

*With the Traditional KhoiSan Leadership Bill now in its final stages with the National Council of Provinces, Aninka Claassens offers a timely evaluation of the role that law has played in characterising traditional leadership in a post-apartheid context. This special working paper forms part of a forthcoming MISTRA publication on Traditional Leadership and Customs in a Constitutional Democracy, due to launch early next year.*

**Mining magnates and traditional leaders: the role of law in elevating elite interests and deepening exclusion 2002-2018**

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‘To use the (Bantu) Authorities Act of 1951 as a platform for land reform in 2004 is simply incredible’ – Dikgang Moseneke<sup>1</sup>

**Introduction**

This paper is about how law has been used to entrench structural inequality in post-apartheid South Africa. The laws analysed in the paper advance the interests of a small elite at the expense of the property and citizenship rights of the 17 million South Africans living in the former homelands. A key and enduring driver of inequality is the legacy of the ‘reserves’ that became ‘homelands’ and which remain zones of desperate poverty and exclusion. Another fundamental driver of inequality in South Africa has been the mining industry. The discovery of precious metals such as platinum, chrome, iron and coal in former homeland areas moved the epicentre of the mining boom to land that is owned and occupied by the poorest South Africans (see Parliament of South Africa 2017: 445; 447). This has resulted in brutal evictions and dispossession. The scale of the problem is ever-increasing. Millions, if not billions of rand due in mining revenues are unaccounted for, increasingly violent protests have led to regular shaft closures, and an entire mountain-top of chrome has been illegally mined and driven off to the docks for export, in plain sight of a major road in Limpopo (Saba, 2016a).

The pivotal laws at play are the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). These laws were developed in concert with one another to enable politically connected

business and traditional leaders to use their homeland antecedents and their political connections to cut themselves into South Africa's most significant source of wealth, the mining industry, on terms that exclude the poor black people who own the land on which mining takes place.

Other laws were intended to bolster the TLGFA but did not survive sustained opposition. The Communal Land Rights Act 11 of 2004 (CLRA) would have given traditional leaders and councils control over all the land in the former homelands, but was struck down by the Constitutional Court in 2010. The Traditional Courts Bill (TCB) of 2008 and 2012 would have provided traditional leaders with far-reaching punitive powers over those living within their tribal jurisdictions. The TCB failed to garner the support of the majority of provinces in parliament and was withdrawn.

The TLGFA confirms the tribal boundaries put in place by the Bantu Authorities Act of 1951 and the official status of traditional leaders who were recognised during apartheid. It does not, however, provide traditional leaders with specific powers, or the legal authority to sign agreements binding the land and other rights of those living within their disputed tribal boundaries. The CLRA and the TCB would have done that. Despite the fact that these laws did not make it into operation, government has treated traditional leaders as landowners with the sole authority to represent the rural people residing within the apartheid boundaries that the TLGFA reinstated. Both the Departments of Mineral Resources, and Rural Development and Land Reform have been complicit in traditional leaders signing surface leases with mining companies in contravention of the consultation and consent requirements of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) (Parliament of South Africa, 2017: 266; South African Human Rights Commission, 2018: 90).

This has resulted in many legally precarious mining deals in which hundreds of millions of rands have gone missing from tribal accounts supervised by government (Bloom, 2016; Bloom & Wales-Smith, 2018). These deals are shrouded in secrecy and have been strenuously opposed by rural communities through petitions to government, legal challenges and violent protests (Claassens & Matlala, 2014). Government has played an active role in enabling unlawful transactions to proceed, and in shielding the perpetrators from efforts to hold them accountable (Parliament of South Africa, 2017: 264).

A slew of bills before Parliament in mid-2018 seeks to provide a veneer of legality to the shadow land of unlawful mining deals involving traditional leaders and senior ANC officials and politicians. The key bill is the Traditional and Khoi-San Leadership Bill (TKLB) which would repeal and replace the TLGFA of 2003. It provides in clause 24 that traditional leaders can sign deals binding all land within their apartheid-era tribal jurisdictions without obtaining the consent of those whose land rights are undermined or dispossessed by such deals.

To justify defaulting to contested tribal boundaries and apartheid-era appointments, the initial TLGFA of 2003 had included 'transformation' mechanisms such as a commission to investigate the legitimacy of disputed apartheid-era traditional leadership appointments and tribal boundaries. This has failed spectacularly, as has the requirement that traditional councils must include women and elected members. Unlike the TLGFA, the TKLB makes explicit its bias in favour of apartheid-era appointments. It criminalises assertions of traditional leadership by those who are not officially recognised despite numerous outstanding disputes and legal challenges, and removes the legal consequence of invalidity for councils that fail to include women and elected members. It denies the decision-making authority of ordinary South Africans in respect of their homes, fields and grazing lands throughout the former homelands.

Former President Kgalema Motlanthe chaired the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change during 2016 and 2017.<sup>2</sup> The Panel had three focus areas, being poverty and inequality, land, and social cohesion. The panellists unanimously recommended that the TKLB, and, among others, a bill to amend the MPRDA be withdrawn from Parliament and reconsidered in light of the Panel's findings and report about the abrogation of constitutional rights in former homeland areas. The Panel made detailed recommendations about how these and other bills could be amended to deal with the problems identified. The Panel's report (Parliament of South Africa, 2017), which includes numerous recommendations for both immediate and longer-term measures to address the urgent crisis in land reform, has been put on a back burner.<sup>3</sup>

Instead, the processing of the 2018 bills, like their predecessors in 2003 and 2004, has been expedited during the build-up to national elections in 2019. This has contributed to the view that bills favouring the interests of traditional leaders are about electoral politics – that appeasing traditional leaders will 'deliver the rural vote' (as had also been indicated earlier,

see Beall et al., 2005). This detracts attention from the role of the bills in providing a veneer of legality to mining transactions that are legally precarious because they were signed by traditional leaders without the legal authority to do so, in contravention of the right to tenure security contained in section 25(6) of the Constitution. The bills also flout other rights, such as equality, freedom of association, language and culture, and just administrative action.

Opposition to the bills has been dismissed as anti-traditional leader and anti-custom in meetings of the Justice portfolio committee that is processing the TCB and the Cooperative Governance portfolio committee that is processing the TKLB (see PMG minutes of meetings). I argue that the opposition is due to the autocratic apartheid distortions that the legislation seeks to entrench, not to opposition to customary law or the institution of traditional leadership per se (Claassens, 2011a). In many instances, current opposition builds on past opposition to the apartheid laws and policies that went before and shaped the current bills. People who opposed forced removals and the Bantustans have been at the forefront of struggles against the bills (Thipe, 2013; Luwaya, 2013). The long history of struggles over land and identity is an important factor in opposition to the bills, as are opposing constructs about the nature of customary law (Delius, 2018). Time and again rural people reference the inclusive and consensual nature of customary law as the standard against which they reject the provisions of the laws and bills. Many written and oral submissions criticise the laws for undercutting customary land rights and indigenous accountability mechanisms (Thipe et al., 2015-2016). By contrast, the laws entrench the institutions and disputed tribal boundaries that were created by the much-resisted Bantu Authorities Act of 1951, used to bed down apartheid-era forced removals (De Souza & Jara, 2010).

The inclusive and participatory version of customary law described by rural people has been upheld in several judgments of the Constitutional Court<sup>4</sup>, which warn about the dangers of past distortions inherited from the apartheid version of 'official' customary law. They point to the 'living' version of customary law, which is constantly reshaped by changes in society and practice on the ground.

There is thus a fundamental divergence between the interpretation of customary law advanced by rural people in fora such as the High-Level Panel public hearings (Parliament of South Africa, 2017: 467-509) and public hearings (Luwaya, 2013; Thipe, 2013; De Souza & Jara, 2010) and the Constitutional Court on the one hand, and that of the executive in terms of the

content of bills approved by the Cabinet and introduced to Parliament on the other. A striking feature of legislation, such as the TCB, the TLGFA and the TKLB, is the explicit focus on the powers and status of traditional leaders, as opposed to the content and development of customary law. I will illustrate in this paper that this is the result of a strong lobby by some (not all) traditional leaders, especially those who were officially recognised during the apartheid era.<sup>5</sup>

The basic premise of the traditional-leader lobby, which includes the Congress of Traditional Leaders of South Africa (Contralesa) and the national and provincial houses of traditional leaders, is that they should be recognised as the sole representatives of 'their' communities (which exist wall-to-wall within the former homelands), backed by laws that provide them with governmental powers, and power over communal land and traditional courts (Cogta, 2017). This is not to say that all traditional leaders who were recognised during the apartheid period support or practice the approach of the traditional-leader lobby.

I argue that the content of the bills betrays their autocratic intent, despite attempts by the traditional-leadership lobby to justify them as upholding idealised and participatory versions of African tradition (Holomisa, 2011). The laws rename the 'tribes' created by the Native Administration Act and the Bantu Authorities Act as 'traditional communities', but they retain the boundaries put in place during colonialism and apartheid.

A key theme of this position paper is how the creation of Bantu Authorities and the consolidation of the Bantustans were predicated on the forced removal of over three-and-a-half million South Africans between 1960 and 1983 (see Platzky & Walker, 1985). Many among the current traditional leadership lobby were involved in, or benefited from that process.

Another theme explored in this paper concerns the role of law in eliciting and obscuring illegal transactions. The chapter describes processes of unlawful looting of the residual assets of the poorest South Africans. Had the CLRA made it into operation, these processes would have had a veneer of legality. But legislation such as the CLRA and the TCB would have been unconstitutional for denying the property and basic citizenship rights of rural South Africans. The message conveyed by government's (failed) attempts to pass the laws has, however, been sufficient to convince major players that they have government backing, which has led them

to act with reckless impunity. In 2018, they are again reaching for law, particularly the TKLB, to protect themselves from increasing legal scrutiny as court challenges work their way up to the Constitutional Court. At the same time, violent intimidation and assassination of mining activists is on the increase as protests by mining communities become increasingly desperate (Ntongana, 2018; Morare, 2016; Bloom & Wales-Smith, 2018).

The paper is divided into four parts:

I start by asking how it came about that a mere 10 years after rural people rebelled against the Bantustans and voted overwhelmingly for a united South Africa, the ruling party introduced laws (the TLGFA of 2003 and the CLRA of 2004) that defaulted to Bantustan boundaries, and to the very stereotypes used to deny black property and citizenship rights under colonialism and apartheid. I suggest that this has more to do with shoring up the short-term interests of key constituencies within the ANC, including business and mining interests and some traditional leaders, than with concern for rural people, and how they are likely to vote. This section includes examples of mining deals involving senior ANC politicians and their close allies.

The second part examines how the laws have been interpreted and applied in practice in some (but not all) areas. It describes processes of systematic exclusion, extortion, dispossession and intimidation that are very similar to the Bantustan excesses of the apartheid era.

In the third and fourth sections I retrace the events that culminated in this situation. The third section focuses on the emergence of the traditional-leader lobby from the early 1990s, placing this in the context of the anti-Bantustan struggles that contributed to the 1994 transition to democracy.

The fourth part examines key elements of the 2002/3 laws, the 2018 TKLB and TLGFA amendment bills and the Communal Land Tenure bill to make the case that the laws introduced from 2002 and the phalanx of proposals before parliament in 2018 embody apartheid distortions, as opposed to customary law. It describes how the bills cement the violent and divisive outcome of forced removals and Bantustan consolidation, particularly in the former province of Transvaal where six 'homelands' were created after 1960.

## **Part 1: The ruling party's constituency?**

When the deputy minister of Cooperative Governance and Traditional Affairs, Obed Bapela, debates and defends the bills on television, he is often accompanied by Kgosi Nyalala Pilane of the Bakgatla Ba Kgafela, whose actions have been the subject of two stinging Constitutional Court judgments, and are currently the subject of the Baloyi Commission of Inquiry in the North West.<sup>6</sup> Kgosi Pilane is the Deputy Chair of Contralesa. On 24 May 2018 an appeal<sup>7</sup>, this time against an eviction order for villagers displaced by mining within the Bakgatla ba Kgafela boundaries, was argued in the Constitutional Court. In their questions, the judges indicated their disapproval of an interpretation of the law that holds that black people, who in this case bought their land one hundred years ago, could be evicted without their rights being formally terminated, or compensation quantified and offered to them before mining activities started on their land.

South Africa's ruling party, the African National Congress (ANC), is not homogenous and has taken different positions about traditional leadership at various times, but as Lungisile Ntsebeza (2005) documents, it has been ambivalent about the institution of traditional leadership from its inception. Steven Friedman (2017) argues that the draconian content of the current bills is a product of the Jacob Zuma era, in that they seek to legalise processes of looting that flourished during his presidency.

This does not, however, explain the timing of the TLGFA in 2003 and the CLRA in 2004, which emerged in concert with the MPRDA of 2002. While the rhetoric about the MPRDA was about a significant dilution of white domination in favour of a state acting in the public interest, it was common knowledge by 2002 that the locus of mining had swung away from depleted gold reserves along the Witwatersrand and in the Free State to rich reserves of platinum, chrome, iron and coal in former homeland areas (Capps, 2012). The Lebowa Minerals Trust and Bophuthatswana homeland leader Lucas Mangope had long monopolised profits from chrome and platinum mining in Lebowa and Bophuthatswana, and homeland leaders had insider knowledge about the location of rich reserves of platinum on 'tribal land' (Capps, 2012).

At the same time, Black Economic Empowerment was widely deemed to be in crisis, resulting in a far-reaching report of the Black Economic Empowerment Commission of 2001, which

recommended greater state regulation of industry to support black ownership of key assets. The sector most directly and immediately affected by the introduction of the MPRDA and the Mining Charter was the mining industry. A number of major deals were quickly brokered, for example between Harmony Gold and Patrice Motsepe's African Rainbow Minerals, and between Goldfields and Tokyo Sexwale's Mvelaphanda (Southall, 2004). Roger Southall suggests that the policy choice to support the aggressive expansion of a class of black capitalists would inevitably lead to class conflict between ANC-sponsored black capitalists and the working class (Southall, 2004: 16).

My argument is that the legislative agenda of the early 2000s went further than supporting specific class interests in struggles between bosses and workers. It was, and is, about processes of primary accumulation and dispossession that undercut the ability of rural communities in the platinum belt to hold traditional leaders, government or mining houses to account. It created a regime that has enabled the confiscation of black surface rights without consent or compensation. The MPRDA, read in conjunction with the TLGFA, CLRA and the TKLB, denies that customary land rights constitute property rights for ordinary people, and elevates the unilateral decision-making power of traditional leaders over the basic citizenship rights of rural South Africans.

More research needs to be conducted into the mining interests, and homeland antecedents, of those who drafted and supported both the MPRDA and the traditional leadership bills. We know that former lawyer<sup>8</sup> Seth Nthai was a key player in the conceptualisation of the approach adopted by the MPRDA in concert with the TLGFA and other laws such as the CLRA and the TCB. Nthai was the first Safety and Security Member of the Executive Committee (MEC) in Limpopo province and a close associate of Ngoako Ramatlhodi, then premier of Limpopo. Media reports indicate that Ramatlhodi benefitted from the purchase and subsequent resale of a farm adjacent to the richest platinum deposit in the world at Mokopane in Limpopo. The farm was registered in the name of Ngoako Properties at the time that Ramatlhodi was premier of Limpopo (Brümmer & Sole, 2009). Mokopane fell within Seth Nthai's constituency as an ANC member of the provincial executive.

Nthai acted for both sides in the expansion of platinum mining by Anglo Platinum in the Mokopane area. He was retained by Anglo Platinum to represent villages that were to be displaced by mining and relocated to other land. He did this by establishing 'representative'

companies in terms of Section 21 of the Companies Act. Anglo, also represented by Nthai, then negotiated the terms of the resettlement with the Section 21 companies. Within a short space of time, the Section 21 companies were discredited and became defunct. At the time of the main negotiations about mining and resettlement, the Mapela community, on whose land the mine lies, was represented by Queen Mother Athalia Langa, who was also an ANC member of the provincial legislature (Rutledge, 2014).

The process of grave relocations and removals that took place to enable mining in Mokopane has left a legacy of serious mistrust, which, in 2015, exploded into particularly violent protests (Boyle, 2016a). The then kgosi, David Langa (son of Athalia), had agreed with Anglo Platinum that an operating community school would be closed down for reuse by the mining company. The protests turned violent when young adults torched the kgosi's unoccupied house and an unoccupied old age home built by Anglo Platinum. The youths who led the protests in 2015 blame their parents for allowing the destruction of their previous agricultural economy without obtaining fair compensation or secure employment at the mines.

Rural people and restitution claimants assumed that black land-holding groups would control the revenue generated from their land after 1994, because the stranglehold on mining revenue by homeland leaders would end with their demise. The introduction of the MPRDA in 2002 put paid to that hope, transferring control over mining in communal areas from Bantustan presidents to national government in the person of the Minister of Mineral Resources.

This has allowed for extraordinary continuities between the role of mining-rich chiefly dynasties during and after apartheid, as Prof Freddy Khunou (2017) spelled out in an affidavit for the Baloyi Commission about the Bakgatla ba Kgafela chieftainship in North West province. Former Bophuthatswana president Lucas Mangope had centralised all revenue from mining to accounts within his office. These accounts remained in place after the transition to democracy and became the accounts from which R600 million belonging to the Bapo ba Mogale disappeared under the watch of post-apartheid premiers (Public Protector, 2017/2018). Mangope, and families closely associated with him, such as the Motsepe family (Masilela, 2015) had insider knowledge of where the platinum deposits were and which groups occupied that land, and on what terms. Media reports of how the farms of the Moiletswane land buyers, and the land of the Mmakau community, came to bolster the

mining interests of the Motsepe family at the time that Jeff Radebe was Minister of Mineral Affairs need fuller investigation (Brümmer, 2000; Yende, 2017)<sup>9</sup>. Patrice Motsepe is a generous donor to both Contralesa and the ANC, and styles himself as prince of Mmakau (Barnard, 2015; Moatshe, 2017).

The mining interests of prominent ANC politicians such as Mathews Phosa are in the public domain. Journalist Athandiwe Saba (2016b) places Phosa at a 2007 meeting of the DMR to discuss prospecting rights to mineral rich land in Sekhukhuneland. At the time, the acting king of Sekhukhuneland was Kgagudi Kenneth Sekhukhune. For decades, there has been a chieftainship dispute between the families of KK Sekhukhune and Rhyne Thulare Sekhukhune. Phosa has been advising and representing Rhyne and his family in this dispute (Saba, 2016b).

Somehow Rhyne Thulare was awarded prospecting rights 'on behalf of the Bapedi nation' in 2006, behind the back of the official acting king. However, a DMR official told Saba that the rights were vested not in the Bapedi nation, but in Rhyne Thulare. When Rhyne died he was succeeded by his son Victor Thulare, who signed over about 10 prospecting rights to Bauba Platinum, a company in which he was a shareholder, and Phosa was a non-executive director (Saba, 2016). The plot thickens in that in 2010, then President Jacob Zuma recommended that Victor's father, Rhyne Thulare, be posthumously recognised as rightful king in the place of Kgagudi Kenneth Sekhukhune. This example of the interplay between mining interests and royal appointments has played out in other provinces as well.

## **Part 2: The on-the-ground impact of the TLGFA and the 2017/18 bills**

The two laws that had been intended to provide specific powers to traditional leaders, being the CLRA and TCB, did not make it into operation. Only the TLGFA of 2003 survived. As its name indicates, it is a framework act, and so was complemented by provincial traditional leadership laws enacted during 2005. These provincial laws are remarkably similar to the homeland laws they replace. The North West Traditional Leadership Act of 2005 for example has much of the exact same wording as the Bophuthatswana Traditional Authorities Act of 1978.

Despite the fact that the content of these laws is confined to issues of status, recognition and financial accountability, and does not provide traditional leaders with explicit powers, they

have deliberately been misinterpreted to suppress opposition to mining deals (Claassens & Matlala, 2014; Boyle, 2016b), and to undermine attempts to hold traditional leaders, mining houses and government to account. They have led to a resurgence of practices that fuelled the widespread anti-Bantustan rebellions of the 1980s and early 1990s (as is discussed below).

### ***The resurgence of levies, interdicts and costs orders***

One such practice is the extortion of 'tribal levies' across the former Bantustans. Traditional leaders demand levies for a range of purposes such as contributions to the royal bride price, *khonza* (tribute) fees for land and for allowing burials. In addition, people are required to pay annual levies that are recorded by the traditional secretary (Maurice Webb Race Relations Unit, 2009). If a rural person's levies are not up to date, he or she will not be given the 'proof of address' letter that is required when applying for an ID book, a social grant, a driver's license, and to get on the voter's roll (Claassens, 2011b).

Another Bantustan practice that has resumed since the TLGFA of 2003 is the banning of community meetings. Traditional leaders claim to have the sole authority to call meetings within their territories, as delineated in Government Gazette notices after 1951. When people defy such bans, traditional leaders routinely go to court to interdict the meetings from taking place (Claassens & Matlala, 2014). Despite a Constitutional Court judgment — *Pilane & Another v Pilane & Another* (28 February 2013) CC 431 — which strikes down such an interdict and asserts the right of freedom of association — magistrates continue to issue such interdicts (Pickering & Motala, forthcoming).

Another practice reminiscent of Bantustan days is the award of legal costs against activists who try to demand accountability from traditional leaders in the lower courts, where they almost invariably lose and are left without the resources to appeal to higher courts, where they would be likely to win.<sup>10</sup> Sonwabile Mnwana (2014) has documented how this practice was used historically, and is still being used today to bankrupt activists who demand financial accountability in the Bakgatla ba Kgafela area. This is particularly galling because the legal costs of the traditional authority come from the very revenue that is unaccounted for, and in principle should belong to all members of the 'traditional community'.

Despite the *Pilane v Pilane* judgment, traditional leaders and mining houses continue to act as though officially recognised traditional leaders are the only people authorised to represent rural people in mining and investment deals. They have received a boost from clause 7(9) of the Traditional and Khoi-San Leadership Bill that at August 2018 was in the final stages of its enactment. It provides that:

Any person who is not a recognised leader as contemplated in subsection (1) but purports to be such a leader, is guilty of an offence and liable upon conviction to a fine or imprisonment not exceeding three years.

The clause is startling for at least three reasons. It ignores the colonial and apartheid manipulation of leadership positions and levels. NJ van Warmelo, a government ethnologist from the 1930s to the 1960s, foregrounded the arbitrary pegging of leaders at different levels by government officials in 1936 (Claassens & Hathorn, 2008: 346):

[T]he distinctions that the authorities made between chiefs and headmen appears, to one who looks at the actual facts, a very superficial one, for while there are appointed chiefs who have no hereditary right, there are actual chiefs of rank who are not recognised in any way whatever. There are, further, so-called “independent headmen” ... who are regarded as chiefs amongst natives.

The second reason is that a key indigenous accountability mechanism is the interplay of power between different levels of traditional authority. Historically, rural people could align themselves with leaders who challenged the authority of unpopular incumbents (Bennett, 1995: 67; see also Schapera, 1956: 207):

Whoever currently wielded power would invariably be challenged by rivals, who in their turn would gain power and consolidate their strength, but would eventually lose control to new competitors. These tensions explain why the African ruler’s power was never in the past absolute. Anyone who attempted tyrannical rule would soon face revolt or secession.

The third reason that the clause is extraordinary is that it illustrates how closely the legislative agenda is tied to shoring up the authority of traditional leaders who were recognised during apartheid, by foreclosing possible counter claims by others who were side-lined during apartheid.

There are numerous hotly contested disputes about the validity of the tribal boundaries entrenched by the TLGFA and the legitimacy of incumbent traditional leaders (Peires, 2014). The TLGFA of 2003 set up a commission, the Commission on Traditional Leadership Disputes and Claims, to investigate and make findings about such disputes. However, the Act was amended in 2009 to downgrade the commission's findings to recommendations to the president in respect of kingship disputes, and to provincial premiers in respect of disputes at the level of senior traditional leaders and 'traditional community' boundaries. Faced with the possibility of findings that might undermine apartheid-era power structures, the amendment made action on the findings subject to the discretion of senior officials. In North West and other provinces, people have had to go to court to get these recommendations made public, despite having spent days providing testimony to the commissions.

This follows an established pattern of colonial and apartheid governments appointing traditional leaders whose interests align with those of powerful figures in government, rather than foregrounding issues of legitimacy and history (Peires, 2014).<sup>11</sup>

### ***Invalid traditional councils and legally precarious mining deals***

The provisions of the TLGFA, requiring that 40 per cent of the members of a traditional council must be elected and that one-third must be women, have been routinely flouted,<sup>12</sup> as has the legal requirement that tribal books of account must be audited annually. This, together with the fact that traditional councils have been exercising powers beyond their legal mandate, means that many of the deals they have signed with mining houses and other investors are legally precarious (Business Leadership South Africa and Business Unity South Africa, 2017: 42-46). The Department of Traditional Affairs cites this 'failure to transform' as the reason for a 2018 amendment to the TLGFA. Rather than ensure that the failure is rectified, the amendment removes the consequence of legal invalidity for non-compliant traditional councils. Preserving mining deals thus takes precedence over democratisation and gender transformation.

The dual application of the MPRDA and the TLGFA has stripped rural people of the capacity to hold their leaders to account, and to ensure that compensation and mining royalties are properly reported and fairly distributed. Recent investigations (Human Rights Commission 2018; Bloom & Wales-Smith, 2018) have laid bare the scale at which poor<sup>13</sup> rural people are losing out through mining deals.

It is massive: in 2017, the Public Protector reported on the R600 million missing from the 'tribal account' of the Bapo ba Mogale in North West province (Public Protector, 2017/2018). More recently, the Baloyi Commission sitting in Rustenburg heard evidence of how the Bakgatla ba Kgafela community lost billions of rands in mining revenue through secret deals negotiated between Kgosi Nyalala Pilane and veteran South African mining magnate Brian Gilbertson's Pallinghurst Resources Ltd, among others (Bloom & Wales-Smith, 2018).

Government is deeply implicated. The account from which the R600 million of the Bapo ba Mogale went missing is held in the North West Premier's office and supervised by officials of the Department of Traditional Affairs (Bloom, 2016). The office of the Auditor-General has confirmed in public hearings that the account has not been audited since 1994, despite this being a requirement of the TLGFA. At the same time, then North West Premier Supra Mahumapelo refused to depose either the Pilane or Mogale traditional leaders, who were implicated in these serious financial irregularities, despite the recommendation for their replacement by the TLGFA commission set up to investigate the legitimacy of traditional leaders (De Souza Louw, 2016).

The thrust of the bills before the NCOP – the TLGFA amendment and the new Traditional and Khoi-San Leadership Bill (TKLB) – is to deal with the fact that traditional leaders do not have the legal standing to contract with mining houses and external investors in relation to communal land. Only the Minister of Rural Development and Land Reform, as nominal owner of the land on behalf of the people who live on it, has this authority. And he or she is bound by IPILRA to obtain the consent of those whose informal land rights (as defined in the IPILRA) to occupy, use or access land would be affected.<sup>14</sup> If they do not consent, their rights must be expropriated, and duly compensated.

### ***The role of government***

Yet the previous minister of Rural Development and Land Reform, Gugile Nkwinti, ignored his legal and fiduciary responsibilities and ceded his authority to authorise mining deals in former homeland areas to traditional leaders. The TKLB attempts to legalise this abrogation of state accountability to ordinary people by, for the first time, explicitly empowering traditional leaders to sign such deals.

Section 24(2) of the TKLB provides:

Kingship or queenship councils, principal traditional councils, traditional councils, Khoi-San councils and traditional sub-councils may enter into partnerships and agreements with each other, and with—

*(a) municipalities;*

*(b) government departments; and*

*(c) any other person, body or institution.*

The agreement

‘...is subject to a prior consultation with the relevant community represented by such council and a prior decision of such council indicating in writing the support of the council for the particular partnership or agreement’ (clause 24(3)(c)).

The consultation sub-clause was added only after sustained objections by civil society and at public hearings. However, unlike IPILRA, the clause does not require that the people whose rights would be directly affected must consent to changes to their land rights. Instead the clause is opaque about whom the traditional council must consult, how, and under what circumstances.

It is likely therefore, to further entrench the current practice of traditional councils authorising deals after nominal processes of consultation. Issues of scale are crucial here. The Mapela traditional council in Limpopo has jurisdiction over 42 far-flung villages. The Bakgatla ba Kgafela traditional council has jurisdiction over 32 villages. Mining shafts typically impact directly on the land of one or two villages, as opposed to that of the entire ‘tribe’. Traditional council members may come from villages that are over 50km from where the mining takes

place. When the traditional council authorises mining deals that generate revenue for the council, there is no direct equivalence between the council that reaps the benefits and the people whose rural livelihoods are destroyed by mining (Mnwana & Capps, 2015).

Why would mining houses with expert lawyers and onerous responsibilities to their shareholders take such extraordinary risks in signing deals with traditional leaders? According to the then Chamber of Mines (now the Minerals Council South Africa), the Department of Mineral Resources routinely advises potential investors to deal directly with traditional leaders (Chamber of Mines, 2017). Mining companies have privileged the DMR's advice over the law in much the same way as many accepted DMR officials' advice about politically connected Black Empowerment Equity partners, rather than including affected communities as BEE shareholders (Burgess, 2010: 12-13; Anonymous, 2013). This collusion between mining houses and parts of government has seen the consent and compensation requirements in IPILRA flouted with impunity and the absence of effective financial oversight to guard against the theft of mining revenue that has happened to the Bapo ba Mogale, Bakgatla ba Kgafela and many other communities (Manson, 2013).

A local land activist speaking at the October 2016 KwaZulu-Natal public hearing of the High-Level Panel led by Kgalema Motlanthe explained it thus:

Investment deals are concluded by the traditional leader without consulting with, or even informing, the community, who simply see bulldozers and trucks on the job. Dynamiting operations crack the walls of houses; coal dust covers roofs so that it becomes impossible to harvest rain water; the same soot covers grass and renders it unfit for grazing. The traditional leader does not want to account, refuses to attend meetings.

Another person from a mining-affected community in KwaZulu-Natal said:

We live in great hardship in South Africa. We are dispossessed of our land by development, by the mines, and we get no compensation or benefits out of the so-called development on our ancestral land. We are not consulted. We have turned into non-entities with nothing, and yet we are the rightful owners of the land.

The broader political climate of rent seeking and legal impunity under former President Zuma appears to have emboldened senior politicians and officials, along with some traditional leaders, to brazenly ignore the law, and use violence to subdue opposition (Bloom, 2016). Now they are backing legislation intended to cover their tracks. These bills cannot legalise current practices, let alone create retrospective immunity for what has already happened because they abrogate basic constitutional rights. But they can do a massive amount of damage on the ground by signalling that the state remains solidly behind mining deals with traditional leaders and will not uphold the land rights of the poor, even if it has to flout its own laws, like IPILRA, in the process.

### ***The demands of the traditional-leader lobby***

In making the case for these laws, the traditional-leader lobby has not been shy to say that they want the same powers as they had under apartheid.

As early as 2006 Inkosi Mtirara of the Eastern Cape is quoted as saying (Bentley et al., 2006: 59-60):

In the new democratic government, people no longer [obey the tribal authority] because there are no laws to compel people to heed what the tribal authority says. An example is the Transkei Authorities Act 4 of 1965, which was against illegal gatherings, but now people do as they wish or please. People hold meetings at schools, churches, even in open areas.

The lobby is explicit in insisting that the kind of authority they want is coercive. The content of the bills confirms this.

The lobby also wants immunity from prosecution, as illustrated by the February 2016 Contralesa application to the Cape High Court<sup>15</sup> to interdict the President from removing Inkosi Buyelekhaya Dalindyebo from his position as traditional leader. Dalindyebo had been found guilty of arson and kidnapping, and concealing the death of Saziso Wofa. His initial sentence of 15 years was reduced to 12 years on appeal in 2015. In their court application at para 67, Contralesa argued that had the Traditional Courts Bill been expedited by Parliament, Dalindyebo would not have suffered the fate he did:

Plainly put, if the TCB had been in operation at the time it would have lent statutory authority to some of King Dalindyebo's actions. In terms of the TCB, anyone within the traditional leader's jurisdiction may be ordered to come before him (as presiding officer), where s/he may be fined and stripped of customary entitlements.

This was despite the fact that the actions for which Dalindyebo was found guilty did not arise from judgments from his traditional court, but from violent actions against villagers before they appeared in court. This sort of narrative provides scant pretexts that the legitimacy of traditional leaders derives from popular support by the people – indeed Contralesa insists that without state law to back them up, they are 'out in the cold' (HLP meeting with Contralesa, 31 May 2017).

Speaking at a press briefing of the National House of Traditional Leaders in Durban on 28 June 2018, Inkosi Mwelo Nonkonyana, the Chair of the Eastern Cape branch of the National House stated that: 'We want to make it clear that chapters 7 and 12, and section 25 of the country's Constitution should be amended before the elections in 2019.' Chapter 7 is about the status and powers of local government, chapter 12 is about the status of traditional leaders, and section 25 governs property rights.

Senior ministers appear to support the demands of traditional leaders. Early in 2018, both Deputy President David Mabuza and the minister of Cooperative Governance and Traditional Affairs, Dr Zweli Mkhize, went on record as saying they supported the demands being made by traditional leaders, Mabuza in relation to land ownership, and Mkhize in saying that traditional leaders 'have a vital role to play within the South African governance system' (Saxby, 2018).

The choice to give traditional leaders control over communal land and governmental powers raises direct conflicts with the Bill of Rights contained in the Constitution. People living in the former homelands are full citizens with the same rights as other South Africans. These laws therefore cannot pass constitutional muster. The legal battles ahead are one issue. Far starker, however, is the symbolism of the choices being made by the ruling party, and whose interests they are seen to prioritise over the basic rights of poor South Africans.

### **Part 3: The emergence of the traditional-leader lobby in the context of countervailing histories and identities**

This section takes us back to the early 1990s to retrace the events that have led to the current contradictions between the claims of the traditional leadership lobby and the Bill of Rights. The Congress for a Democratic South Africa (CODESA) negotiations in the early 1990s between the newly unbanned ANC and other political organisations sought agreement on the terms of the coming transition to democracy. A lobby of traditional leaders, including the Inkatha Freedom Party, Bophuthatswana homeland leader Lucas Mangope (backed by right-wing Afrikaners) and other homeland leaders vociferously opposed the re-incorporation of the Bantustans or homelands into a unitary South Africa with a common voters' roll. This was against the backdrop of the massacre at Bisho where anti-Bantustan protestors had been shot down and the Bophuthatswana coup of 1998 and subsequent violence in Mmabatho. There had been, and was, also severe repression of the surge of anti-Bantustan rebellions in Lebowa, Kwa-Ndebele and other former homelands. These rural rebellions were an important component of the struggle by the United Democratic Front (UDF) to make South Africa 'ungovernable' (South African History Online, 2011). The UDF had played a key role in precipitating the unbanning of the ANC and in the negotiations at CODESA. In that context, it was inevitable that the ANC would support the dismantling of the Bantustans, and equal citizenship for all South Africans. The traditional-leader lobby thus lost the first round at CODESA when the Bantustans were reincorporated into South Africa.

The next round played out during the constitutional negotiations (1994-1996) when Contralesa and others argued that the Bill of Rights, and particularly the right to equality, should be subject to customary law. This precipitated a major standoff between Contralesa and organisations representing women (Albertyn, 1994; Murray, 2001). Again, the traditional-leader lobby lost the battle, at least partly because of extraordinary statements about the place of women under customary law. Thereafter, Contralesa and Inkatha challenged the Constitution for failing to provide explicit powers to traditional leaders, but lost in the Certification judgment of 1996.<sup>16</sup>

The phalanx of laws and bills before Parliament in 2018 seeks to recover lost ground by giving traditional leaders the exclusive power to represent people living within the boundaries of the

former Bantustans, and ownership and control over all the land within them. The problem the bills confront is that other people already have countervailing rights to this land, and countervailing forms of identity and representation, many of which derive from customary law, and from prior histories of resistance to colonial dispossession and Bantu Authorities.

Opposition to the laws is built, in many places, on decades of resistance to the impact of the colonial and apartheid policies and laws that went before them. Rural resistance to dispossession and indirect rule took many forms, which resulted in forms of property and identity that contradict the apartheid vision of neatly abutting 'tribes' existing in a separate legal sphere where land ownership is not allowed and the court system is segregated from the rest of South Africa.

That history of opposition cannot be airbrushed away. It is engraved on the land in very material ways, which differ from province to province. For example, thousands of people clubbed together and bought land with title deeds between the 1860s and 1936,<sup>17</sup> which their descendants still have (Feinberg, 2015; Mwanza & Capps, 2015). People also went to court, repeatedly arguing from the 1860s onwards that they, not traditional leaders, owned the land. They challenged the authority of traditional leaders to make decisions binding their land rights (Chanock, 2001; Klug, 1995: 35). Some joined mission settlements on church land. Many thousands resisted the apartheid policy known as Betterment and the imposition of Bantu Authorities (Mbeki, 1964; Luthuli, 1962: 200). Some formed community authorities instead, some formed civic associations, some simply ignored the leaders and tribal identities imposed on them during apartheid and elected local leaders (Ntsebeza, 2005). Groups of labour tenants who had resisted eviction over decades continue to live independently on South African Development Trust (SADT)<sup>18</sup> land that had been expropriated from white farmers (Harries, 1989; Claassens, 2001). Superimposed traditional leaders and tribal identities faded from relevance over time in various places.

These various forms of resistance culminated in the anti-chief and anti-Bantustan rebellions of the late 1980s and early 1990s, which played a significant role in the 1994 transition to democracy (Delius, 1996: 112-118; Maloka & Gordon, 1996).

#### **Part 4: The early laws, the TLGFA, the CLRA, the TCB and the MPRDA**

This section discusses the legislation in the context of prior opposition to the historical precedents it reinforces, for example the Native Administration Act of 1927 and the Bantu Authorities Act of 1951, and in relation to contemporary opposition to the TLGFA, the CLRA, the TCB and the MPRDA. It ends by discussing the legitimacy of the institution of traditional leadership, and the damage being done to that legitimacy, and to the political and economic stability of mining in communal areas by the laws under discussion.

### ***The Traditional Leadership and Governance Framework Act of 2003***

Thuto Thipe (2014) has analysed the 2000 TLGFA Discussion Document generated by the then Department of Provincial and Local Government, the draft white paper on Traditional Leadership of 2002, and the final white paper that culminated in the TLGFA of 2003. These documents show a remarkable about-turn in policy direction at the same time as the MPRDA was being drafted and enacted. The initial discussion document of 2000 concedes the distortions created by the implementation of the Bantu Authorities Act (Government of South Africa, 2000: 36):

[N]o 'chief' who held views contrary to those of government was confirmed in his position as 'chief'... traditional leaders became important tools in the government's strategy of extending its control over Africans in the countryside, through the establishment of 'reserves', 'self-governing states', 'homelands' and later 'independent states'.

Thipe (2014: 8) traces how this analysis is turned on its head during the evolution of the draft and final white papers, which advocate for the recognition of untainted pre-colonial forms of traditional authority, and ultimately posit that the leaders recognised in terms of the Bantu Authorities Act, and the tribal boundaries delineated by it, embody just such pre-colonial formations.

Rural groups who made submissions to Parliament opposing the TLGFA in 2002 rejected the assertion that Bantu Authorities reflected legitimate tribal boundaries, and that traditional leaders inherited from apartheid had pre-colonial legitimacy. They pointed out the serious material consequences for groups who had been subsumed under the 'wrong' tribal authority jurisdictions after the enactment of the Bantu Authorities Act in 1951. The Act provided that as, and when, Bantu Authorities were delineated, notices would be published in the

Government Gazette establishing each Bantu Authority, naming the traditional leader and his council, and describing the extent of the land over which the authority had jurisdiction.

The legacy of this history is very close to the surface in the former Transvaal where black people were separated out by language and forcibly removed from previously multi-ethnic settlements to create the six separate homelands of Bophuthatswana, Lebowa, KaNgwane, Venda, Gazankulu and KwaNdebele. Leaders who resisted establishing Bantu Authorities were either given tiny jurisdictional areas or put within the tribal jurisdictions created for chiefs who cooperated with the Bantustan agenda. Many cooperative chiefs became ministers within the homeland legislative assemblies.

During the two states of emergency between 1985 and 1990, the Black Sash conveyed a request for help from the multi-ethnic Driefontein and KwaNgema communities in the Eastern Transvaal, who were fiercely resisting pending forced removal to three homeland leaders. The Zulu-speaking people in these communities were to have been moved to Babanango, adjacent to KwaZulu, the Swati-speaking people to Oshoek, adjacent to KaNgwane, and the Sotho-speaking people to land adjacent to QwaQwa. Only Enos Mabuza of KaNgwane refused to accept the additional people and land that were gifted to the homelands by forced removals (Claassens, 1990).

In the Transvaal, unlike parts of the Eastern Cape and KwaZulu many traditional leaders were appointed only after the Bantu Authorities Act was enacted in 1951 – and some as late as the 1980s. Their disputed authority and tribal boundaries have since been set in stone by the TLGFA. One example is that of the Makuleke community of Limpopo, who were brutally removed from their land in the Kruger Park to resettlement camps at Ntlaveni on land that had been purchased or expropriated from white farmers by the South African Development Trust for ultimate inclusion in the Gazankulu Bantustan. Unbeknown to them the land was included in the newly delineated Mhinga Bantu Authority. Successive waves of other Tsonga speaking people were also removed to the same area, all of whom chief Adolf Mhinga claimed as his subjects despite their furious denials. At the time, Mhinga was minister of justice in Gazankulu (Claassens & Hathorn, 2008).

As Thipe argues (2014: 2), ‘the TLGFA reproduces many of the violences and material inequalities ... that its predecessors set in place’.

### ***The Communal Land Rights Act***

The problems created by the TLGFA were exacerbated by the proposed powers of the CLRA.<sup>19</sup> While the TLGFA re-instituted and renamed tribal authorities<sup>20</sup> as traditional councils, the CLRA sought to give traditional councils the power to administer 'communal land'. As many authorities have pointed out, the term 'communal land' is a misnomer (Chanock, 1991; Gluckman, 1965: 76-108; Mamdani, 1996; Bennett, 2008). Within so-called communal areas, families have ownership of their homes and fields. Only grazing, woodlands, and access to other shared resources such as thatching grass and medicinal herbs are 'communal'. Moreover, these resources are often shared by discrete user groups, rather than the large overarching 'tribes', which the TLGFA renames 'traditional communities' and superimposed over all other forms of community and identity within the former Bantustans.

The CLRA empowered the minister of Rural Development and Land Affairs to transfer (by endorsement) the hard-won title deeds of historical land buyers and new land reform beneficiaries to the superimposed tribes that had been delineated in terms of the Bantu Authorities Act. This would have meant that title deeds belonging to specific small groups of people who had fought for, and obtained ownership for themselves, could become the property of much larger tribes within which they would be structural minorities.

The problems the CLRA would have created were not restricted to the descendants of black land-buying syndicates. In a 2012 judgment, the KwaZulu-Natal High Court upheld the argument of the Ingonyama Trust that, because a Hlubi traditional leader (BG Radebe) was consigned under apartheid to a small community authority<sup>21</sup> shared with three other groups, the amaHlubi in the Newcastle area have no rights to land outside that small shared community authority. This is despite strong historical evidence to the contrary, and ongoing occupation of the land in question.<sup>22</sup>

In 1981, multi-ethnic land-buying syndicates who had bought land northeast of Pretoria before 1936, through exemptions from the Land Act, found their land subsumed under tribal authorities that had been imposed on them when the KwaNdebele homeland was created (Claassens & Gilfillan, 2008). Overnight, their title deeds meant nothing any longer. They became tribal subjects of superimposed Ndebele traditional leaders. This led to serious and violent conflicts in many areas (Claassens & Gilfillan, 2008).

KwaNdebele was the site of particularly well-organised anti-Bantustan mobilisation during the apartheid years, with the entire civil service going on strike at times and the army stationed in rural villages to guard the palaces of traditional leaders and quell protests (Yawitch, 1986).

The 1994 transition was hailed as a victory over those dark days, only for the TLGFA and CLRA to subsequently reinstate the control of Ndebele traditional leaders who had been recognised as late as the 1970s and 1980s. Most were members of the KwaNdebele Legislative Assembly that was targeted during the anti-Bantustan revolts.

The CLRA was also rejected by members of customary communities headed by traditional leaders, who argued that decision-making power over land is layered and decentralised, starting at family level and then referred upwards to user group or village level. They argued that vesting ownership and control at the tribal level would undermine the accountability inherent in the interactions and trade-offs within and between lower village-level and clan-based systems of customary decision-making authority (Claassens, 2011a).

Four rural communities brought a legal challenge to the constitutionality of the CLRA in the North Gauteng High Court in 2006, arguing that by vesting control over their land exclusively in traditional councils, the Act rendered their tenure less, rather than more secure.

Section 25(6) of the Constitution promises legally secure tenure to those whose current insecurity is as the result of past discriminatory laws and practices. The High Court ruled in 2009 that sections of the CLRA were in conflict with the Constitution because they undermined the right to tenure security. The judgment was appealed to the Constitutional Court, which struck down the CLRA in its entirety in 2010, but this time on procedural grounds. The Act had been rushed through Parliament with great haste during the buildup to the 2004 national elections, despite vocal opposition.

Because the Act was declared unconstitutional on procedural grounds the Constitutional Court did not rule on the substantive issue of tenure security. The 2010 judgment<sup>23</sup> did however warn that:

[T]he field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend. [...] Indeed all the parties approached the matter on the footing that the land which the four applicant communities occupy is regulated by indigenous law' (*Tongoane & Others v National Minister for Agriculture & Land Affairs & Others*, 2010, para 79).

This is a powerful indication that 'communal' land is not the government's gift to bestow on

traditional leaders, unless it does so in accordance with pre-existing indigenous law and customary land rights. The Constitution recognises rights derived from customary law in section 39(3) of the Bill of Rights.

During the hearing of the case, then Deputy Chief Justice Dikgang Moseneke remarked that 'to use the (Bantu) Authorities Act of 1951 as a platform for land reform in 2004 is simply incredible'.

These statements go to the heart of the issue that this paper addresses, which is that while most land in the former Bantustans may be registered as state-owned, it is subject to pre-existing countervailing property rights, whether derived from customary law, common law (the land buyers), or statute law (for example the holders of Permission to Occupy certificates<sup>24</sup>). The government would have to expropriate these land rights before it could transfer title to superimposed tribes. Any claim that leaders whose boundaries were delineated after 1951 in terms of the Bantu Authorities Act have 'indigenous ownership' of all the land in the former Bantustans would not survive legal or historical scrutiny.

### ***The Traditional Courts Bill***

The next traditional leadership bill to be introduced to Parliament was the Traditional Courts Bill in 2008. The memo accompanying the bill stated that it had been drafted in conjunction with the National House of Traditional Leaders. This was after the NHTL had rejected the South African Law Commission's (2003) recommendations and draft bill concerning customary courts. The Law Commission had conducted public consultation about the reform of customary courts, including a special set of large consultation meetings with rural women.

The sticking point was the Law Commission's recommendation that people must be allowed to opt into, or out of, using customary courts. The NHTL, on the other hand, insisted that it should be a criminal offence for anyone living within delineated tribal territories to opt out of using traditional courts.<sup>25</sup> By this stage the TLGFA had been enacted, and made it clear that the territories of traditional leaders coincided with the tribal boundaries gazetted in terms of the Bantu Authorities Act.

The Bill was predicated on the model of the Native Administration Act of 1927 with traditional leaders as presiding officers and no role for councillors or the lower level village forums where most disputes are heard. Though the traditional-leader lobby valourised traditional justice systems as 'restorative' of good community relations, rather than punitive like Western courts

(Holomisa, 2011), the TCB included extraordinary punishments such as forced labour by anyone in the 'traditional community', no matter whether they were before the court or not. It enabled the traditional leader, as presiding officer, to strip people of customary rights (land rights are one such right), and made it a criminal offence not to appear when summoned. Judgments by traditional leaders had the same status as judgments made by Magistrates Courts.

Rural people feared that the bill would enable those traditional leaders with disputed authority to deal comprehensively with anyone who challenged them, including other traditional leaders who disputed their status or legitimacy. There are fewer than 900 senior traditional leaders in South Africa, yet around 1,244 disputes had been lodged with the Commission on Traditional Leadership Claims and Disputes<sup>26</sup> by 2013.<sup>27</sup>

The people who spoke out eloquently against the bill in public hearings included village level headmen who complained that it ignored the crucial role they play in dispute resolution, and traditional leaders who were not recognised during apartheid, and so are not recognised in terms of the TLGFA. They disputed the superimposed jurisdictions of the TLGFA by reference to the fact that people flock to their courts – in recognition of their authority – and the bill would instead force them and their supporters to appear before TLGFA-recognised leaders with draconian powers.

The strongest opposition to the bill came from women. Instead of nudging along the processes of change that are underway in many areas by providing a quota of women members for customary courts, as recommended by the South African Law Commission, the TCB failed even to provide that women must be allowed to attend, and if they so wish, represent themselves in traditional courts. Many of the women opposing the bill highlighted that this failure to provide for substantive equality for women in the legislative process is indicative of the derogatory attitudes to women that prevail in many traditional courts (Mnisi Weeks, 2011).

The Constitution provides that the NCOP can only pass bills that affect provinces with the support of a majority of the nine provinces, which the TCB failed to attract. The provinces that opposed it did so, not because of opposition to customary law, or to traditional leadership, but because it undermined *existing* customary dispute resolution processes. Many said that the Bill reflected skewed power relations and would enable TLGFA-recognised traditional leaders to flout important customary accountability mechanisms (Thipe et al., 2015/16: 532).

Ultimately the TCB of 2008, which was reintroduced unchanged in 2012, failed in Parliament

in 2014. A reworked version, which addresses some of the key challenges, was introduced in 2017, but by mid-2018 was still bogged down by disputes over the opting-out issue. The traditional-leader lobby seems to be of the view that people will not use their courts unless they are forced to do so by law.

### ***The Mineral and Petroleum Resources Development Act***

The TLGFA, CLRA and TCB emerged in concert with the Mineral and Petroleum Resources Development Act of 2002. The MPRDA effectively nationalised mineral rights, and provided for the Department of Mineral Resources to issue mining licenses. To soften the blow for the prior (overwhelmingly white) holders of mineral rights, the Act included a process to convert their existing mineral rights to new-order mining licenses.

At face value, the MPRDA attempts to break the stranglehold of white capitalists in the mining sector by requiring that black capitalists be cut into the sector. But in combination with the TLGFA, it goes much further than that. It reinstates the very mechanisms that were used to exclude and subjugate the black majority during colonialism and apartheid and to reserve key assets to a small elite. These mechanisms were, and are, justified on the basis that customary land rights do not qualify as property rights and that rural black people do not have independent decision-making power in respect of their land. They are primarily tribal subjects, bound by decisions taken by traditional leaders. Their consent is not required. Their rights are not even worthy of expropriation according to this logic.

The Act has been interpreted to provide license-holders with an unconditional right of access to the land needed to conduct mining without any requirement for agreed levels of compensation for those whose surface rights to the land are affected or destroyed by mining (Dale et al., 2005: 155). In elevating mining rights over surface rights, the MPRDA has ridden roughshod over the land rights and livelihoods of poor black people living in the former homelands.

### ***The Interim Protection of Informal Land Rights Act (IPILRA) of 1996***

All of the laws described above exist in tension with an early post-apartheid law that was enacted to give effect to the tenure security promised by section 25(6) of the Constitution. As its name implies, IPILRA, which consists of only two pages, was put in place to secure land

rights until more comprehensive legislation could be enacted. IPILRA provides that no one can be deprived of an informal right to land without their consent, except by expropriation. Most people in the former homelands qualify as the holders of informal land rights, though some also have formal rights. IPILRA recognises three types of land rights: occupation, use (e.g. fields) and access (e.g. grazing). It requires that the people whose rights are directly affected must be consulted, and must consent. If they refuse to consent, their rights must be expropriated and compensation paid to them. IPILRA binds the Minister of Rural Development and Land Reform, as the nominal owner of most communal land, to obtain the consent of those directly affected before signing surface leases with mining companies. The Minister has abrogated this responsibility, and the Department of Mineral Resources has encouraged mining companies to enter into mining deals directly with traditional leaders. At face value the MPRDA and the TLGFA are subject to IPILRA which is a constitutionally mandated law. Government has, however, chosen to ignore IPILRA. Were it to repeal IPILRA, it would be in breach of section 25(6) of the Constitution. Litigation to test whether the MPRDA and TLGFA can be interpreted to ignore IPILRA is working its way through the courts during 2018.<sup>28</sup>

### ***Legitimacy and instability – the damage done***

The view that traditional leadership is a legitimate and important institution was reiterated in all the HLP public hearings. What people objected to was the behaviour of certain leaders, for which government was squarely blamed. A man in Limpopo lamented that government had corrupted ‘our leaders’ by giving them unaccountable powers. In fact, traditional leaders are generally bit players in a larger web of Black Empowerment Equity deals and kickbacks for politicians. They are the mechanism that has been used to deny the land and mineral rights vesting in the people whose land is directly affected by mining, and to exclude them from consultation, compensation and oversight of the profits generated from their land.

The nub of the laws is in their content, interpretation and practical application. This is generating opposition at a scale that cannot be ignored. Mining companies indicated in October 2017 that protests involving road blocks, vehicle stoning and assaults on people going to work had caused a significant reduction in platinum production at Mogalakwena, the world’s largest open-pit platinum mine, and Impala Platinum’s Marula mine (Stoddard, 2017). Impala has said that it may soon have to close Marula, which would be the first such shutdown in South Africa linked purely to social upheaval. Chris Griffiths of Anglo Platinum told Reuters

that 'what we are trying to do is get away from some of the previous structures where we felt obliged to pay the money over to the Kgoshi (chief)' (Stoddard, 2017).

In a written submission to the High-Level Panel about problems confronting mining-affected communities the Minerals Council South Africa wrote (Chamber of Mines, 28 July 2017):

We are conscious that the legitimacy of traditional leaders is disputed by some community members in some jurisdictions, and that this can be the source of negative relationships between mines and adjacent communities... There have also been cases where the proceeds of these transactions have been mismanaged. None of this is satisfactory for the mines and the companies that own them... However, the industry's interest is in greater stability and a reduction of social conflict both within those communities and between disaffected members of those communities and the mines. That would need to include acceptance of greater accountability by traditional leaders.

Yet mining companies continue to enter into agreements with traditional leaders and insist that the consent or expropriation provisions of IPILRA do not apply when people's surface rights to land are destroyed by mining. Government, and Parliament, continue to support legislation that would effectively empower traditional leaders to bind the land rights of all those living within apartheid tribal boundaries without consent or accountability.

This suggests strongly that the ruling party, government, and the mining industry have no alternative vision of how to go about mining in a way that upholds constitutional rights and secures the rural livelihoods of communities whose land is destroyed by mining. Instead, they have defaulted to the same mechanisms of exclusion enacted by white governments to secure the interests of white capital in the past, and have resorted to the use of law as a mechanism to deny black property rights and re-assert indirect rule by chiefs to subdue opposition. Mining deals are made in secret, in order to avoid legal scrutiny, especially by those whom they systematically exclude. This secrecy veils the use of transfer pricing by multinational companies to ensure that their real profits do not reflect in South Africa (Radebe, 2015). The profits from mining, and indeed large volumes of raw minerals, are ending up offshore, rather than benefitting South Africa as a nation, contrary to the narrative used to justify the MPRDA.

Minister Gwede Mantashe has reiterated in the context of the 2018 draft of the Mining Charter that ‘communities’ should benefit from mining through a portion of mining revenue being deposited to ‘community trusts’. Given that the laws discussed in this paper define community to mean ‘tribe’, this means that revenue will continue to be deposited into tribal accounts, rather than compensation being paid to those directly affected. The law governing trust property in South Africa, the Trust Property Control Act of 1988, was not designed for trusts with hundreds of thousands of beneficiaries, and the complex interface with laws such as the TLGFA. It is notorious in failing to include effective oversight, and mechanisms to address breaches and internal disputes.

My analysis situates the genesis and purpose of these laws in the context of the mineral-rich northern provinces of South Africa, and the Bantustan legacies and continuities that benefited particular leaders and their politically-connected investment partners. This does not imply that the traditional-leader lobbies in the Eastern Cape and KwaZulu-Natal are not implicated in similar deals about natural resources, including less-valuable minerals and tourism land. They too have lobbied fiercely for laws to bolster the power and authority of traditional leaders.

## **Conclusion**

As someone who witnessed the rural land struggles of the 1980s, and to some extent participated in them, it has been hard to come to terms with the legislative agenda of the ruling party of South Africa, the ANC. At that time of the 1980s, young people were risking their lives to challenge tribal levies and confront traditional leaders and their tribal police who went around collecting levies from poor women. Many activists ended up fleeing their homes and sleeping in our Transvaal Rural Action Committee (TRAC)<sup>29</sup> offices at Khotso House in central Johannesburg. It was a heady time of United Democratic Front (UDF) alliances and people desperately trying to connect with the leadership in exile. But the passion and the bravery were home-grown and irrepressible, notwithstanding the violence and oppression of the 1985-1990 states of emergency.

People were convinced that even if they were not in contact with the ‘Congress’, what they were doing followed in the footsteps of the opposition of Govan Mbeki, Albert Luthuli and

Nelson Mandela to the Bantustan system. When rural people voted overwhelmingly for the ANC in 1994, they voted for equality within a re-united South Africa.

The bills referred to in this paper fundamentally betray the promise of a unitary democratic South Africa, and seem to be an extraordinary risk for the ruling party to take during the run-up to the national elections in 2019. Having heard the sense of betrayal and bitter disillusionment expressed by thousands of people during the provincial public hearings of the Motlanthe High-Level Panel, one wonders whether senior officials and politicians are oblivious to this anger because they speak only to traditional leaders, as opposed to the people affected by the laws.

Opposition to the proposed traditional leadership bills discussed in this chapter does not reject the legitimacy of the institution of traditional leadership, but rather the colonial and apartheid distortions of customary law that the bills embody. This opposition builds on decades of resistance to the apartheid laws and practices that went before them. That resistance resulted in multiple, different forms of property and identity in rural areas, which the new bills seek to deny and to subjugate.

How has it come about that the ruling party would ram these bills through Parliament, given the important symbolism of the ANC's role in the transition to democracy, and the ideal of equal citizenship in a unitary South Africa? Many of the people who oppose them risked their lives in anti-apartheid and anti-Bantustan struggles. The answer appears to be that senior politicians are deeply implicated in, and profit from, the ways in which the traditional leadership laws interact with the MPRDA to deny the property and citizenship rights of rural citizens.

Far from bringing a new dawn for local communities, mining has been a curse that has destroyed many rural livelihoods, divided communities and seen billions siphoned out of South Africa through deals which, because they are secret, are easy for mining magnates to manipulate.

In making the policy choices that it has, the ruling party, judged by the actions that were analysed in this paper, has chosen mining magnates and traditional leaders over the poorest and most vulnerable of South Africans. This reflects dominant class interests within the ANC,

but also puts those class interests under the spotlight in relation to the Constitution and elections. We know from history (and South Africa's in particular) that capitalists and aspirant-capitalists use the state to pass laws that favour their interests. The problem, from their point of view, is that South Africa now has a Constitution, and these laws cannot withstand constitutional scrutiny because they abrogate basic political rights such as decision-making authority in respect of customary property rights.

The South African state, in concert with apartheid-era traditional leaders, has therefore resorted to a 'shadow land' of traditional powers and functions that do not actually exist in law, backed by violent forms of repression that are seemingly invisible to the police. Protective laws such as IPILRA are abrogated and the financial accountability mechanisms in the TLGFA are ignored while 'tribal' funds disappear under the watch of some provincial premiers. The scale of illegality is now coming back to bite the mining companies and traditional leaders who are implicated, hence the attempt by the 2018 bills to provide a veneer of legality for mining deals signed by traditional leaders. But all the TKLB can do is to buy time, because it too will be struck down for abrogating Constitutional rights. In the meantime, dispossession continues and fertile land is irrevocably destroyed. Kgalema Motlanthe told the ANC's May 2018 Land Conference about the scale and nature of the problems his panel had witnessed in former homeland areas, and in relation to the failure of land reform throughout the country. He pointed to the panel's detailed legislative recommendations about how the situation could be turned around to protect the poor and the marginal, whom he insisted must remain the ANC's primary constituency. In response he was effectively rebuked for having 'insulted' traditional leaders by pointing to examples where specific leaders had acted dictatorially (Zungu, 2018).

Not only do the laws and bills discussed in this paper enable dispossession, they also deny the ANC's own history of opposition to the Bantu Authorities Act. They reaffirm the denial of basic citizen rights of the 17 million South Africans living in the former homelands, denials that the Bantustan system had justified. They also deny – and trump – the forms of identity and land rights that people created in opposition to the Land Acts, the Native Administration Act, the Bantu Authorities Act and the Bantustans themselves. These land rights and identities were hard fought and hard won over many decades. The bills subsume them all within tribal overlordship. Rural people are watching the passage of the TKLB and the TCB in Parliament closely. At stake is not just the reputation of the ANC, but the long-term legitimacy of the

South African state, the Constitution of South Africa and the credibility of South Africa's application of the rule of law.

### Legislation listed and acronyms

Communal Land Rights Act 11 of 2004	CLRA
Interim Protection of Informal Land Rights Act 31 of 1996	IPILRA
Mineral and Petroleum Resources Development Act 28 of 2002	MPRDA
Traditional and Khoi-San Leadership Bill	TKLB
Traditional Courts Bill of 2008, 2012 and 2017	TCB
Traditional Leadership and Governance Framework Act 41 of 2003	TLGFA

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<sup>1</sup> Comment made by then Deputy Chief Justice Dikgang Moseneke in 2010 during the hearing of the *Tongoane* case in the Constitutional Court – see note 22.

<sup>2</sup> The author was one of 14 members of the High-Level Panel.

<sup>3</sup> The ANC appears to have distanced itself from former President Motlanthe after he urged it to address the vested interests of those complicit in dispossession, including some traditional leaders, at its land summit in May 2018.

<sup>4</sup> *Alexkor Ltd & Another v Richtersveld Community & Others* (2003) 12 BCLR 1301 (CC); *Bhe & Others v Magistrate, Khayelitsha & Others* (2005) 10 SA 580 (CC); *Shilubana and Others v Nwamitwa* (2009) (2) SA 66 (CC).

<sup>5</sup> As discussed later the TKLB criminalises unrecognised traditional leaders who claim they are legitimate leaders.

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<sup>6</sup> Previously named the Maluleke Commission until the passing of Judge George Maluleke in August 2017. The Commission continued, chaired by former co-commissioner Adv Sesi Baloyi. It finished hearing evidence in June 2018 and the findings are expected to be delivered during 2018.

<sup>7</sup> Grace Masele (Mpane) Maledu and others v Itereleng Bakgatla Mineral Resources and another. Constitutional case No 267/17 (judgement pending as at August 2018).

<sup>8</sup> Nthai was struck off the roll of advocates after the North Gauteng High Court found that he had acted disgracefully by suggesting that his opponents bribe him while representing the South African government in a matter concerning mining rights. Another charge was the amount that he was claiming from Anglo Platinum for legal services over and above the monthly retainer that he received of R330,000.

<sup>9</sup> The sisters of Patrice Motsepe, Dr Tshepo Motsepe and Mrs Bridgette Radebe, are the wives of President Cyril Ramaphosa and Energy Minister Jeff Radebe, respectively.

<sup>10</sup> Lower courts tend to default to the existing legal precedents set during apartheid. It is in the nature of courts to be precedent-based and therefore backward looking. It is mainly in the higher courts, and in the Constitutional Court particularly, that lawyers have challenged the constitutionality of apartheid precedents and judgments have struck these down. It takes time for new precedents set in the Constitutional Court to filter down to the lower courts, especially if local lawyers do not bring them to the attention of the lower courts.

<sup>11</sup> The specific example of the suppression of the explosive records of the 1990 Mushasha and 1998 Ralushai Commissions of Inquiry into Venda and Limpopo apartheid manipulation of historical chieftainship disputes has been omitted here because of space constraints but will be discussed in a forthcoming publication by the author.

<sup>12</sup> Parliamentary question 3378 posed in the National Assembly, written reply by Cogta on 4 September 2015, indicates that no traditional councils in Mpumalanga or Limpopo met the composition requirements in relation to women and elected members. Only 14 traditional councils in North West met the composition requirements, while 28 failed to do so. In Northern Cape, KwaZulu-Natal and Free State all traditional councils met the composition requirements. No information was available in relation to traditional councils in the Eastern Cape.

<sup>13</sup> Noble, Zembe and Wright (2014), 'Poverty May Have Declined, but Poverty and Deprivation are Still Worst in the Former Homelands', Southern African Social Policy Research Institute (SASPRI), <http://www.econ3x3.org/sites/default/files/articles/Noble%20et%20al%202014%20Former%20home%20lands%20FINAL.pdf>, accessed 23 August 2018.

<sup>14</sup> IPILRA is discussed further in part 4.

<sup>15</sup> *Congress of Traditional Leaders of South Africa v the Speaker of the National House of Assembly & Others* (2016) 16 WCC 2474.

<sup>16</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC).

<sup>17</sup> Many exemptions to the Land Act's prohibition of African purchase were granted between 1913 and 1936 as Feinberg and others document. [give the actual reference]

<sup>18</sup> Created in terms of the South African Natives Trust and Land Act of 1936. The trust was initially named the South African Native Trust (SANT), but was subsequently renamed the South African Development Trust (SADT).

<sup>19</sup> The CLRA was never brought into operation because of pending litigation about its constitutionality.

<sup>20</sup> Formerly named Bantu Authorities.

<sup>21</sup> An amendment to the Bantu Authorities Act in 1964 provided for the establishment of community authorities alongside tribal authorities. In some instances, groups who rejected, or had no tribal identity were made community authorities as opposed to tribal authorities. But community authorities were also used to 'downgrade' the status of separate historical groups by lumping three different 'tribes' into one community authority, rather than each group being separately recognised. This was particularly common in Limpopo when mixed Venda and Tsonga speaking communities were separated and forcibly removed in order to create the Venda and Gazankulu homelands.

<sup>22</sup> *Ingonyama Trust v Radebe & Others* (2012) ZAKZPHC 2.

<sup>23</sup> *Tongoane & Others v National Minister for Agriculture & Land Affairs & Others* (2010) 6 SA 214 (CC), at para 79.

<sup>24</sup> A PTO is a 'Permission to Occupy' certificate issued most commonly in terms of Bantu Land Regulation R180 of 1969, although there are also much older forms of PTOs in various provinces. PTOs are upgradable to ownership in terms of the Upgrading of Land Tenure Rights Act of 1991.

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<sup>25</sup> In this respect, the NHTL's position echoes the Native Administration Act of 1927, which did away with various provincial provisions that had allowed Africans to apply for exemptions to chiefly jurisdiction (Chanock 2001: 342-345).

<sup>26</sup> Established by Chapter 6 of the TLGFA of 2003.

<sup>27</sup> Answer to Parliamentary question 697 posed to the Minister of CoGTA in March 2013 and answered in May 2013.

<sup>28</sup> Grace Masele (Mpane) Maledu and others v Itereleng Bakgatla Mineral Resources and another. Constitutional Case no 267/17 (judgment pending as at August 2018).

<sup>29</sup> I worked for the Transvaal Rural Action Committee (TRAC), a project of the Black Sash, which supported people resisting forced removals and farm evictions from 1983-1990.