Land, Law and Chiefs in Rural South Africa

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Contested Histories and Current Struggles

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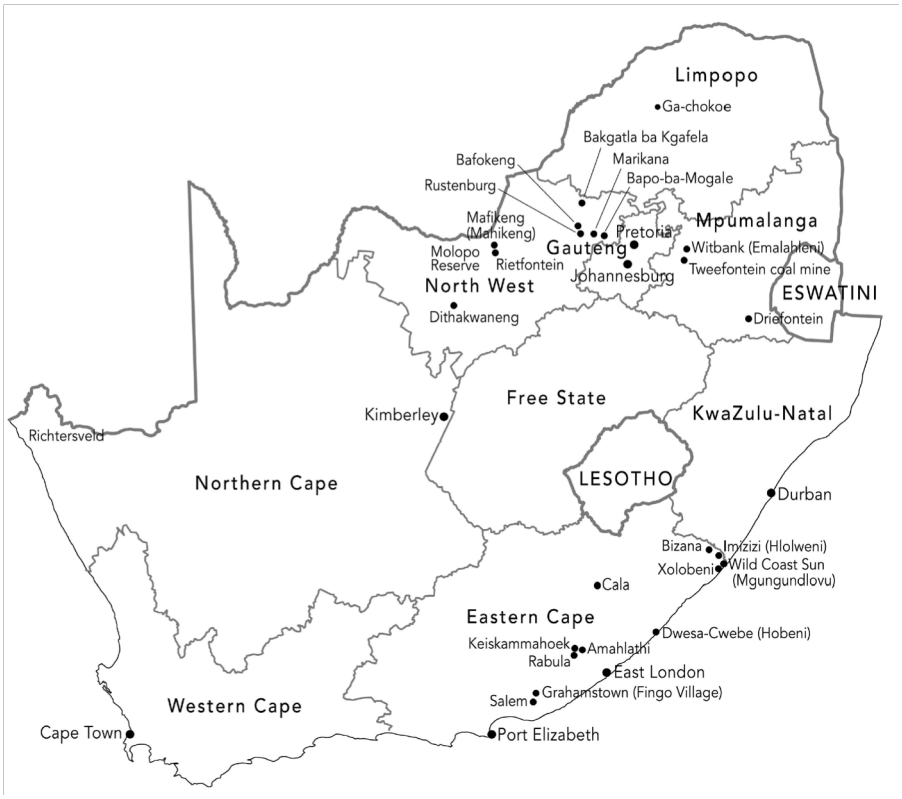
CONTENTS



Location of key sites mentioned

ACRONYMS AND ABBREVIATIONS

ACC	AmaHlathi Crisis Committee
ACLA	Advisory Commission on Land Allocation
AFRA	Association for Rural Advancement
ANC	African National Congress
AnCRA	Association for Community and Rural Advancement
BEE	black economic empowerment
BRC	Border Rural Committee
CLARA	Communal Land Rights Act
CNIP	Ciskei National Independence Party
CNP	Ciskei National Party
COBACO	Concerned Bakgatla Anti-Corruption Organisation
CONTRALESA	Congress of Traditional Leaders of South Africa
CPA	communal property association
D	account development account
DAFF	Department of Agriculture, Forestries and Fisheries
DLA	Department of Land Affairs
DRDLR	Department of Rural Development and Land Reform
GRC	General Royal Council
ha	hectare(s)
IBMR	Itereleng Bakgatla Mineral Resources (Pty) Ltd
IPILRA	Interim Protection of Informal Land Rights Act
JSC	Judicial Service Commission
km	kilometres

KTC	KwaGcina Traditional Council
LARC	Land and Accountability Research Centre
LGTA	Local Government and Traditional Affairs
LRC	Legal Resources Centre
MARTISA	Mining and Rural Transformation in Southern Africa
MKLM	Moses Kotane Local Municipality

MLRA	Marine Living Resources Act
MPA	Marine Protected Area
MPRDA	Mineral and Petroleum Resources Development Act
NFA	Native Farmers' Association
NGO	non-governmental organisation
NHRA	National Heritage Resources Act
NLC	National Land Committee
NPS	North Pondoland Sugar
PGS	Professional Grave Solutions (consultancy)
PP	Public Protector
PTO	permission to occupy
SADT	South African Development Trust
SANCO	South African National Civic Organisation
SANNC	South African Native National Congress
SCOPA	Standing Committee on Public Accounts
SPP	Surplus People Project
SWOP	Society, Work and Politics Institute
TA	Traditional Authorities or Tribal Authorities
TDC	Transkei Development Corporation
TLGFA	Traditional Leadership and Governance Framework Act
TRAC	Transvaal Rural Action Committee
TRACOR	Transkei Agricultural Corporation
UDM	United Democratic Movement
ULTRA	Upgrading of Land Tenure Rights Act

PREFACE William Beinart

This edited collection illustrates contestations over land, law and political authority in South Africa's rural areas, focusing on popular rights. The chapters were initially presented at three workshops that addressed the theme of Contested Histories in the rural areas. The first was convened by Gavin Capps and Peter Delius in October 2015 at the University of the Witwatersrand.[1] It was

prompted by the recognition that historians and social scientists were increasingly being drawn into legal contests over land and political authority in the contemporary South African countryside, both as expert witnesses in court cases and through the provision of research to government, communities and lawyers. The workshop sought to create a space to compare such engagement in applied research work.

Participants discussed the specific cases in which they had been involved and the broader context of research. Some reflected critically on their experiences of providing court testimony, as well as assisting lawyers, non-governmental organisations and communities. Some participants had been directly engaged in policy formation and legislative processes. A common theme concerned the importance of historical and anthropological research about land, chiefs, governance and custom in these debates. Participants agreed to continue the conversation through future workshops and to encourage younger researchers in this field, working at the interface between academic scholarship and public engagement.

A second workshop was organised in May 2016 by Aninka Claassens, with the assistance of Rosalie Kingwill and other colleagues at the Land and Accountability Research Centre (LARC), University of Cape Town. This was a larger event that honed in on the role of law and the impact of the Constitution (Act 108 of 1996) with regard to strategically pressing issues of land ownership and property rights in the former homelands, as well as the increasing significance of customary law. This workshop sought also to promote a positive exchange between academics and practitioners, especially lawyers. The LARC workshop assessed the research priorities necessary to mount a legal, historical and discursive challenge to the current government policy of prioritising the authority of traditional leaders and councils over land and rural governance. Detailed discussion was directed to the land rights of ordinary occupants and users. There were a number of outcomes, including a focused discussion of land legislation that led into recommendations to the High Level Panel that reported to Parliament in 2017.

A committee was also chosen (William Beinart, Gavin Capps, Thiyane Duda, Michelle Hay, Rosalie Kingwill, Khumisho Moguerane and Wilmien Wicomb) to promote further academic initiatives under the Contested Histories banner. This committee held a third workshop at Wits University in November 2017. About 15 people participated, most of whom presented papers that were discussed in detail; we included both established academics and those still completing their degrees. The primary purpose was to facilitate publication of case studies that illustrated the themes emerging in the first two workshops. These papers have been reworked and form the basis for this collection. Responsibility for the publication was devolved to William Beinart, Rosalie Kingwill and Gavin Capps. William Beinart did the bulk of the editing.

Thanks to Roshan Cader for her patience in steering this collection through the publication process and to Colin Bundy for his meticulous contribution to editing.

NOTE

1 This was hosted by Mining and Rural Transformation in Southern Africa (MARTISA) project, funded by the Ford Foundation and located in the Society, Work and Politics Institute (SWOP) at the University of the Witswatersrand (2013–2018). Thanks to these institutions for their financial and academic support.

INTRODUCTION

Land, Law and Chiefs: Contested Histories and Current Struggles

William Beinart

BACKGROUND

The past two decades have witnessed growing competition for landed resources across much of sub-Saharan Africa, generating pervasive conflict over the ownership and control of communal property and the systems of customary authority that typically mediate access to it (Peters 2004, 2013; Ubink and Amanor 2008; Capps 2016; Buthelezi, Skosana and Vale 2019). This collection brings together a range of essays that explore the ways in which these struggles are unfolding in the South African countryside. They focus particularly on the intersections between law, history and academic research in current efforts to advance popular rights to land. They also examine political conflicts, above all in relation to the powers of the chieftaincy within and beyond the areas of customary or communal landholding, largely in what were formerly defined as the 'black homelands' or 'Bantustans'. The backdrop to the collection is shaped by the confluence of two important developments in the post-apartheid era, which are simultaneously redrawing the contours of the rural political economy and intensifying contestation over its future direction.

The first of these developments arises from the distinctive character of South Africa's national land reform programme. After the official end of apartheid in 1994, the new African National Congress (ANC) government adopted a multipronged approach to undo the gross racial inequalities in access to and control over land arising from white political domination and apartheid. Laws were passed and policies developed providing for: the restitution of land to black people who had been forcibly dispossessed by the state after 1913; the subsidised redistribution of land from willing white sellers to black landholders; the reform of land tenure

in the communal areas to clarify rights of occupation, ownership and use; the protection of informal and customary landholdings; and new instruments of collective ownership called communal property associations (CPAs). Since local land management in the Bantustans had typically (though not exclusively) been placed under chieftaincies or tribal authorities during apartheid, these interventions inevitably raised questions about the future role and powers of those institutions in the new dispensation.

The 1996 Constitution enshrined democracy, the rule of law and universal rights. It also recognised customary laws and practices, to the extent that they were compatible with the Constitution more broadly. This raises complex issues in relation to land reform and tenure. If customary law and landholding is to be retained and developed, it will be necessary to engage in historical and grassroots research in order to identify rules and practices. Given that many of the latter are inadequately recorded and currently contested, this is a challenging task for legal as well as historical and social research. Land reform and tenure upgrading within and beyond the areas of customary tenure has thus provided a rich field for contestation over historical evidence and interpretation. It has also proven an inherently political process – one intricately tied up with the shifting terrain of political competition and conflict as South Africa has wrestled with efforts to build a stable, inclusive democracy that simultaneously respects and amends inherited forms of custom and chiefly authority.

A second major development has been the changing economic status of the former homelands themselves. Under apartheid, they were largely cast as labour reserves for the mines, factories and farms located in 'white' South Africa, and as dumping grounds for the black populations whom the apartheid authorities attempted to remove from white-owned farmlands and the cities. While there were initiatives to promote a degree of local economic activity, such as irrigation projects and decentralised industries, particularly towards the end of the apartheid era, these rural zones largely remained residual to the wider national economy. When the ANC came to power they were the poorest and least developed parts of the country.

In recent years, however, the areas with customary tenure have increasingly been identified as repositories of valuable resources, both under and on the land, including high-demand minerals (platinum, chrome, titanium and coal), fertile soils, wildlife and marine reserves, as well as areas of outstanding natural beauty. Some are located close to the boundaries of rapidly expanding cities, such as Durban, where peri-urban land is at a premium. In other cases, land in Limpopo with valuable plantations of macadamia nuts and subtropical fruits has been transferred to

collective ownership. Spending power in some of the former homeland towns, now regional hubs, has escalated. This has a stimulated a wave of investment by mining, agribusiness, construction, retail and tourism concerns, both local and multinational, which is beginning to transform pockets of the former homelands from rural backwaters to new growth frontiers in the post-apartheid economy. As land values have risen, so have struggles for its control, with new avenues opening for accumulation by chiefly and other local elites, while growing numbers of the rural poor are threatened with displacement and dispossession.

These conflicts have been given further impetus and direction by the manner in which the constitutional imperatives of tenure reform itself have been translated at the policy level. After a brief experiment with democratising rural relations in its first term (1994–1999), the ANC government has increasingly turned to chieftaincy as a means of governing the former homeland areas, reproducing apartheid-era jurisdictions (Claassens and Cousins 2008). Under President Mbeki (1999–2008), the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA) gave chiefs formal recognition and the Communal Land Rights Act (CLARA) of 2004 made it likely that administration and control of land in these areas would fall under the traditional councils established in the TLGFA. CLARA was subsequently overturned by the Constitutional Court in 2010, largely on procedural grounds, and by 2019 it had not been replaced. While the direction of ANC's tenure reforms remains uncertain, government policy under President Zuma (2009–2018) was sympathetic to chiefs (Weinberg 2015; Beinart, Delius and Hay 2017; Buthelezi, Skosana and Vale 2019).

This pro-chieftaincy thrust has been reinforced under President Ramaphosa (2018 # to the present) by the Traditional and Khoi-San Leadership Act (Act 3 of 2019) and parallel legislation defining the juridical powers of chiefs. Although there are differences within the ANC and some government departments, traditional authorities are often seen as the prime representatives of rural community interests in relation to land-use decisions. Mining companies and the state tend to turn to them first as local business partners. Major new laws like the Mineral and Petroleum Resources Development Act (MPRDA) of 2002, and subsequent policies, are helping clear the way for such developments by requiring black economic empowerment (BEE) deals in new mining investment. Local chiefs and traditional councils have been in advantageous positions to become intermediaries. At the same time such interventions can further weaken popular land rights. Parallels can be seen more broadly elsewhere in Africa where relatively weak states devolve functions to corporate enterprises that connect with localised power structures (Comaroff and Comaroff 2018). In the South African case, the

central state retains considerable control of mining development and seems to encourage such links.

Questions about how land should be governed are equally significant in areas that have been restituted or redistributed to black communities. Rights over such land, and economic developments on them, have also sometimes become contested in disputes that invoke historical and customary precedent. The courts have become a frequent recourse for such conflicts. This has in turn drawn in key actors such as public-interest lawyers, non-governmental organisations (NGOs) and rural activists, as well as academics who have expertise on the history of specific areas or on custom and social change.

This volume draws on the research and experiences of such people. While it cannot claim comprehensiveness in the choice of the cases it considers, either geographically or thematically, it nevertheless provides a rich snapshot of some of these issues as they have been rehearsed in key parts of the country, at different juridical and administrative levels, and with an eye to their deeper historical contexts.

FOCUS AND THEMES

As noted, our main focus in this collection is on the regions of South Africa that fell under the Bantustans or homelands in the apartheid era. While they comprised at their height about 14 per cent of the country's area, they still include around a third of the country's population. The boundaries of the Bantustans are no longer statutory, and in certain respects are fluid, but their institutional legacy remains in the systems of landholding and local authority, which are substantially different from most of the rest of the country. They are largely still dominated by forms of customary, non-private or off-register land tenure and many of them still have chiefs and traditional councils as part of local governance.

A few chapters also consider the land that has been transferred from white private ownership, and from the state, to black communities. Most of these areas now fall under forms of collective ownership, either trusts, or CPAs that were established under Act 28 of 1996. Recent government figures (The Presidency, South Africa 2019) suggest that about 8.5 million ha or 10 per cent of the agricultural land in South Africa has been transferred through government land reform schemes of restitution (about four per cent) and redistribution (about six per cent). The state is keeping direct ownership of an increasing amount of

redistributed land, and leasing it to beneficiaries, rather than transferring it directly to CPAs.

At the outset it is important not to create rigid boundaries in thinking about the white-owned farms and the former Bantustans, nor urban and rural zones. These are not disconnected spaces geographically nor in the lives of many people. We should think about these issues outside of silos and in the context of wider processes of economic and social transformation now facing South Africa. Historically, many people have moved between these areas, as migrants, as workers and as the victims of forced removals. In some parts of the country, privately owned farmlands, communal areas and peri-urban settlements are juxtaposed and their social networks are meshed. The former homelands include growing cities and large peri-urban settlements. The issues addressed in this volume impinge on all South Africans. Nevertheless, poverty still remains most persistently entrenched in the areas of customary landholding and traditional systems of authority. Protecting the rights of poor families and communities in these areas is a priority. So too is new thinking about effective landholding and governance in addressing poverty and marginalisation.

There are four main interlinked and overarching concerns in the chapters of this volume. Firstly, several chapters assess the recent history of landholding and rural authority in South Africa. They demonstrate wide diversity in both, reflecting historical continuities and the uneven impact of apartheid. While chieftaincy often features as a central element in present claims and disputes to authority, some chapters show that rural communities developed new forms of organisation and landholding where traditional leaders featured only marginally. Contributors explore hybrid forms of local authority and landholding institutions that involve in varying degree the state, chiefs, communities and private landholders.

Secondly, with regard to the theme of the chieftaincy, the chapters discuss somewhat contradictory trends. On the one hand, they provide evidence that chiefs and traditional councils are becoming entrenched in the rural areas and are trying to assert control over land, rural resources such as minerals, and local politics. On the other hand, they show push-back from groups that reject the central role of chieftaincy in land administration and local government. They also discuss recent court judgments that have applied the Constitution to uphold the rights of communities, families or individuals where they are threatened by chiefs or external agencies such as mining companies.

Thirdly, chapters illustrate and debate customary law. The South African Constitution recognises customary law and the courts are attempting to incorporate and develop this branch of jurisprudence. The Constitutional Court has accepted

that customary law is not static and has begun to evolve a 'living customary law'. Although still a fluid area, the Constitutional Court, in contrast to some regional courts, tends to favour a view of customary law that accords with the rights and protections of all South Africans as specified in the Constitution. This has resulted in judgments that run counter to traditionalist hierarchies and gender inequality. A number of chapters explore the dynamic character of land tenure on the ground, which may influence the content of living customary law.

Fourthly, chapters analyse the deployment of history in contemporary struggles and debates around these contested issues. A few discuss in some detail historical antecedents to current conflicts over land. More generally, chapters focus on different versions of local histories and their promotion in claims over land and chieftaincy, not least in the platinum belt. The ANC government instituted an official inquiry into chieftaincy disputes through the Nhlapo Commission, which was tasked with discovering legitimate succession. In these disputes, historical evidence about incumbency as well as rules and practices of succession have been central.

The Restitution of Land Rights Act (22 of 1994) also put a premium on historical and legal research to provide evidence that communities or individuals were deprived of their land by racial legislation after 1913. When such cases come to court, research is inevitably required to identify the history of landholding and the process of dispossession. The composition and boundaries of claimant communities are also sometimes contested because they can result in decisions that exclude some families from the benefits of land claims.

ACADEMICS, APPLIED RESEARCH AND COURT CASES

Land reform has been a central issue for academics in South Africa and issues of tenure became of particular importance in relation to the legal challenge to the Communal Land Rights Act of 2004 (Hall and Ntsebeza 2007; James 2007; Walker 2008; Claassens and Cousins 2008). As the chapters in this volume record, historians and social scientists have frequently contributed research to the land restitution process in South Africa, as well as to claims and cases around the resolution of tenure disputes, overlapping rights, chieftaincy and customary law. We have encouraged contributors to illustrate and analyse their engagement, or at least to acknowledge how their ideas have developed in relation to public policy, claims and court cases. Contributors do not agree on all points and some differences can be discerned in the chapters. Each expresses the individual views of the

contributor, and although they have been discussed collectively, we have not tried to impose uniformity. All, however, share a concern with democratic processes, with equality and with popular rights in South Africa. The chapters are critical both of the state and chiefs when they are judged to have worked against such outcomes.

In court cases and investigations that have arisen around such issues, academic historians and other experts are sometimes called upon to give evidence. In the *Salem* land claim case,[1] two noted historians appeared for opposite sides (Ross 2018). This case also demonstrates a trend where white landowners are increasingly hiring their own archival researchers to defend their land against claims. Courts, land commissioners and lawyers weigh evidence but often require expanded research and the seal of expert authentication. While courts seek certainty in a system that is still largely premised on conceptions of ownership rooted in common law, 'living customary law' is increasingly being recognised, introducing an element of legal flexibility. As the public-interest lawyer Geoff Budlender notes, decisions by courts, commissions and administrative bodies are taking into account a complex range of histories and rules. There have not, however, been sufficient judgments to provide decisive precedents in all areas of law and living customary law remains elusive in many areas. A number of chapters raise further questions about the relationship between legislative and customary law.

Derick Fay analyses the role of experts in some detail, showing how their contributions are shaped by the requirements of cases but also have the potential to influence legal arguments and court decisions. Their engagement in legal processes also defines their research in particular ways and brings them into new kinds of relationships with lawyers, officials, their research subjects, and with one another. This poses questions about the nature of their expertise: how did they develop their knowledge and what are the configurations of research and writing that underpin its production? Fay notes that during his anthropological training, the idea of 'custom' was considered outdated and static; anthropologists focused more on social practice and social change. However, the invocation of living customary law by South African courts has both necessitated working with this concept and provided a vehicle for rethinking customary practices as dynamic. Broadly speaking, experts have to operate within the conceptual ground rules being set by legislation, lawyers and courts, though they can try to introduce alternative approaches. Interpretation of the term 'community' is a case in point and its meaning is by no means identical in different legislation and judgments.

Research and evidence for court cases can present problems for academics. Historians, for example, have the freedom to explore multiple vantage points, to illustrate different interpretations and to qualify their arguments. Although they try

to develop arguments consistent with their evidence, this is sometimes less uniform, less complete or messier than they would like (Ross 2018; Fay, Kingwill and Beinart in this volume). Lawyers deal with similar evidence and in many respects develop similar modes of argument. Lawyers also need to consider different interpretations in order to anticipate how their opponents may be thinking. But in general, they are compelled to avoid explicating alternative lines of argument that may be useful to their opponents. Lawyers need to ensure, as far as possible, that their evidence and argument is consistent with a version of the law as it stands, or a convincing development of the law. Academics working on court cases and claims have sometimes to be guided by lawyers both in the specific focus of their research and in constraining perspectives that could disable the case of the clients they are supporting.

Communities develop their own understandings of history. These are usually based largely on oral material, although some have access to archives and books that they use to strengthen claims. Their access to such materials is usually limited and for professional historians, their versions of history are often incomplete or inadequately contextualised. Sometimes they are clearly self-serving, but they also throw important light on historical processes that have not been adequately reported in the archives or in dominant regional narratives (Mager and Velelo 2018; Mnwana, and Duda and Ubink in this volume). Vernacular and oral evidence may also be mobilised to good effect in restitution claims and court cases. In this context, training and interviewing experience in such disciplines as history and anthropology, where extensive oral material is often recorded, is valuable. Academics can sometimes explain how memories and narratives are established, and become powerful vehicles for community claims and identities, even when they may not accord fully with other evidence.

Discussion in the workshops where these chapters originated illustrated the complexities faced by academic researchers acting as experts. Those contributing to this collection have nevertheless been keen to play this role, because they perceive it to be assisting processes of change in South Africa. The hurdles set by legislation such as the Restitution Act were perhaps higher and more demanding than many expected – both in relation to the law and the scale and complexity of evidence required. Academic researchers may also have policy agendas, or at least wish to support pro bono lawyers, such as the Legal Resources Centre (LRC), who have taken up cases on behalf of impoverished communities and worked creatively with the Constitution. The LRC and associated lawyers have undoubtedly influenced the direction of judgments, such as the *Richtersveld* case (2003),[2] and urged the courts to take account of socio-economic rights. Together with attorneys

such as Richard Spoor, they have also been at the forefront of challenges to mining developments that threaten community land rights.

POST-APARTHEID CHIEFTAINCY

With the transition to democracy, chiefs succeeded in ensuring that traditional leadership was recognised in the 1996 Constitution (Section 211) 'according to customary law' (Oomen 2005; Ntsebeza 2011). Though constrained by the Constitution, their influence on the government has increased considerably, particularly through the vehicle of the Congress of Traditional Leaders of South Africa (CONTRALESA). The TLGFA (2003) formalised the status of 'senior traditional leaders' and traditional councils. With the recognition came an influx of applications for, and disputes around, chieftaincy positions, some submitted to the Nhlapo Commission, established by the 2003 Act.

As mentioned above, the Restitution Act has further levered and mobilised chiefs to claim land on the basis of authority over landholding. Raphael Chaskalson shows how a chief claimed control of land in Bizana, in the former Transkei, following a successful restitution case from which the traditional council had had been excluded. Chapters by Mnwana, Pickering and Motala, and Duda and Ubink argue that chiefs have asserted power through effective political mobilisation at local, provincial and central government level. The TLGFA recognised many apartheid-era boundaries, but simultaneously tried to make traditional councils more democratic by introducing the requirement that 40 per cent of their members should be elected and one-third women. Traditional council membership requirements have, however, often been ignored (Buthelezi and Skosana 2018; Capps in this volume).

Provinces that contained former homelands passed their own laws, recognising the role of chiefs, who were also represented in provincial houses of traditional leaders; this and parallel developments in the legal sphere were a further carry-over from the Bantustans (Claassens and Budlender 2013; Delius 2019). The TLGFA and its provincial iterations did not devolve control over land and other administrative functions to traditional councils; this has to be specified in legislation. But at the local level, chiefs have often succeeded in inserting themselves as intermediaries between the central state and rural people. In certain respects, they run a parallel system of governance to elected local authorities. The ANC sees them as valuable in delivering the rural vote and the institution does have

some grassroots support, especially where local government institutions are ineffective or corrupt.

As Thiyane Duda and Janine Ubink note, chiefs were associated with unpopular apartheid policies in much of the former Ciskei area of the Eastern Cape. But the Eastern Cape provincial government has been sympathetic to their political revival, even in contexts where local communities strongly contest this model. For example, a major legal case in Cala focused on the right of people of a particular administrative area to elect their own headman in line with historical practice, rather than accept a nominee of the local chief, who was supported by the province. Drawing on detailed evidence from University of Cape Town academic Lungisile Ntsebeza, the judge ruled in favour of the community. He argued that the Framework Act did not give this power to chiefs and the customary practice of the area should be accepted. This was an important example of a court being guided by the constitutional provision that traditional leadership should operate democratically. However, the legal victory was to a significant degree dependent on research by academic experts and the work of pro bono lawyers. Nor was it immediately enforced. In their chapter on a parallel case in Keiskammahoek, Duda and Ubink find evidence of an alliance between the Eastern Cape government and traditional leaders. In KwaZulu-Natal, especially, this authority seems to be spreading beyond the former homeland area over land transferred to CPAs (Hornby et. al. 2017).

Speaking of South Africa as a whole, Delius (2019: 8–9), who has been researching land restitution cases in Limpopo and Mpumalanga for the Land Claims Commission and Court, sees ‘growing ethnic mobilization and conflict at local levels with long submerged identities being resuscitated by individuals and groups in pursuit of office’ and notes how such processes ‘have also contributed to a growing emphasis on and debate about which groups are “indigenous” and/or were the original rulers’. Duda and Ubink provide a specific example in the former Ciskei. Imposing chiefs against popular wishes and strengthening their control over village communities can have far-reaching political consequences within areas of customary landholding and beyond. The issue is not whether individual chiefs are ‘good’ or ‘bad’, but the structural problems that arise by extending controls over land, resources and administration to such intermediaries.

Sonwabile Mnwana, and Joanna Pickering and Ayesha Motala illustrate that in some cases, and particularly in the Bakgatla-ba-Kgafela area of North West Province, chiefs attempted to control protest against their authority by banning meetings. When challenged, they went to court to get interdicts prohibiting meetings that were considered hostile, ostensibly on the strength of their customary

powers. While a lower court granted these interdicts, the Constitutional Court struck them down in *Pilane* (2013) on the grounds that they violated constitutional rights to freedom of expression, association and assembly; living customary law should come into line with constitutional principles.[3] The judgment was considered a major legal victory for constitutional freedoms and customary rights. However, evidence again suggests that the judgment has not been uniformly respected. Interdicts and other court orders continue to be sought and obtained by traditional leaders to silence and restrain their critics, thus enabling them to avoid dialogue or customary dispute resolution forums. This has other consequences, also, in that such restrictive political authority can inhibit open party politics in the villages.

MINING AND CONTROL OF LAND

Mining in South Africa was initially highly concentrated, especially in the gold mines of the Witwatersrand and Free State. It largely fell within areas of private property in 'white' South Africa; or, historically, the process of colonisation resulted in private property being demarcated where land was seen to have promise for minerals. This pattern has changed in recent decades. The MPRDA of 2002 eliminated private ownership of mineral rights and vested it in the people of South Africa under the custodianship of the state – 'common property and subjected to the disposition of the state' (Capps 2012). Under the MPRDA, mining and production rights are governed by state permits. Mining has become increasingly decentralised in search of newly valuable minerals such as platinum, in which employment overtook gold by 2010. By chance major platinum deposits fell within the former homelands, particularly Bophuthatswana – now in North West Province. The resulting competition for resources and contestation over land administration in mineral-rich areas has drawn in chiefs, communities, lawyers and academics and was a significant element in the decision by Gavin Capps and the Society, Work and Politics Institute (SWOP) at the University of the Witwatersrand to convene the first Contested Histories workshop.

In this volume, Capps focuses specifically on the Bapo-ba-Mogale case in the context of the political economy of chiefly reassertion in North West Province. He argues more generally (Capps 2010: 27–34, 2016) that Mahmood Mamdani (1996) places too one-sided an emphasis on the political role of modern chieftaincy as 'decentralised despotism'. A feature of the democratic era in South Africa has been the increasing economic role played by chiefs as a form of landed power, especially in areas where mining takes place under their jurisdiction. Chiefs' capacity to retain

administrative control over mineral-rich communal land has placed them in a strong position as intermediaries to negotiate with, and benefit from, mining corporations. The latter need access to land and natural resources and find it easier to deal with an apparently representative and single-entry institution. In cases like the Bafokeng and Bapo-ba-Mogale, this has enabled traditional authorities to appropriate mineral revenues and in some instances demand rewards for facilitating access. In the Bapo-ba-Mogale case (the collective membership of which is colloquially referred to as 'the Bapo'), this involved working with provincial officials and politicians who were also able to take advantage of divisions within the ruling lineage and the complex transactions involved. These new processes of accumulation have generated conflicts over the control of the monetary rewards of mining, with credible evidence pointing to the disappearance thereof. Chiefs are not, however, private landowners and are unable to benefit exclusively: the income is to some degree redistributed for public projects and to cement political support in order to reproduce their effective control over this property. There is a tension between accumulation by those in position and the remaining 'communal' elements in ownership.

In these cases, the rapid development of mining created competition for resources in the shape of chieftaincy disputes and also land disputes.

Mnwana also discusses post-apartheid laws regulating mineral rights, particularly the MPRDA and its accompanying regulations. He focuses on the Bakgatla- ba-Kgafela Traditional Authority on the platinum belt that has significant control over revenues from platinum mining in the area. In seeking to redress past injustices by transforming relationships between the mining companies and local communities, this legislation included greater state control over licensing, BEE, mine-community partnerships and social labour plans as requirements for mining companies. The state has encouraged communities who previously received royalty compensations for loss of land due to mining to convert their royalties into equity shares (see also Capps in this volume). These initiatives have reinforced the position of chiefs, as assumed custodians of communal resources and as mediators of mineral-led development and mining deals. The Traditional and Khoi-San Leadership Act (2019) seems potentially to enhance their power in contracting with outside enterprises.

Chiefs enter into mining contracts and receive royalties and dividends on behalf of rural residents who live in the mineral-rich traditional authority areas. This traditional-elite-mediated model of community participation in the mining industry has received increased academic and media attention, particularly since the 2012 Marikana massacre. In the face of protracted labour unrest in the platinum sector

and the decline in platinum prices between 2011 and 2018, Mnwana argues that the dominant view propagated by the government, mining companies and the chiefs is to secure stability through the existing arrangements. This has reinforced land dispossession as local chiefs attempt to gain control over mining revenues by claims to land on the basis of 'tribal' identity. Claimants whose ancestors jointly bought private land, only to see it subsumed under chieftaincies during the era of segregation and apartheid, have tried to reassert these historical rights. In some cases, they see no alternative but to shift their meaning of land towards exclusive group claims and histories. The court battles highlighted in Mnwana's chapter address this link between national policy, control over land and rural political authority.

The history of mining in Bafokeng in the Rustenburg region of North West Province provides a parallel case that is not discussed in detail in our chapters. Capps (2016) notes that the Bafokeng and the Rustenburg region as a whole was distinguished by a particularly high concentration of African land-buying syndicates (including mineral rights) in the late nineteenth and early twentieth centuries.[4] However, the land was progressively registered to the state 'in trust' for a recognised chief and 'tribe'. This fusion of the legal apparatus of land title with broader notions of both 'state' and 'tribal' trusteeship over Africans produced a hybrid form of tenure. When these areas fell within Bantustans, proprietorial control was frequently contested between chiefly authorities and the Bantustan regimes, as 'tribal' and 'state' trustees respectively, particularly as the latter became increasingly reliant on the tax and royalty revenues generated by mining.[5]

Following the democratic elections of April 1994, the homelands were formally abolished and their territories reincorporated into the new unitary South African state. However, some of the laws that governed them remained in place at the provincial level. The courts effectively established the Bafokeng chiefs as intermediaries, who gained a significantly improved royalty and an equity stake in platinum production. In 2007, the Traditional Council became the largest shareholder in a major platinum producer and the Bafokeng chieftaincy corporatised its mining assets into a holding company that diversified into banking, telecoms and construction. As John Comaroff and Jean Comaroff (2009) argue, ethnic identity has been commercialised in parts of South Africa. In the Bafokeng case, financial dealings were highly professionalised, but in the case of the Bapo, where this was not achieved, Capps shows how provincial administrators and rival chiefly factions were able to siphon off a great deal of money by exploiting the continuing administrative ambiguities around 'tribal' and 'state' trusteeship. Mnwana and Capps illustrate how disputes over resources become entangled with

issues of legitimacy, succession and competition for office. They can also involve some communities attempting to secede from the traditional authority to which they have historically been connected. Discussions of customary land law in this context (Peters 2004; Moguerane in this volume) attest to its negotiability and adaptability.

Dineo Skosana focuses on another element of contestation in relation to occupation of land for mining. The issue of grave sites has been significant in community claims to land (James 2009). At Tweefontein coal mine in Mpumalanga, multinational mining company Glencore removed graves in order to pursue mining operations. The African families affected felt that they were inadequately consulted and compensated. There was not opportunity to conduct appropriate ceremonies and relocation exacted a heavy psychological and physical toll on the families. Neither Glencore nor the state recognised the significance of ancestors in the arrangements made for the removal. This question became further complicated by land claims.

Skosana argues more generally that the National Heritage Resource Act (1999), under which such removals are regulated, is inadequate in catering for intangible heritage and particularly for the issues that are raised in this case. At the same time the MPRDA provides for strong rights by the holders of mining licences, as opposed to those who might be affected by mining, and tends to override the protection of heritage and specifically graves. This results in further marginalisation of those who already had weak legal rights to land and resources. For those who are dispossessed, the graves matter both because of their connection to their ancestors and because their removal is seen to perpetuate historical injustices.

LIVING CUSTOMARY LAW

South African constitutional jurisprudence has incorporated and developed the notion of 'living customary law'. Budlender analyses major constitutional court judgments and argues that this has become an increasingly diverse and sustained legal field where popular rights are generally accepted and developed. He suggests that the judiciary is developing some degree of consistency on a case-by-case basis by interpreting the Constitution and applying it to the field of customary law. There is also evidence of the development of a body of law based on precedent. In certain respects, the precepts of living customary law are being developed through the courts rather than in legislation. But there is also evidence of courts and legislature

moving in some diverging directions – particularly in relation to the powers of traditional leaders.

Fay explores the operation of living customary law in the *Gongqose* case (2012) near Dwesa-Cwebe reserve on the Eastern Cape coast.[6] Fay became an expert witness because of earlier ethnographic fieldwork in the area, so that he could attest to the nature of customary practice before the issue came to the courts. The *Richtersveld* land restitution claim (2003) and the *Bhe* judgment (2004),[7] which concerned the rule of male primogeniture in customary law of succession and inheritance, were key to the Constitutional Court's jurisprudence in this field. Aninka Claassens and Geoff Budlender (2013) noted that judgments were informed not only by old authorities but by contemporary everyday practice with an eye on socio-economic rights. These ideas were developed in Claassens and Ben Cousins (2008) who argued for a customary law that should not be formulated in ways that might support authoritarian or top-down rural hierarchies.

The *Gongqose* case concerned rights to marine resources under customary law at Dwesa-Cwebe, for those whose ancestors had long resided in the area. Those who were accused of contravening the law regulating fishing won their case in the Constitutional Court after judicial disagreement at lower levels. The LRC found funding to take this matter to the highest level in order to establish a legal principle and precedent. The question arose as to whether conservationist legislation designed to protect such natural resources negated customary rights. An expert witness for the state argued that the legislation should have priority and that fishing, especially with newer technology, could not be seen as customary and could not continue unregulated by the state. But the ethnographic evidence showed that such rights had been exercised over a long period of time and the court focused on the recognition of living customary law rather than the precise practice of fishing. The judgment gave the community continued access to marine natural resources, although this does leave open important issues in relation to the commercialisation of customary rights and the limits of conservationist controls.

WHO OWNS THE LAND? THE NATURE AND STATUS OF CUSTOMARY LANDHOLDING

Living customary law might also apply to landholding in the former homelands but this has not yet been decisively established by the courts. Chaskalson explores some of the issues in relation to the *Hlolweni* land claim in Bizana, former Transkei, settled in court in 2010.[8] Following annexation, land was regulated by

government proclamations that gave the state overarching power, but during the apartheid era there was a tendency to accept increasing control by chiefs. Chaskalson and Beinart discuss an alternative interpretation based around the writings of Alastair Kerr (1953, 1990), Professor of Customary Law at Rhodes University, who was one of the few to publish on this question. He saw the role of both chiefs and the state as largely administrative. Land once granted could not easily be confiscated and in regard to residential plots and arable fields, rights amounted to a form of ownership. Budlender and Johan Latsky (1991) adopted this idea, not so much because they wished to equate customary and private ownership, but in order to emphasise the strength of rights accorded in customary tenure. Claassens and Cousins (2008) emphasised the security of rights in such systems as well as the rights to exclude outsiders. However, they placed more emphasis on collective controls, particularly over commonage and natural resources such as forests or, Fay would add, fisheries. Beinart emphasises the strength of family rights and limitations on chiefly and collective community authority. He argues that living customary law should be defined to recognise and prioritise such rights.

Chaskalson, however, drawing on Sara Berry's *No Condition is Permanent* (1993), argues that local understandings of landownership and tenure in the former homelands are not static. The *Hlolweni* case shows that three different understandings of rights to the same piece of land evolved over a relatively short period, sometimes at the expense of household entitlements. The case arose over a restitution claim for about 10 000 ha that had been carved out of Bizana district for a sugar plantation and smallholder scheme under the Transkei government. The claimants were those displaced by the scheme but the sugar smallholders also contested their right to the land. The claimants were successful, based on their rights as previous holders of residential and arable plots with rights to grazing land. After they had won their case, the local chief claimed the land should come under the traditional council. All three parties seemed to agree that the old, family-based rights in the land had lapsed. These ideas were not necessarily imposed from above by a chief, but were generated by the claimants who wished to use the area as 'business land' for large-scale commercial agriculture, a shopping mall and other developments. Living customary law becomes particularly complex in this context.

Moguerane adds deeper historical context by exploring the nature of landholding in the early twentieth century. She shows how privately owned farms in the Barolong, Tswana-speaking areas became increasingly communalised. In part this was a result of government intervention and segregationist legislation that was, at that stage, intent on breaking down the control by chiefs over the land. However, Khumisho Moguerane also makes an innovative argument to the effect

that ordinary landholders, who had previously paid rent to the chiefs, asserted their claims to land. Thus the making of the commonage in the Barolong Molopo reserve was in part a result of this pressure from below, in the period after colonisation. Her chapter again shows historical contestation over land, and over ideas about property. It suggests that caution should be exercised in assuming the customary law has remained static and has long been entrenched in all the former homeland areas. Private property became increasingly barred to African people after the Natives Land Act (1913) and the Native Administration Act (1927). This analysis is echoed in Chaskalson's chapter, which also explores changes in landholding that were generated from below, rather than simply being imposed from above. Simultaneously, those commoners who gained access to land increasingly established a form of ownership in practice. In this respect, her arguments tie in with Beinart's about the significance of family-based property on customary land.

Rosalie Kingwill examines another variation of the history and character of African landholding. Her cases are based on land that was allocated in individual title in the nineteenth century Cape (Kingwill 2014). Over the course of time it continued to be held by the successors in the form of family property in private tenure. The land was seldom sold and usually regarded by families as a long-term asset. Elements of African customary norms and concepts of property were infused into the ownership of private, titled landholdings. In the examples provided, the definition of family membership for the purposes of access to land includes all categories of kin, without having to be named or quantified. The argument formed around the case studies suggests that it takes more than title to create practices of private ownership that involve alienation, or narrow systems of inheritance and exclusion. Kingwill explores such hybrid forms of ownership and develops a gendered approach in analysing access to such land.

Simultaneously, after 1994, the Department of Land Affairs moved away from the permission to occupy (PTO) certificates, which had been the most general recognition of land rights in the homelands. These were problematic in several respects: they were dependent on government proclamations and Bantustan legislation of increasingly dubious validity and they were also very largely registered to men. But the absence of any central system of record has been a major change, leaving a legacy of uncertainty in the rural areas. The early attempts to develop new legislation governing customary forms of tenure under the new Constitution were informed by democratic, communalist ideas. But attempts to legislate these failed with the termination in 1999 of Minister Derek Hanekom's tenure at the Department of Land Affairs. CLARA, the alternative legislation passed in 2004, placed greater emphasis on traditional authorities and was declared

unconstitutional in 2010. Replacement Bills were circulated in 2015 and 2017 but have not yet been finalised.

Tara Weinberg discusses how some of these changing ideas were formulated in the Communal Property Associations Act 28 of 1996. The Act made provision for group or community control of land that was transferred under the land reform programme and also in effect provided a vehicle for living customary practices. She argues that this was not imposed from above by the new state but emerged also from community mobilisation and debates as the prospect of new land became available through restitution and redistribution. The CPAs, as collectivities, became private owners of land with title. But rights within the farm depended on the CPA constitution and the practices developed by such landholding groups. Thus, land reform established a new hybrid form of landownership, drawing on some the customary practices, but different from them both in the formal rights of collective ownership and the capacity of communities to make their own rules.

Collectively the chapters on tenure argue for the importance of hybrid forms and ideas, whether resulting from long-established title, as in Kingwill's case, or land held in customary tenure. They all emphasise that chiefs have not been continuously in control of land allocation – and some lay emphasis on the strength of family rights, akin to ownership. Ideas about customary landholding are diverse and changing. But Beinart suggests that we are left without a clear statement in law about the nature of customary land rights held by families and that this is an urgent priority in a context where such rights are increasingly threatened. While the Interim Protection of Informal Land Rights Act (IPILRA) of 1996 provides a legal defence again dispossession of informal and customary landholdings, it has little bureaucratic support and makes certain exceptions. The recent judgments in the *Maledu* and *Baleni* cases, both handed down in 2018, may seem to have established that full and informed consent by the relevant customary landholders is now necessary before mining can take place.[9] Agreement by the chief and traditional council is not sufficient. The landholders, by implication, should also be beneficiaries of development, if they agree to it, and receive full compensation. Yet it has taken cases funded by pro bono lawyers, opposed by the state, to achieve this outcome and government responses to these judgments suggest that they are not entirely secure. The courts and the executive again seem to be pursuing different priorities. Nor do these judgments give a clear statement about the content of customary and informal land rights.

Some argue that it is best to leave customary land tenure, properly protected against dispossession, to be regulated at a local level. This is also an attractive route for those who are opposed to the commodification of land and titling, which may

lead to alienation. However, there are many examples in our chapters of external intrusions on customary land or threats from chiefs and local accumulators. Customary practices do not always seem to provide sufficient protection against dispossession. The passing of the 2019 Traditional and Khoi-San Leadership Act may reinforce these dangers of accumulation from above. In this context, there is increasing advocacy of a form of land registration at the level of the family. The High Level Panel report (Parliament 2017) and the Presidential Advisory Panel on Land Reform and Agriculture (2019) both supported this route. We hope that the chapters collected in this volume may help to inform this continuing debate about land, customary law, contested history and local political authority. Although the chapters are not in agreement on all points, and do not all specifically focus on policy, collectively they offer an alternative approach to current routes being pursued by the government.

NOTES

1 Salem Party Club and Others v Salem Community and Others (CCT 26/17) [2017] ZACC 46 (11 December 2017) ('*Salem*').
2 Alexkor Ltd v Richtersveld Community and Others (CCT 19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC) 2003 (12) BCLR 1301 (CC) (14 October 2003) ('*Richtersveld*').
3 Pilane and Another v Pilane and Another (CCT 46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC) (28 February 2013) ('*Pilane*').
4 The following draws on Capps (2010: 153–80, 252–62). See also Capps (2012: 71–2) for a more condensed version.
5 See Gavin Capps, 'Full Research Report on Land and Political Histories in Bafokeng', commissioned by the Legal Resources Centre. Submitted as Third Respondent's Answering Affidavit in the Matter of Royal Bafokeng Nation v Minister of Rural Development and 15 Others, 999/2008 [2008] ZANWHC, April 2011.
6 S v Gongqose, Elliotdale Magistrate's Court E382/10 (unreported 2012) ('*Gongqose*')
7 Bhe and Others v Khayelitsha Magistrate and Others [2004] ZACC 17 ('*Bhe*').
8 Hlolweni, Mfolozi and Etyeni Communities v North Pondoland Sugar [2003] LCC41/03 [Judgment 2010] ('*Hlolweni*').
9 Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another (CCT 265/17) [2018] ZACC 41 (25 October 2018) ('*Maledu*'); Baleni and Others v Minister of Resources and Others (73768/2016) [2018] ZAGPPHC 829 (22 November 2018) ('*Baleni*').

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CHAPTER 1