, University of Cape Town*	
09.30 – 09.45	**REMEMBRANCE CEREMONY** Nokwanda Sihlali, *LARC, University of Cape Town*	
09.40 – 11.10	**OPENING PLENARY** Nolundi Luwaya, *LARC, University of Cape Town* SPEAKERS – Grace Maledu, Lesethleng Community, *First applicant in the Maledu Judgement* – Sindiso Mnisi-Weeks, (tbc) – Mahmood Mamdani, *Professor of Government, Columbia / Makerere, USA/Uganda (tbc)* – Kgalema Motlanthe, *Former President of the Republic of South Africa (tbc)*	
11.10 – 11.40	**BREAK**	
11.40 – 13.10 *Panels to run parallel*	PANEL 1A **DISPOSSESSION AND MINING THE SACRED** CHAIR Mbongiseni Buthelezi, *Public Affairs Research Institute, University of the Witwatersrand* **No last place to rest: Grave Matters** Dineo Skosana, *SWOP, University of the Witwatersrand* **Whose eyes are looking at the history of dispossession?** Mbuso Nkosi, *University of Pretoria* **Working the Land: The contemporary problems of restitution** Simon Gush, *Artist and filmmaker*	PANEL 1B **DISPOSSESSION DISGUISED AS REGULATION** CHAIR Zenande Booi, *Center on Race Law and Justice, Fordham University* **The failed promise of remedies: A political analysis of the Trust Property Control Act of South Africa** Kholosa Ntombini, *University of Cape Town* **Where does power lie, CPA Committee or traditional leader.... The tensions between the CPA Act and TKLA: the Khomani San experience** Cecile van Schalkwyk, *Legal Resources Centre* David Mayson, *Phuhlisani Solutions and Khomani San community leader* **iSimangaliso Wetlands unraveling the complexities of plural governance systems in coastal conservation** Philile Mbatha, *University of Cape Town*
13.10 – 14.10	**LUNCH**	
14.10 – 15.40	PLENARY 2 **HOW THE COMMUNAL LAND TENURE BILL (CLTB) POLICY APPROACH ENTRENCHES THE URGENT CRISIS OF RURAL LAND TENURE INSECURITY AND CONFLICTS WITH THE CONSTITUTION** CHAIR Nolundi Luwaya, *LARC, University of Cape Town* **The Ingonyama leases judgement - implications for customary ownership and the Communal Land Tenure Bill policy approach** Aninka Claassens, *LARC, University of Cape Town* **The impact of proclamations, regulations, vestings and the power of traditional leaders on the land tenure security of ordinary people in the former homelands** Sithe Gumbi and Janet Bellamy, *LARC, University of Cape Town* **Why and how the CLTB approach conflicts with the requirements of section 25(6) of the Constitution** Tembeka Ngcukaitobi SC, *Johannesburg Bar*	
15.40 – 16.10	**DEBRIEF/ CLOSE OFF THE DAY** Ruth Hall, *PLAAS, University of the Western Cape*	

DAY 2
Responding to the problem — here and now

09.00 – 09.30	**RECAP OF DAY 1** Wilmien Wicomb, *Legal Resources Centre*	
09.30 – 11.00	PLENARY 3 **ORGANISING AGAINST BANTUSTAN MENTALITY, SELF-EMANCIPATION FROM BELOW** CHAIR Constance Mogale, *Alliance for Rural Democracy* COMMUNITY ACTIVISTS – Christinah Mdau, *Mmaditlhokwa Community, North West* – Zibuyisile Zulu, *Matshantsundu Community, KwaZulu Natal* – Margaret Molomo, *Mapela Community, Limpopo* – Speaker Mahlake, *Moreipuso Community, Mpumalanga* – Nomvuso Nopote, *Cala Reserve, Eastern Cape*	
11.00 – 11.30	**BREAK**	
11.30 – 13.00 *Panels to run parallel*	PANEL 2A **COMPARATIVE AFRICAN EXPERIENCES WITH FORMALISATION** CHAIR Admos Chimhowu, *University of Manchester* **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* **The impact of formalisation on women's land rights** Phillan Zamchiya, *PLAAS, University of the Western Cape* Chilombo Musa, *University of Cambridge* **Land Law Reform and Tenure Security in West Africa: Evidence from Ghana** Augustine Fosu, *PLAAS, University of the Western Cape*	PANEL 2B **UNDERSTANDING CUSTOMARY LAND RIGHTS IN CONTEXT: HISTORICAL INTERPRETATIONS AND CURRENT STRUGGLES** CHAIR Nolundi Luwaya, *LARC, University of Cape Town* **Ascertainment and Ignorance: the Making of Customary Law of Land in the Eastern Cape** Derick Fay, *University of California* **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* **CPI's/Alternatives to CPAs** Tara Weinberg, *University of Michigan* Sithembiso Gumbi, *LARC, University of Cape Town*
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14.00 – 15.30 *Panels to run parallel*	PANEL 3A **THE PROBLEM OF LEGISLATING CUSTOMARY LAW** CHAIR Willmien Wicomb, *Legal Resource Centre* **Asserting customary fishing rights in South Africa** Michael Bishop, *SC, Cape Town Bar* **Legislating Customary Law** Thandabantu Nhlapo, *University of Cape Town* **Giving effect to customary rights in legislation: the case of customary fishing rights** Jackie Sunde, *Masifundise Development Trust* Wilmien Wicomb, *Legal Resource Centre*	PANEL 3B **MOBILISATION AND LITIGATION NEXUS** CHAIR Nokwanda Sihlali, *LARC, University of Cape Town* **Conceptions of Justice: Obstacles to Land Restitution in South Africa's Putfontein Community** Baby Makgeledisa, *Land activist, North West* Alex Dyzenhaus, *Cornell University* **A Neglected but Vital Factor in the Demand for Land: The Spiritual Power of Restitution** David Coplan, *Wits University* Kearabetswe Moopela, *land research anthropologist and ethnographer* **A Glance at Liberia Land Reform: Progressive Land Rights Law that Protects Customary Land Rights** John Kelvin, *Rights and Rice Foundation in Liberia*
15.30 – 16.00	**DEBRIEF/ CLOSE OFF THE DAY** Wilmien Wicomb, *Legal Resources Centre*	

DAY 3
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08.45 – 10.15	**PLENARY 4** **POTENTIAL CHALLENGES TO THE FORTHCOMING COMMUNAL LAND TENURE BILL** CHAIR Zenande Booi, *Center on Race Law and Justice, Fordham University* **Are 'customary' land tenure systems in rural South Africa changing, and if so, why?** Ben Cousins, PLAAS, *University of the Western Cape* **Protection gaps illustrated in previous Communal Land Tenure Bill** Zenande Booi, *Center on Race Law and Justice, Fordham University* DISCUSSANT Dimuna Phiri, *Land Equity International Pty Ltd., Zambia/Australia*	
10.15 – 10.30	**BREAK**	
10.30 – 12.00 *Panels to run parallel*	**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* **IPILRA and Section 54 of the MPRDA: How we leveraged various laws to achieve FPIC for mining projects** Aubrey Langa, *community activist, Mogalakwena Mining Communities* **FPIC and natural resources: Lessons from Nigeria** Dayo Ayoade, *University of Lagos, Nigeria* **Consent and Coercion: Communities' capacity to respond to external requests for community land in Liberia, Uganda and Mozambique** Rachael Knight, *International Institute for Environment and Development*	**PANEL 4B** **THE INTERFACE BETWEEN LAND TENURE SECURITY AND LAND ADMINISTRATION** CHAIR Wilmien Wicomb, *Legal Resource Centre* **How is the role of land administration understood in the rural context?** Nokwanda Sihlali, *LARC, University of Cape Town* **The Gwatyu problem** Siphesihle Mguga, *Legal Resource Centre* Thembakazi Matsheke, *chairperson of an "unregistered" Gwatyu CPA* **Nesting land tenure in land administration** Rosalie Kingwill, *independent researcher*
12.00 – 13.30	**CLOSING PLENARY/ SUMMARY** CHAIR Dineo Skhosana, SWOP, *University of the Witwatersrand* DISCUSSANTS – Katlego Ramantsima – Ben Cousins – Nomboniso Gasa – Constance Mogale/Tshepo Fokane *Two discussants to draw out overarching themes in a facilitated discussion. Highly participatory format – proposed input into strategy for way forward*	
13.30 – 14.30	**LUNCH**	

ABSTRACTS

DAY 1
Describing the problem

PANEL 1A

DISPOSESSION AND MINING THE SACRED

CHAIR: MBONGISENI BUTHELEZI
Public Affairs Research Institute

Panel abstract
In mining-affected communities the following legal frameworks among others: The South African Mineral and Petroleum Resources Development Act (2002); the Interim Protection of Informal Land Rights Act (1996), the National Heritage Resource Act (1999), the National Environmental Management Act (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 previous 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 SKHOSANA, *SWOP, University of Witwatersrand*

Open-cast mining not only dispossess families of the land, but it also disturbs ancestral graves- compelling the next of kin families to agree to relocations. In this chapter, former labour tenant families who lived in Tweefontein agricultural farmland (Mpumalanga), as well as on tribal land in Somkhele (KwaZulu-Natal), whose graves were relocated for mining by Glencore and Tendele mines, provide detailed accounts of the undignified exhumations and reburials of their loved ones. The relocations took place within the ambits of the National Heritage Resources Act (1999) which protects graves and the South African Mineral and Petroleum Resources Development Act (2002) which leases minerals and therefore, the land for mining purposes.

What is shown to have occurred is that inadequacies in the law has created conditions for a market-friendly mineral law to override the protection of heritage, which has led to new forms of exclusion (lawful exclusion), that compels previously marginalised African people to find alternative ways to validate their belonging. Grave relocations in this chapter feature as an aspect of dispossession. The latter does not only encompass events of deprivation, and the loss of land and property, but also covers the loss of the incorporeal. It illustrates that communities not only lose their land for mining, but they also lose their 'last place to rest', spiritual connections to the land, as well as the material evidence which validates their claims to land, history, and belonging.

Whose eyes are looking at the history of dispossession?

MBUSO NKOSI, *University of Pretoria*

In this presentation I theorise the importance of asking whose eyes are looking at the problem of dispossession in South Africa. This theorisation is about how the eye is not just about seeing, but the eye is an ethical organ, that hears, and recognises the face of the other. This is a phenomenological theorisation of the eye. I thus map out the eye as a prejudice organ and bring forth a puzzle of how can we appreciate history through the eye if the eye is an organ of prejudice. That is why the question of whose eyes are looking at history becomes important if we are to ascertain the truth about the condition of being dispossessed. I follow the eyes of a people who no longer had a home in a country of their birth, to understand the meaning of this uncertainty and their relationship with this new state of existence. Thus, venture with me as we look at dispossession through the discredited eye, the eye of the dispossessed, who steals a grave, who works the land, who is killed in this land, and then concealed in unmarked graves.

Working the Land: The contemporary problems of restitution

vimeo.com/simongush/workingtheland (30 minutes film)

SIMON GUSH, ***Artist and filmmaker***

This project started in 2016 as a simple idea for a short film based on an anecdote about my ancestor, Richard Gush. On arriving in Salem, South Africa, he deliberately built a church before building a house for his family – the act of work a way to claim his space in a new land. The project grew, and the turning point in my research came when I discovered that this church and the land around Salem were part of a controversial land claim making its way through the courts and still awaiting its final conclusion. The legal aspect of this land claim forms the basis of Land is in the Air, the first of three films on exhibition. At this point the relationship between land and work became central to my project. A quick glance at the election posters earlier this year would have revealed that these are, separately, some of the most important issues facing South Africa. What I am interested in, however, is how historically and in the present day land and work are entangled; how the dispossession of land was linked to the creation of a workforce for the colony and, as I discovered after spending time with the community on the restituted farms, how work still affects and structures the processes of return. Collaborating on the interviews with my neighbour, journalist Niren Tolsi, opened up stories I had not expected to find. Through his pavement-pounding process, on the third day of filming in Salem we found ourselves on the doorstep of the Madinda family, caretakers of Castle Farm. This was one of five farms restituted through the 'willing seller willing buyer' process before the claim made its way to the courts. For more than 10 years the Madindas have been trying to get the farm running. Their experiences and the obstacles they face form the basis of the third film, Working the Land.

I was particularly taken by Mongezi Madinda's beautiful narration of the history of the land, his retelling of the story of Richard Gush and the ways this deviates from the settler myths that I read as a child. The second film, A Button without a Hole, contrasts Mr Madinda's narrative with the stories repeated in books and a 1980 play by Guy Butler titled Richard Gush of Salem. This film explores the 19th-century dispossession in which my family played a central role.

PANEL 1B

DISPOSSESSION DISGUISED AS REGULATION

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

Panel abstract

This panel will explore 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 and strength of property rights held by people living in terms of customary law and other group tenure systems 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 contexts 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.

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

KHOLOSA NTOMBINI, ***University of Cape Town***

This paper explores how seemingly neutral laws and administrative processes that govern the management of community trusts threaten the property rights of people living on communal land in South Africa. Trusts have been a constant feature in communal areas since the earliest trusts recorded in 1844 in the Cape Colony; the notorious South African Native Trust (SANT) to the proliferation of trusts in areas where there is mining development in the 2020s. Since their establishment, trusts have been heavily contested because they turn community members from being land rights holders to beneficiaries. This action has serious implications for control over the land and revenue derived from the exploitation of that land. For example, the democratic government has acknowledged that in practice, trusts have constrained the flow of benefits to the envisioned beneficiaries in the mining sector. Despite the concerns that the government has acknowledged, it continues to support the use of community trusts to hold land and revenue that has been returned to communities following successful land restitution claims. This raises interesting questions about the relationship between trusts and the state and the implications of this relationship for property rights.

It is important to clarify that community trusts can exist in different sectors, however, this paper limits itself to community trusts that have been established following successful land restitution claims that resulted in negotiations, and in some cases, partnerships with the government to facilitate conservation and mining ventures. This is because these trusts emerge within the context of the national land reform programme through which the democratic state aims to address the legacy of unjust patterns of landholding. The national land reform programme is anchored on three principles, land redistribution, land restitution and tenure reform (Republic of South Africa, 2017). Hence, the 2017 National Land Reform Framework Bill describes the mandate of land reform as building a "unitary non-racial system of land rights for all South Africans that moves away from weak forms of rights" (National Land Reform Bill, 2017:7). This means that all aspects of the land reform programme, including the settlement of land restitution claims, must feed into this mandate. Consequently, community trusts that emerge from successful land restitution claims should be analysed through the lens of how they influence property rights on communal land.

Where does power lie, CPA Committee or traditional leader… The tensions between the CPA Act and TKLA: the Khomani San experience

CECILE VAN SCHALKWYK, *Legal Resource Centre*
DAVID MAYSON PHUHLISANI, *Solutions and Khomani San community leader*

This panel will be situated within the larger discussion about the way legislation can inadvertently threaten the land rights of communities. The focus will be on the Khomani San Community in the Northern Cape whose successful land claim in terms of the Restitution of Land Rights Act was settled in two stages in 1999 and 2002. The forebears of the Khomani San lived in a nomadic manner in the southern Kalahari, in the far north of the Northern Cape. When the former Gemsbok National Park was established, the Khomani San were systematically removed between 1913 and 1965. The restitution settlement resulted in the purchase and transfer of eight farms that has been registered in the name of the Khomani San Communal Property Association. The conduct of the CPA and the management of its assets on behalf of the community is largely governed by the CPA constitution. The constitution makes provision for the election of a management committee and a traditional leader every four years at an annual general meeting of the community.

On 1 April 2021, the Traditional Khoi San Leadership Act 3 of 2019 (TKLA) came into effect. Although the Khomani San should not be interpreted to constitute a traditional community in terms of the TKLA, it is likely that the government will recognise them as such. When the TKLA came into effect, the person who happens to hold the position of traditional leader could apply to be recognised as leader and will then have the power, in terms of the TKLA, to form a council. That council is likely to insist on assuming the powers and functions created by the TKLA. These powers and functions include (s20) "administering the affairs of the Khoi San community in accordance with customs and traditions". The TKLA also envisions the Khoi San council to be the structure representing the community in interaction with government at all levels – duplicating the CPA's function. Most alarming, section 24 of the TKLA empowers the Khoi San council to enter into agreements with municipalities, government departments and "any other person, body or institution". Overnight, a parallel structure will arise in the community that will likely assert powers that are ascribed to the CPA. This can only paralyse the governance of this community.

iSmangaliso Wetlands unraveling the complexities of plural governance systems in coastal conservation

PHILILE MBATHA, *University of Cape Town*

In various parts of the world, rural and indigenous coastal communities who have a long history of relying on land and coastal resources that predate colonial times are threatened by an ever-expanding conservation estate. In South Africa, such communities have been "preserving" resources for a long time through cultural practices and customary systems of governance. However, these systems of resource use and governance have been undermined by State-led conservation governance policies and programmes. State-driven conservation in South Africa tends to focus only on biodiversity and ignores the rights and needs of rural people, with conservation governance in rural areas failing to recognize bona fide customary governance systems. Instead, the institutions of traditional authorities, which are not always representative of the needs and views of wider rural populations, are regarded as allies in promoting exclusionary and oppressive forms of conservation. Using a case study research approach, this study shows that giving traditional authorities power in conservation decision-making processes, instead of bona fide customary institutions, results in conservation governance perpetuating the disenfranchisement of coastal communities. Findings reveal how contemporary conservation governance that adopts colonial (and apartheid) modes of governance based on indirect rule, with chiefs, disempowers wider rural populations and infringes on their livelihoods and customary practices. This results in governance asymmetries and the loss of customary livelihoods.

PLENARY 2

HOW THE COMMUNAL LAND TENURE BILL (CLBT) POLICY APPROACH ENTRENCHES THE URGENT CRISIS OF RURAL LAND TENURE INSECURITY AND CONFLICTS WITH THE CONSTITUTION

CHAIR: NOLUNDI LUWAYA
Land and Accountability Research Center, University of Cape Town

Panel abstract
This panel will discuss typical examples of land tenure insecurity in the former KwaZulu and the devastating consequences for rural people, their livelihoods, and for rural development. 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. The panel will explore the nature of the problems created by the Ingonyama Trust across the province and present 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 the interests of predatory elites over those of ordinary citizens. The panel will discuss how government policy, including the CLTB, undermines the right to tenure security enshrined in Section 25(6) of the Constitution. It will also discuss the Constitutional implications of the 2021 Ingonyama lease judgment which reaffirms that ownership rights vest in customary holders of land rights as opposed to 'traditional' elites or institutions such as the Ingonyama Trust.

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

ANINKA CLAASSENS, *LARC, University of Cape Town*

Aninka will discuss the Ingonyama leases judgement; what it says about the scale of tenure insecurity generated by policies and programmes such as the Ingonyama leases programme: what it says about the nature of customary law and customary ownership of land: and the implications of these findings about customary ownership rights in relation to the injunction in section 25(9) of the Constitution that government must introduce laws that secure underlying tenure rights that are insecure as a result of past discriminatory laws and practices. She will argue that the judgment illustrates how the CLTB not only fails to secure underlying customary ownership rights, but in fact undermines such rights by seeking to vest ownership of the 'outer boundaries' of communal areas in traditional institutions such as traditional councils.

The impact of proclamations, regulations, vestings and the power of traditional leaders on the land tenure security of ordinary people in the former homelands

SITHE GUMBI, *LARC, University of Cape Town*

JANET BELLAMY, *LARC, University of Cape Town*

Sithembiso Gumbi and Janet Bellamy have pieced together examples from their research highlighting the extraordinary efforts of ordinary people to secure their rights to land in the former KwaZulu 'homeland'. While these stories are of people living in KwaZulu Natal, similar issues arise in all former homelands where over 18 million South Africans reside. The studies include the history of the first 'native land trust' in South Africa, which lost registered ownership of land allocated to it in 1858 by vesting, as a result of various proclamations and laws, and which land now vests in the Ingonyama Trust. A more specific example is provided relating to a senior citizen's society in the area, who have found themselves vulnerable to the actions by the Ingonyama Trust Board, Eskom and the iNkosi, resulting in them being 'evicted' from their premises, a thriving community centre. There is the story of a local farmer near Newcastle who applied for and obtained a permission to occupy certificate as well as consent by the traditional council for his grazing land only to discover that the property in question was privately owned and to find his grazing land fenced off. They tell of a community who were removed from their tribal land to make way for the Inanda Dam in 1987. The land allocated to the community in compensation in 1989 is still not registered in the Deeds Office and other land allocated to the tribe has been the subject of land dealings by the traditional leader.

Section 25(6) of the Constitution makes a promise, that a person or community whose tenure of land is legally insecure as a result of past racially based 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, yet, after 26 years there is still no law in place to provide this in the former homelands. The impact of proclamations, regulations and resulting vestings in the Deeds Office, of traditional leaders dealing with land without consulting with or obtaining community consent and of failing land administration processes, are perpetuating land tenure insecurity for people living in the former homelands. The illustrations provided highlight the critical need for Parliament to fulfill its duty and to urgently pass a law or to provide a recordal system to protect the customary rights to land of rural people living on land in the former homelands.

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

TEMBEKA NGCUKAITOBI, *SC Johannesburg Bar*

How and why current government policy and legislation fails to give effect to the right to tenure security promised by section 25(6) of the Constitution? Rethinking our approach to communal tenure and customary law to fulfill constitutional rights.

PANEL 3

ORGANISING AGAINST BANTUSTAN MENTALITY, SELF-EMANCIPATION FROM BELOW

CHAIR: CONSTANCE MOGALE
Alliance for Rural Democracy

Panel abstract

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 legalizing 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 organizational strategy (realized through advocacy research, mobilization, and communications plans) relies on a groundswell of active mobilization 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 homeland is 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 organized 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 organizations, 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 mobilizing 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.

Participants

CHRISTINAH MDAU, *Mmaditlhokwa Community, North West*

ZIBUYISILE ZULU, *Matshantsundu Community, KwaZulu Natal*

MARGARET MOLOMO, *Mapela Community, Limpopo*

SPEAKER MAHLAKE, *Moreipuso Community, Mpumalanga*

NOMVUSO NOPOTE, *Cala Reserve, Eastern Cape*

PANEL 2A

COMPARATIVE AFRICAN EXPERIENCES WITH FORMALISATION

CHAIR: ADMOS CHIMHOWU
University of Manchester

Panel abstract

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*

In Uganda, Mozambique and Malawi, like it is for some of the African countries, several initiatives dubbed 'Fit for Purpose' (FFP) approaches have developed tools to waiver vulnerable and poor communities of the cost of land registration through embracing the concept of systematic titling and leveraging on various technological advancements. It is noteworthy that, unlike Uganda where pilots have been conducted, Mozambique has advanced on massive land titling as a consequence of successful pilot projects while Malawi is still at the inception stage with various discussions being held to lay the ground for FFP pilots. The objectives of this study were to assess the situation of Customary Land Registration in the three countries, to document the successes and challenges of the initiatives, and draw lessons to inform future land titling initiatives. In-depth research, interviews, and community dialogues were conducted to achieve these objectives. Findings indicated that governments have set out to strengthen the security of tenure for, especially smallholder farmers as these are the most vulnerable. Initiatives are steered by both the government and private sector with both making various contributions to ensure their success. For a successful titling project, all parties involved must see an end in the process and also achieve the desired outcomes. This however is sometimes not the case as governments and partners have failed to establish means of sustaining the benefits to the communities while diffusing pre-existing power imbalances in communities especially for long-term benefits that come with land registration. Women's rights are the least represented with many unable to comprehend and appreciate the processes like in Mozambique or completely not appear among the beneficiaries of the initiatives like in Uganda.

The impact of formalisation on women's land rights

DR PHILLAN ZAMCHIYA, *PLAAS, University of the Western Cape*
CHILOMBO MUSA, *University of Cambridge*

This paper aims to reveal the implications of the formalisation of customary land on women's livelihoods by sharing case study results from four countries and demonstrating ways in which policy responses can effectively protect the rights and interests of rural women in a changing customary land holding landscape. The studies in Mozambique, South Africa, Zambia, and Zimbabwe reveal that current formalisation processes take an oversimplified approach to land access on customary land and fail to address the complex interaction of social, economic, and cultural practices in customary areas. By providing extensive empirical evidence, the paper shows that the theoretical underpinning of current formalisation processes does not account for nested interests in customary land. The Western view of landholding blurs the complexities of customary land in sub-Saharan Africa, thus garbling its nature in formalisation processes. The empirical base of the paper provides an opportunity for deepened policy considerations, as well as more nuanced theoretical expositions and conceptualisations of women's customary land rights. The paper concludes that debates on women's access to and tenure security on customary land require an unpacking of its complexities to inform formalisation processes effectively. Further, there is a need for more sophisticated and context-specific approaches to land policy reform.

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

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

Formalisation of land rights is recognised in the development community as a catalyst to boost economic development and improve the living conditions of the poor. The conventional assumption underpinning formalisation of land rights is that land owners can use their titles to secure loans from financial institutions. It is widely acknowledged among scholars that formalisation of land rights requires a robust legal framework to facilitate the securitisation of the tenure of people, especially, the poor. From the beginning of independence till now, many African countries have undertaken initiatives to reform their land laws to support formalisation of land rights. Moreover, studies conducted in Africa and elsewhere reveal that land law reforms have tended to sustain colonial land laws and tenure, protect the position of powerful stakeholders, and increase the opportunities of landed elites. Research shows that land law reforms have exacerbated existing land conflicts and widened social inequalities among people in societies. From the 1960s till date, West African countries have reformed their land laws to protect the tenure of people. Recently, Ghana, the focus of this paper, enacted a Land Act, (Act 1036), to support land administration, registration, and management. While the extant literature has documented the processes and the impacts of land law reforms on the tenure security of the poor in West Africa, there is still the need to understand empirically the current state of land law reforms in the sub-region, how the poor are engaged in land law reform processes, and the ways the state protects the poor, particularly women's land rights during land commoditisation. This paper, therefore, uses existing literature on land law reforms and the author's recent studies in peri-urban Ghana to understand this phenomenon, particularly, in Ghana. The insights from this study will contribute to the current debate in land law reform in Africa and provide alternative ways of reforming the land laws to protect the tenure security of the vulnerable, especially, women.

PANEL 2B

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

CHAIR: NOLUNDI LUWAYA
LARC, University of Cape Town

Panel abstract

This panel brings together papers and presentations that deepen our understanding of the factors that have shaped customary land rights. Panelists will discuss the historical classification of cases dealing with customary land rights and how that has shaped our understanding of customary law. They will also look at the current struggles that shape how we think about customary tenure, these include the struggles that take place at the interface of municipalities and customary land governance structures as well as the challenges facing communal property institutions.

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

DERICK FAY, *University of California*

It has been widely recognized that existing recorded customary law around land has been distorted, predominantly through its biases towards the perspectives of older male informants. This paper examines other more subtle factors shaping the history of "ascertainment" of customary law by South African administrators, and legal practitioners and scholars. Its starting point is the observation that land cases were treated as "purely administrative" affairs, outside the scope of the law, so that the case law upon which the official customary law of land is based, predominantly consists not of land cases, but of other types of cases in which land issues came up. Moreover, these cases were biased towards areas in which relatively wealthy and educated Africans had access to lawyers and chose to pursue their disputes through the formal legal system. The outcome was that ignorance was produced as much as ascertainment, ignorance which served the interests of administrators and traditional authorities, and which left vast and largely unrecognized (and perhaps unrecognizable) gaps in their accounts of customary law of land.

The Municipal- Traditional Authority Interface in the Governance of Land Under Customary Tenure in South Africa

GAYNOR PARADZA, *Public Affairs Research Institute*

Land administration is a complex issue. The complexity is compounded by diverse authorities managing land in South Africa which range from global entities to community based organisations. In rural areas where land is held under diverse regimes, the customary and statutory authority interface becomes a site of struggle as globalisation processes exert pressure on the increasingly scarce land resource. This paper focuses on rural local authorities, specifically the Municipal/customary land governance authorities to highlight the impact of land conversion on customary land tenure. The research illustrates how the power asymmetry, legal pluralism and policy gaps undermine customary land tenure regime. The process is not without struggle as traditional authorities and local communities engage in various strategies to secure their land. The consequences for those who hold this tenure and policy options to secure customary land tenure in South Africa are also highlighted. The work draws on empirical studies of in depth field work that was carried out in three rural local authorities in Limpopo, Mpumalanga and Eastern Cape in South Africa.

CPI's/Alternatives to CPAs

TARA WEINBERG, *University of Michigan and Sithembiso Gumbi, LARC , University of Cape Town*

This paper will discuss Communal Property Institutions (CPIs) – that is, Communal Property Associations (CPAs) and Community Land Trusts – are an important, yet challenging, area of South Africa's land reform programme. In their best form, they seem to offer an alternative to the narrow forms of property ownership that exist in common law – a space in which people can have their local forms of property ownership and management recognized and supported. However, in their implementation since 1994, CPIs have been problematic structures, where rightful beneficiaries of land reform are sometimes excluded and where certain CPI members, traditional leaders and government officials have used these vehicles to enrich themselves. In this paper, we assess the complex history of CPIs and their implementation, in the distant and more recent past. We look at CPIs in historical perspective, tracing their antecedents in earlier forms of collective forms of property ownership in South Africa in the early 20th century. Then, based on research and experience in the DRDLR in the 2000s, we reflect on the issues that emerged with CPIs, including: the short cuts taken, the lack of capacity for these institutions, the limits of Trusts and CPAs as legal entities, and the issue of government's privileging of traditional leaders over CPIs. We examine the importance of these CPIs for the possibilities of a more equitable and just political and economic future. To this end, we also propose some ways out of the current CPI impasse.

PANEL 3A

THE PROBLEM OF LEGISLATING CUSTOMARY LAW

CHAIR: WILLMIEN WICOMB
Legal Resource Centre

Panel abstract

The Constitution, in s211(3), provides that customary law is subject to the Constitution and *legislation that specifically deals with customary law*. In *Gongqose*, 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. This panel looks at the record of parliament in legislating customary and how this has served to dispossess people of their rights and empower elite structures. More particularly, it grapples with the question of what s211(3) of the Constitution requires of parliament and what that means in practice. The panel will discuss 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*

The recent judgment in *Gongqose v Minister of Agriculture, Forestry and Fisheries* recognizes that customary fishing rights can continue to be exercised, notwithstanding legislation purporting to prohibit fishing without a permit. This article explores the implications of that judgment for customary fishing rights in South Africa, and for customary law generally. It posits an analytical framework to assert customary rights in the face of legislation that could be read to alter or extinguish those rights. The starting point is whether the customary fishing is a right under customary law, or a customary practice without legal status. Both are substantively protected under *Gongqose*, but the customary rights get additional procedural protections. The primary procedural guarantee – and the key innovation of *Gongqose* – is that customary law can only be altered by legislation if the legislature has considered the content of customary law. Even then, legislation must be read to avoid or limit any alteration or extinguishment of customary law. If interference is inevitable, there will ordinarily be a limitation of rights that the state must justify. Justifications sourced in conservation must be carefully scrutinized, and justified by scientific evidence, not assumptions. Environment-based justifications must also be evaluated through a lens that sees people as part of the environment, not separate from it, and that recognizes the need for equitable access to resources. Finally, a court may develop customary law, although that approach risks distorting the character of customary law.

Legislating Customary Law

THANDABANTU NHLAPO, *University of Cape Town*

The Constitutional Court has made it clear that the customary law recognised by the Constitution in Section 211(3) is living customary law, as opposed to official customary law (*Bhe*, *Shilubana*, *Alexcor*). Furthermore, this customary law is an independent source of law and is "protected by and subject to the Constitution in its own right" (Bhe). That means that the validity of customary law must be determined with reference to the Constitution and not to common law or legislation according to the constitutional provision that recognises it, customary law is "subject to … any legislation that specifically deals with customary law' [S211(3)] customary law may be regulated in terms of other legislation in terms of Section 212, aspects of customary law and traditional leadership may be regulated through legislation

It is thus possible to argue that where customary law exists, "there is in theory no need for further statutory regulation – unless it is necessary for purposes of bringing customary law in line with the Constitution or for another legitimate purpose" [Wicomb note; s39(3)]. This is sometimes lost on legislators who, if one considers the clumsy attempts at regulating customary courts via the TCB, seem to assume that customary law must be regulated in terms of legislation or 'codified' in order for it to be constitutional [Wicomb note]. This misses the point that any attempt to impose regulation upon an area that is regulated by custom must not amount to the extinction of customary rights and rules. If it does, this will be an infringement of the constitutionally protected right to culture and to living customary law. Such an attempt must thus be justified in terms of Section 36 of the Constitution. This paper will look at several attempts by Parliament to regulate customary law and, following *Gongqose*, will argue that in the public law area, at least, the legislator has not got it right. Examples from private law (eg, the RCMA in respect of marriage; RCLS Act on Succession) will be used to argue for the need to use living customary law as the starting point for statutory intervention in these matters so that legislation can regulate in a manner that is least intrusive in bringing any particular practice in line with the Constitution.

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

JACKIE SUNDE, *Masifundise Development Trust*
WILMIEN WICOMB, *Legal Resource Centre*

In 2014, the Marine Living Resources Act was amended to recognise the existence of customary fishing communities along South Africa's coastline. This amendment came in the midst of the *Gongqose* litigation and following sustained advocacy campaigns by and on behalf of customary fishing communities in particular in the Eastern Cape and KwaZulu-Natal where they continued to be criminalised and harassed when fishing. The Act included in the definition of a small scale fishing community those who "continue to exercise their rights in a communal manner in terms of an agreement, custom or law". This paper looks at the steps taken by the responsible Department to implement this recognition of customary fishing rights through regulation and a long-winded implementation process. We demonstrate how the purported 'recognition' and regulation of customary fishing rights – while finally providing more secure access to some communities – have in reality largely eroded the very existence of the customary systems they sought to protect and promote. This, it is argued, is not only contrary to the very intention of the statutory framework, but unconstitutional in that it limits both the rights to culture and to property unjustifiably. It threatens the very nature of customary systems that enable their critical contribution towards biodiversity protection and resilience in times of risk and uncertainty. We then outline some modest principles and proposals for how customary rights of access and control over communal resources can and should be identified and regulated by the legislature in order to be constitutionally compliant.

PANEL 3B

THE NEXUS BETWEEN COMMUNITY ACTIVISM AND THE LAW

CHAIR: NOKWANDA SIHLALI
LARC, University of Cape Town

Panel abstract
This panel will explore 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 focus moves from individual clients and cases and shifts into a partnership between lawyers and activists. A partnership that proactively seeks 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. Surfacing issues around the practical usefulness of legal solutions for community issues.

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

BABY MAKGELEDISA, *Land activist*
ALEX DYZENHAUS, *Cornell University*

Land restitution claimants in South Africa have faced many difficulties in trying to claim their land. In this paper, we detail the obstacles experienced by the Putfontein community after the formal resolution of their claim. The community has experienced issues with the Communal Property Association and outside mining interests. We ask how this has affected the community's decisions and beliefs around land reform and political activity. Further, we ask how these issues have brought in external actors into the land claim and what effect this has on the land claimants.

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

DAVID COPLAN, *Wits University*
KEARABETSWE MOOPELA, *land research anthropologist and ethnographer*

Our paper departs from the conference's central theme of securing tenure for black communities that remained on and continue working the land. In our research, we have discovered that various social formations among black South Africans have retained and even intensified their attachment to particular features or locations despite their historical dispossession and loss of access. These attachments are deeply imbricated in the self-defined identity and group membership of these 'communities'. The driving force underlying them is spiritual and oral historical belief, ritual practice, and discourses of origin as claims to land. Ignored during apartheid, these religious and heritage-based claims to rights of access and occupation of these spaces have emerged into the light of legal disputation in the post-1996 Constitutional period. The paper reviews a small selection of these claims that have come to significant public attention and formal disputation in the courts. In the latter cases, important legal judgements have been on occasion handed down by the justices. At the heart of these judgements are efforts to recognize and validate 'customary law' and practice, to secure freedom of religion, to preserve heritage, and to mitigate previous dispossession. On this basis we argue for the importance of the *meaning* of land to African people expressed in spiritualized geographical features, and for the formal recognition of these attachments in the integration of 'living customary law' into South Africa's functioning legal system.

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

JOHN F. KELVIN, *Land Rights Coordinator, Rights and Rice Foundation in Liberia*

The Land Rights Act (LRA) legislated in 2018 is a progressive law that recognizes the land rights of all Liberians but moved a step further to recognize customary land rights and gives it equal protection like private land. This recognition of customary land rights "with or without a deed" enables communities to exercise their rights over their land including the rights to possess, own, exclude, and dispose of the land. This recognition of customary land rights with or without a deed places an estimated 70% or more of the country's land under customary ownership. The LRA provides a procedural framework that communities should follow in the formalization of their customary land rights. The process begins with Community Self Identification (CSI), proceeds with documentation and mapping of customary land, formulation of by-laws and self-governance structures, conducting of confirmatory surveys by the Liberia Land Authority (LLA) and concludes with the issuance of "Statutory Deeds". The agency with the statutory mandate to implement the LRA is the Liberia Land Authority (LLA).

DAY 3

Where to from here in addressing the problem?

PLENARY 4

POTENTIAL CHALLENGES TO THE FORTHCOMING COMMUNAL LAND TENURE BILL

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

Panel abstract

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?

Are 'customary' land tenure systems in rural South Africa changing, and if so, why?

BEN COUSINS, *PLAAS, University of Western Cape*

In papers published in 2007 and 2008[1] I described 'communal' or 'customary' systems of land tenure in rural South Africa in the following terms: land and resource rights are directly embedded in a range of social relationships and units; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character; rights are derived primarily from accepted membership of a social unit; they include both strong individual and family rights to residential and arable land and access to a range of common property resources and are thus both 'communal' and 'individual' in character; access to land is distinct from control, which is concerned with guaranteeing access and enforcing rights, and often located within nested systems of authority; social, political and resource boundaries, while often relatively stable, tend to be flexible and negotiable.

This paper will review more recent research findings in order to assess the degree to which these features are present today, to describe key changes and to explore the reasons for such change. One key focus will be land tenure systems in densely-settled 'communal' areas located in peri-urban areas and displaying some urban characteristics, such as high levels of dependence on urban employment and social grants, the abandonment of agriculture and natural resources as important sources of livelihood, and an emerging sales and rental market in land. Another focus will be on the roles and powers of traditional authorities in land tenure systems subject to change,

The paper will also revisit the question of how to understand processes of social change in relation to land, focusing in particular on practices, strategies, power relations and class dynamics. Here, as previously, the wider international literature will be drawn upon.

Protection gaps illustrated in previous Communal Land Tenure Bill

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

Since 2017 with the release of the Draft Communal Land Tenure Bill (CLTB), we have been waiting for a long-promised law that will deal with the many challenges faced by people and communities entitled to protection of their insecure land rights as required by section 25(6) of the Constitution. No comprehensive legal framework exists that recognises and protects rights held by people and communities in the former homelands of South Africa that were denied, distorted and weakened by colonial and apartheid laws, policies, and practices.

The CLTB has been sold by Parliament as the silver bullet that will respond to and address all issues of tenure insecurity for individuals and communities who hold rights to land in terms of customary law or other tenure systems that were previously unrecognised and unprotected.

No other version of the CLTB has been published since 2017, however statements and actions from Parliament indicate that a law aimed at giving effect to the state's obligation to legislate the rights of communities in terms of section 25(6) is on the horizon.

Although the Communal Land Rights Act (CLRA) was declared unconstitutional in 2010 on procedural grounds - many substantive issues were raised including the impact the legislation would have in weakening the rights individuals and communities hold to their land. An important continuing question is whether the CLTB in whatever form it comes out in next deals with the substantive issues communities continue to raise - the state's obsession with titling the outer borders of community land and transferring it to traditional leaders or similarly placed institutions without properly, and independently, recognising and protecting the rights of individuals and sections of the broader community does not bode well.

However, another gap in both CLRA and the available version of the CLTB relates to the many communities that have land protected by section 25(6) and the Interim Protection of Informal Land Rights Act (IPILRA) who have had their rights significantly weakened or lost.

An example of such community is the KwaDinabakubo community whose land was transferred to their traditional leader in terms of the Upgrading of Land Tenure Rights Act (ULTRA) who in turn transferred it to the eThekwini Municipality without informing or obtaining the consent of the community members. This was allowed to happen because of gaps in protection in ULTRA as well as the state's practice of ignoring the existence of IPILRA and the rights it protects. Using the KwaDinbakubo community as a case study, I will show that intended laws and policies -including the CLTB - since CLRA have failed to provide such communities with any protection or recourse for the continued dispossession of their land.

Discussant

DIMUNA PHIRI, *Land Equity International Pty Ltd*

Legal and land Administration Specialist with experience in both customary and statutory land tenure regimes at both local, regional, and international levels in Zambia, South Africa, Australia, Nauru, Fiji and Bangladesh.

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

Panel abstract
"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 seeks to draw from experiences and struggles of mining communities in South Africa who leverage different pieces of existing law to enforce FPIC. Second, to contrast arguments from a legal perspective on FPIC as a concept deriving from international laws and treaties and measure its legal stronghold in national state context drawing from the experiences of natural resources extraction projects in West Africa. Third, contrast the legal perspective with implementation practice. What is the nature of FPIC in practice, is it informed consent or just consultation? Last, have discussions with social movements in the global South who lobby and advocate and have achieved FPIC in their communities.

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*

I focus on free prior and informed consent (FPIC) in giving effect to indigenous people constitutional right to self-determination regarding exploitation of platinum minerals on communal and state land reserved for exclusive use by the African indigenous people in terms of colonial and apartheid regime land laws. This exclusive use right is retained in the current Interim Protection of Informal Land Rights Act ("IPILRA") and we sought Ivanplats to comply with regarding access to the land. We applied for leave to appeal directly to the Constitution Court against judgment of the High Court confirming spoliation order in favor of Ivanplats, arguing that the MPRDA Section 54(1)(a) and IPILRA Section 1(c) permits prevention of access to mining right area. Because right of access in terms of section 5(3) is subject to the Act including section 4(2), 25(2)(d), and 54, the litigation was improper as Section 54 precludes litigation and application of common law spoliation remedy whereas a constitutional remedy is prescribed to deal with dispute relating access. In November 2021 we also objected to Ivanplats' application for amendment of environmental authorization (EA) on the basis that IPILRA consent was not obtained prior to launching the application, as required by new regulation following the deletion of NEMA EIA Regulation 39(2)(b) from 11 April 2021. The deleted regulation exempted mining right and EA applicants from obtaining landowner's consent prior to applying for EA.

Fpic and natural resources – Lessons from Nigeria

DAYO AYOADE, *University of Lagos, Nigeria*

Free Prior and Informed Consent (FPIC) is a specific right of indigenous people to be consulted on development of natural resources on their lands and territories. It takes shape in human rights related rights to self-determination, civil and political rights, ILO indigenous and Tribal Peoples Convention 1989 and UN Declaration on the Rights of Indigenous Peoples. Yet, these decades old hard and soft laws struggle to produce concrete enforceable rights at the national level. This is perhaps because the meaning and extent of FPIC is contested. Nigeria, with more than 250 ethnic groups which all claim to be "indigenous" cannot for instance be compared to the US or Australia that legally recognise native/first people or aboriginal rights. Moreover, Nigeria is the leading African oil and gas producer with over 40 minerals ranging from iron ore, lithium, silver, marble, and gold that it needs to develop to satisfy a population of over 200 million people. Allowing indigenous communities, the power to veto projects controlled by the Nigerian Federal Government will be difficult. The paper adopts a doctrinal research methodology and argues that there is an emergent but fragmented move towards FPIC that can be distilled from an evaluation of natural resources laws in Nigeria. Also influential, is the militancy attacks against oil and gas infrastructure in the Niger Delta that has pushed the Nigerian government to develop petroleum host communities and consult historically ignored people. It reviews the adequacy or otherwise of the extant legal framework against the international right conferred by FPIC. The paper will analyse (i) the origins and sources of FPIC; (ii) arguments about the status of FPIC; and (iii) Nigerian natural resources law provisions relevant to 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 (formerly with Namati)*

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 140 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 this 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. Community members and leaders from the majority of the communities described "consultations" that fell far short of international FPIC standards, and many described their "consent" as coerced, forced, or driven by intimidation tactics. Overall, the data suggest that community land documentation efforts 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. FPIC "consultations" are often characterized by significant power imbalances: investors and/or government officials may carry out a "consultation" as an opportunity to only inform a community that an investment or development project will be happening. Alternatively, external actors may seek only the consent of local leaders rather than the full community or pass around what they fraudulently claim are "attendance sheets" for people to sign, which they later claim as community members' consenting signatures. Such "consultations" may be used by the company and/or the government to give the impression to external interests – international standards certification bodies or financial backers, among others – that FPIC principles have been complied with and community members have genuinely consented to the project. Community members who request more information, demand written contacts, or ask for environmental or social impact assessments may be labeled as "anti-development" and criticized as being at odds with government, investors and the community at large. In the worst cases, communities that choose to reject an external actor's request for their lands and resources may face coercion through the use or threat of violence, criminalization, and false arrests by either the government or the investor and his agents. Community leaders who oppose the investment may be replaced with individuals more "amenable" to outside interests. By showcasing the rampant injustices faced by the study communities, the report aims to shed light on how best to address such imbalances of power and strengthen global efforts to protect community land rights. This presentation will share what was learnt about what enables and what prevents communities who know their land rights to either give or withhold their free, prior and informed consent for any sharing or changes to their land. Having legally recognised, and even documented, land rights is no guarantee by itself that communities are able to defend their land. The presentation will provide some guidance on how to use FPIC in defence of community rights.

PANEL 4B

THE INTERFACE BETWEEN LAND TENURE SECURITY AND LAND ADMINISTRATION

CHAIR: WILMIEN WICOMB
Legal Resource Centre

Panel abstract
This panel centres around the problematic of legalising off-register, customary or informal land rights in the context of an appropriate land administration framework that is critical for supporting secure 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 argue that the obstacles to legal certainty go beyond the contestations 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 misfit 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*

This presentation focuses on the disjuncture in South Africa between, on the one hand, the current state-led land administration and, on the other, land rights that operate outside of this formalised system. The former centres on a formal system of governance that centralises the cadastre and land registry system, and in the latter rights are primarily regulated by localised hybrid institutions without much state regulation. I go along with some observations by Kingwill (2004, 2005, 2020) that there is misalignment between land governance and land administration practices on the ground and the formal institutions thereof, including policies. This manifests in lack of intergovernmental and inter- and intra-departmental coordination. I will explore these issues through the case study of the 2021 Casac vs. Ingonyama Trust Board case, where the ITB had tried to secure land rights by concluding 40 year leases to introduce "formal" tenure, thereby negating the localised tenure systems that already exist to protect rural citizens. I argue that land administration is an aspect of public administration that is centred on both formal and informal regulation of land and natural resources, countering the conventions in state law that favour registration through formalisation into the existing legal-administrative framework. International 'soft law' provides a window into potentially more flexible approaches to land administration but the definitions all tend to be interpreted in terms of westernised land administration systems that operate better for private property systems that are market driven. South Africa moulded its formal land administration system around this model, which has had problematic consequences.

The Gwatyu problem

SIPESIHLE MGUGA, *Legal Resource Centre*
THEMBAKAZI MATSHEKE, *chairperson of an "unregistered" Gwatyu CPA*

This presentation discusses a case that illustrates the broader problem of legalising land tenure in situations of contested and overlapping claims that are a feature of South Africa's tenure landscape. As a member of the legal team from the Legal Resources Centre (LRC) I present a case of tenure insecurity on a block of farms known as Gwatyu on behalf of a farmdweller community that after decades remains unresolved, while a community leader will relate their day-to-day struggles for formal recognition. The case goes back to the 1970s when the apartheid government expropriated more than 60 farms from white owners in the Queenstown district for incorporation into the newly 'independent' Transkei. The farmworkers stayed on and started farming on their own and sometimes simultaneously for a new set of claimants well connected to Kaiser Matanzima and his power brokers got leases from Transkei government. Over time, the lessees ceased to pay rentals and other farmdwellers from neighbouring districts joined the families. Most occupiers have lived there for decades and qualify for rights of beneficial occupation. They have made the area their home, and developed internal arrangements of access and use of the land. The arrangements follow consistent patterns with some internal nuances to how rights are recognised on each farm and from family to family. Formal recognition is imperative to secure occupiers' tenure and basic services, but more critically to adjudicate their rights in the face of land invasions and an ethnically-based claim to the entire area relating to colonial dispossession in the eighteenth century in spite of being dismissed by the Restitution Commission. We examine the challenges of fitting these tenure arrangements into existing frameworks and propose possible solutions by relying on the promise of s25(6) of the Constitution.

Nesting land tenure in land administration

ROSALIE KINGWILL, *Independent researcher*

This presentation critiques the notion that tenure laws can work in isolation of land administration institutions, conversely tenure fits into a broader regulatory spectrum. In South Africa various statutes protect and/or secure rights. Post-1994 laws protect 'informal' rights and the Deeds Registries Act 47 of 1937 secures real right. Protective legislation has been largely successful against eviction but unsuccessful in facilitating sustainable formalisation. Sustainability includes cultural sensitivity and capacity to absorb widely practiced norms and customs (subject to the Constitution), which require land rights to be nested in land administration institutions seen as legitimate, reliable and consistent. Advantages of local flexibility and dynamism can be overshadowed by institutional pluralism that leaves outcomes to the brutalities of local power struggles. The efficiency of the Deeds Registries system in securing real rights lies in its predictability and scalability, associated with a set of values that conform to a market economy. It is underscored by the central notion of 'transferability' of rights that denotes a complete severance by one party each time there is a change in ownership resulting from intestate succession, inheritance, sale or subdivision. Passage of property triggers simultaneous processes of survey, land use planning, conveyancing, rights adjudication, taxation (for services), valuation, recordation, certification, etc. Valuation reflects asset formation that can be quantified. But a large proportion of landholders view their ownership in terms of continuity across generations without transfer or severance, reflecting patrimonial rights expressed as 'family property' based on familial ties. These are not static notions of property but evolve according to changing family values and new patterns of capital accumulation. Although sometimes exchanged on informal markets family property is generally thought of in terms of a line or chain of relationships that do not get severed. This is contrary to the notion of transfer that compartmentalises rights to allow for alienation as well as group ownership that seldom secures family property. It should be possible for land administration to mirror a range of property values in order to work for all.

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