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The two faces of custom: ambiguities in mobilising against post-apartheid dispossession in the communal areas of South Africa

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The two faces of custom: ambiguities in mobilising against post-apartheid dispossession in the communal areas of South Africa

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Abstract

This paper will explore the politics of 'tradition' in mobilising rural communities in South Africa in defence of their land rights, against an onslaught launched in recent years by mining companies, traditional leaders and the ANC government. New policies dispossess the people who bore the brunt of forced removals under apartheid. Corruption in deals between chiefs/traditional councils and mining companies mean that the main beneficiaries of mining development in communal areas are politically-connected elites and officials. The paper focuses on understanding rural resistance to the capture of the democratic state by factions of capital and its allies within the state apparatus, and on the ambiguous role of 'tradition' in such struggles. It argues that tradition can be both emancipatory and oppressive. These ambiguities and contradictions emerge clearly when considering the role of women in such struggles, with many demanding their land rights under custom, while challenging gendered inequalities in terms of democratic values. The two faces of 'custom' embody many of the contradictory features of both authoritarian and progressive populism, as summarised by Scoones et al (2017): populism is ambivalent about democracy; fails to address key aspects of social differentiation such as class; stresses solidarity and emancipation from oppression, but fails to address deeper structural problems; and constrains alliances with other forces. These issues emerge within the Alliance for Rural Democracy, a loose alliance of communities, land activists and university-based researchers. The ARD has successfully challenged oppressive laws and policies, including the Communal Land Rights Act of 2004 and the Traditional Courts Bill. It engages in awareness-raising campaigns, lobbies policy makers, organises pickets, protest marches, and engages in litigation. The ARD is itself the site of contested versions of custom, with some community leaders being contenders for positions as 'traditional leaders'. Key challenges facing the ARD are to engage in forms of politics informed by the liberation struggle and the constitution, without rejecting 'custom' and conceding this terrain to the forces of authoritarian populism.

1 Background and content

What to do about customary land in post-apartheid has been a longstanding terrain of contestation between landless rural communities and political elites. The issue of communal land (formerly known as Bantustans) is relatively small compared to freehold land. In the absence of land redistribution of white owned or state land, it is this land, which is governed by traditional leaders and where a large portion of the rural population lives, where the contestations between rural communities, traditional leaders and political elites has played out. Political elites should also be counted to include provincial/local leadership and the national leadership. Currently, the ANC is in charge of eight provinces, while the opposition DA runs Western Cape.

If at all there is a vision around communal land reform on the part of the state, the various phases of reform of traditional land tenure, have increasingly reflected a desire on the part of the ANC government (provincial and national) to reform communal land in a manner that concentrates power in the hands of traditional leaders and central government, rather than allowing for a democratised agrarian reform process that equally harmonises communal land tenure with the land redistribution programme. This is compounded by the fact that the ruling party does not have a vision around restructuring production and production relations (labour, land, markets, etc) away from what is a highly concentrated, unequal, colonial type of agriculture and towards creating employment, increasing the asset base of the rural poor, and bringing excluded communities into agricultural markets. Promoting agriculture as a basis for reforming the communal areas appears to be far from the vision: rather communal land is being viewed as a tool for elite accumulation of property, particularly given that the increasingly the economic crisis is squeezing the government's options for feeding its system of patronage.

Communal areas are politically important because unlike the typical image of rurality, in South Africa rural populations are extremely dense as a result of apartheid. South Africa's proportional representation system therefore means that capturing votes in rural areas where tenure is under one form of traditional leadership or another is critical to electoral outcomes. But the land in those areas is a small percentage of the overall land. Attempts by traditional leaders are now looking at retaining their powers while expanding the amount of land that comes under their "jurisdiction.

Common property regimes in South Africa, including land, marine and natural resources have barely moved forward in the past apartheid era, despite land being central to resolving the questions of inequality dispossessions, poverty are far from being resolved. Rural communities are not averse to communal tenure but there is a wide gap between communities' vision of communal land governance, and the direction in which the government wishes to go. Much of this happens at the margins of public policy discussions, which are concerned with the formal economy, stock markets, land values and formal employment, and less vision for the alternative country side.

a) brief history of ARD

The Alliance for Rural Democracy (ARD) is a dynamic grouping of civil society organisations and communities which come together voluntarily whenever there is a need to contest policy and legislation that threatens to dilute the rights of rural citizens living in the former homeland areas. Such laws and practices distort customary law, undermine security of tenure and rights in land while entrenching the powers of traditional authorities, The ARD has challenged these undemocratic practices and proposed laws on the ground and through the courts.

- The ARD has mobilized for review of the Traditional Leadership and Governance Framework Act which prevented rural people from democratically transforming their lived realities and addressing the complex legacies of the apartheid Bantustans, recently the Department has introduced the amendment act to give a lifespan to the existing Traditional Council who are mostly illegal.

- Together with its legal advisors the Alliance successfully contested the implementation of the Communal Land Rights Act (CLRA) in 20014, and the Restitution of land rights amendment bill in 2016 through Land Access Movement of South Africa (LAMOSA and others) which was struck down by the Constitutional Court.
- The ARD campaigned tirelessly against the Traditional Courts Bill from 2008 to 2012, this resulted in a vote against the government-sponsored draft law in parliament's National Council of Provinces (NCOP). The Department has re-introduced it again in 2016, and we need to campaign vigorously against it.

Throughout the policy debates and submissions, The ARD succeeded in amplifying the voices of rural women who have been at the forefront of opposition to the TCB, arguing that it would create a separate legal system for the 17 million people living in the former Bantustans and render them as subjects of traditional leaders with second class rights in the South African democracy.

b) the ARD constituency and how it comes together in the ARD

The social and political character of ARD's constituency reflects the economic realities of rural life today. Most rural residents of the former Bantustans pursue a range of livelihood strategies that are combined in a variety of ways. Many practise small-scale agriculture by cultivating homestead gardens and keeping a few livestock, and some also engage in dryland cropping. Only a minority secure a major portion of their income from farming. Some households also use or sell natural resources such as firewood, thatching grass, wild fruits and material for craft products. Land-based livelihoods thus continue to be important for most rural families. Wage income is critically important as a source of cash, but employment is hard to find, particularly for young people. Social grants such as pensions and child support grants are vital for the great majority of people. Many rural households send young adults to urban areas in search of jobs, some of whom are the parents of young children looked after by grandmothers in rural areas.

The ARD co-ordinates affected communities and their organisations, partners with research organisations and engages in litigation. The Alliance convenes meetings from local village level to national level in order to plan how to contest policies and legislation that threaten to dilute the rights of rural citizens living in the former homeland areas, and at village level to document case studies for policy reviews and as the basis for litigation. The constituencies and research partners are guarding parliament from laws and practices that distort customary law, undermine security of tenure and rights in land and entrenching the powers of traditional authorities, The ARD has challenged these undemocratic practices and proposed laws on the ground and through the courts.

Throughout their gatherings, communities have consistently argued that democratic South Africa has failed to deal with the apartheid legacy of the former Bantustans and to meet key constitutional obligations to ensure security of land tenure. The ARD is currently organising across the country to highlight the implications of the Traditional and Khoisan Leadership Bill which entrenches apartheid geographies through the proposed establishment of traditional councils based on the old "tribal authorities" of the Bantustans, introduced by the 1951 Bantu Authorities Act.

The ARD is also playing an active role to organising against elite mining deals which fail to benefit rural citizens together with the illicit leasing of land in the former homelands without the informed consent of the rights holders as required by the Interim Protection of Informal Land Rights Act (IPILRA). The communities working with the ARD are recognised in most of public hearings organised by parliament and the High Level Panel led by the former President, Dr Kgalema Motlanthe.

The ARD functions as a loose alliance of a large number of community-based groupings and activists from rural areas, located mainly in communal areas across South Africa. One key focus of recent campaigning has been land rights in areas where mining is taking place, especially in North West,

Limpopo, KwaZulu-Natal and the Eastern Cape. These provinces are thus strongly represented in the ARD.

The ARD works closely with a range of partner organisations, such as public interest law firms and service organisations, the Legal Resources Centre being the main example. These assist with analysis of existing or proposed legislation, and advice on litigation. In addition, the ARD engages with partners such as rural NGOs (e.g Nkuzi, AFRA) and other civil society organisations, which often come together in specific campaigns. In addition, the ARD works closely with researchers at university-based centres such as the Land and Accountability Research Centre (LARC) at the University of Cape Town and the Institute for Poverty, Land and Agrarian Studies (PLAAS) at the University of the Western Cape. These undertake research on particular policies and laws and their impacts on the ground, and assist the ARD to come to an in-depth understanding of the implications of different policies and laws.

The way in which the ARD works is to base its lobbying and advocacy firmly on rural people's own experience and understandings of key issues in relation to land rights and rural governance. Enabling ordinary residents' voices in public hearings and other forums has proved to be highly effective, as in the campaign against the Traditional Courts Bill. Researchers and lawyers who work with the ARD acknowledge that their understandings of the potentially negative impacts of laws and policies are deeply influenced and shaped by the views of people on the ground, and that they learn a great deal from interacting with them. Similarly, community members appreciate the insights they derive from interactions with partners. Relationships between members of different communities within the Alliance, as well as between the Alliance and its partners, are thus truly collaborative, and this has been key to the relative success of the ARD to date.

The key organisational tool used by the ARD is a participatory workshop. Here, members of different rural communities come together to discuss laws, policies and outcomes, and to agree on lobbying and advocacy strategies. These workshops are convened at different levels, from district to province and to national level, and views and decisions are communicated from one level to the other. Decisions are taken after intensive discussion and debate, generally once a consensus is reached. Differences in views (e.g. in relation to the role of traditional leaders in rural society) often reflect different local histories, and are thus tolerated to a degree. Tensions do arise at times as a result of such differences, but to date have not proved to be debilitating.

Researchers and lawyers from ARD partner organisations assist these processes by offering their own analyses of laws, policies and impacts, and advice on possible strategies, but are careful not to pre-empt the views of rural residents. The ethos of the ARD and its partners stresses democracy, equality and respect for differences.

Other tools made use of by the ARD include

c) Government Policies on Land and Chiefs, And Why They Are Problematic

Recently the ANC led introduced new policies and laws and amendments that seeks to marginalise rural citizens from enjoying the new constitutional democracy. These policies and laws set the former homelands apart from the rest of South Africa as zones of chiefly sovereignty and undermine the citizenship rights of the 18 million people living within them. The reason behind this move is the irony that some of the former Bantustans, once assumed to be the least valuable land, have been found to hold massive reserves of valuable minerals – platinum in North West and Limpopo, coal and iron in Mpumalanga and KwaZulu-Natal and titanium along the Wild Coast of the Eastern Cape. The poorest South Africans live on some of the richest land, but for many this has proved to be a curse, rather than an opportunity.

The primary beneficiaries of South Africa's new mining rush are not the people, but mining companies and politically-connected elites, including traditional leaders. Recent law specifies that the

state will grant mining rights only to companies with black economic empowerment partners. It is an open secret that officials often dictate who such partners should be. The scale and spread of mining investments by senior politicians and their close associates is no secret.

Government and Traditional leaders in South Africa see land ownership by ordinary people as hindrance to their intended development without consultation and consent and a threat to their power. Unfortunately, land was bought by group syndicates and the communities are the ones who claimed land through Restitution of land rights in the 1996-1998 era. The President attempted to reopen the claims through the Restitution of land rights amendment act of 2016 to allow traditional leaders to lodge the claim. Shortly after the passing of the Restitution amendment act, King Zwelithini announced that his Ingonyama Trust would submit a massive claim to all land lost by the 'Zulus' since 1838. The amendment act was successfully challenged in 2016, and the Constitutional Court declared it invalid for the reasons of lack of Public Participation, see LAMOSA and others vs NCOP

The announcement of these massive claims to overlapping tracts of land has been greeted with alarm by rural people – as has the new Communal Land Tenure Policy unveiled in September 2014, which proposes new legislation that would transfer title to most land in the former Bantustans to traditional structures headed by chiefs. The families who actually own most of this land would get weak 'institutional use rights' to their homestead plots only. Title to fields, grazing land and forests would be transferred to traditional structures, who would have the sole power to enter into business, tourism and mining ventures 'on behalf of the community'.

Instead of legislating a communal tenure law that will secure tenure rights to 18 million people living in the former Bantustans, the CLTP and ITB facilitates the downgrading of indigenous ownership to leasehold. This contradicts the land rights guaranteed by section 25(6) of the Constitution, which provides that people whose land tenure is insecure because of past racial discrimination are entitled to legally secure tenure, or to comparable redress. At least two post-apartheid laws explicitly protect 'informal' indigenous rights. In addition, the Ingonyama Act itself forbids the trust from infringing on existing rights and interests.

The process of excluding and dispossessing ordinary people is a general one in South Africa and not confined to KwaZulu-Natal. Serious problems exist in respect of platinum mining projects on communally owned land in North West and Limpopo provinces. The pattern is one of opaque mining deals between traditional leaders, mining houses and politically connected BEE partners that bypass and exclude the ordinary people who live on the land. The North West provincial government is alleged to have raided the multi-million tribal accounts under its supervision, but has so far refused to submit to any form of audit. The provincial administration has failed to enforce the oversight controls contained in the same laws that bestow official status on traditional leaders. The state's collusion in the diversion of community funds goes further than a failure of oversight. Recently the state-funded Industrial Development Corporation (IDC) made a R3.2-billion investment in a company in which one of the most notorious chiefs is a shareholder.

d) how rural community members respond to government policies

In the past, rural uprisings against the Bantustans and the traditional leaders who governed them were a major component of the anti-apartheid struggle. As a result of those uprisings, the transition to democracy in 1994 incorporated Bantustans into a united South Africa with a promise of equal citizenship under an integrated legal regime. Land reform to address the legacy of racially based structural dispossession was one of those promises

The Government of the 21st century wants to reverse those gains by introducing new laws and policies that seeks to betray this promise, and actually further dispossess the very people who bore the brunt of the forced removals that culminated in the consolidation of the Bantustans. These laws and policies seek to separate the former Bantustans from the rest of South Africa as zones of autocratic

chiefly power, in the process transferring ownership and control of land that ordinary people have inherited over generations to traditional leaders.

The Alliance for Rural Democracy and its alliance partners supported communities who strongly opposed these new laws and policies. The rural communities perceived these laws as a return to the autocratic powers that traditional leaders had during apartheid. In his statement, Mr Tongoane emphasised that Communal and Rights Bill was a reintroduction of apartheid boundaries, for the reason that it will only be applied to the rural villages and former homelands. A legal challenge to the Communal Land Rights Act of 2004 resulted in that Act being struck down by the Constitutional Court in 2010.

The other popular pushback was the defeat of the Traditional Courts Bill in Parliament. The Bill would have given traditional leaders far-reaching punitive powers, including the power to strip people of customary entitlements such as land rights. RWAR and the Alliance for Rural Democracy played a central role in supporting this struggle. The Bill failed when the government could not muster the support of five of the nine provinces in 2014. This was after concerted mobilisation by rural people during provincial public hearings.

ARD community activists in Bapong ba Mogale and Bakgatla ba Kgafela applied to court to demand an audit of their mining revenue and 'tribal funds', their legal standing to do so is challenged by traditional leaders. In the lower courts, such as the North West High Court, community activists have routinely been denied legal standing. The community activists who bring such cases are hit with crippling cost orders to pay the legal fees of those they seek to challenge.

Kgosi Nyalala Pilane paid a single attorney R49-million over three years to fight a community bid to make him account for the use of the very fund he used to pay that bill, according to an internal audit report. Appeals against adverse costs orders and interdicts are routinely refused. Only one such case has yet reached the Constitutional Court – the *Pilane vs Pilane* case of 2013 – and that probably only because the Constitutional Court was petitioned to grant leave to appeal by high profile and very skilled lawyers. In that case, the Constitutional Court expressed concern about the pattern of traditional leaders interdicting community members from meeting, and struck down a string of interdicts on the basis that they undermined freedom of expression, assembly and association, as well as the constitutional principle of accountability.

e) what are the different versions of 'customary law' that are put forward in debates over government policy?

The Constitution of the country, Act 108 of 1996, Section 211(1) states : “The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.” This section recognizes living customary law as a legal system equal to common law.

The key concern for communities living under traditional leaders is the definitions of customary law, and the interpretations as presented and written in the policies. e.g. The definitions of a COMMUNITY is different in every bill regulating traditional communities We see distortions of customs and traditions government policies such as

Traditional leadership and Khoisan Bill of 2015. The bill gives traditional leaders a territory over land, and powers to the King/Queens who are recognised by the Minister to enter into deals with third parties without consultation with affected communities as according to IPLRA. It doesn't take into consideration the fact that according to living customary law, consultation can never be a single meeting with multiple signatures of individuals, but it's a multi layered process from household and depends on different practices of a particular family, village or community.

Communal Land Tenure Bill of 2017: The bill proposes wagon wheel model where rural households will own their residential plots only, giving the outer boundaries to the Traditional authorities to take decisions on development, therefore facilitating easy access of big commercial industries and mining companies to communal land without prior consultation with land rights holders.

Traditional Leadership and Governance Framework amendment bill of 2017; The amendment bill has not moved from its original undemocratic transitional requirements. Traditional councils will still be dominated by the nominated 60% of members with only 40% members elected. Since 2003 the elections of many councils have never taken place which is a demonstration of resistance to transformation by these autocratic leaders. The TLGFAB still enhance the traditional leaders' influence within the tribal boundaries established in terms of the Bantu Authorities Act of 1951

Section 212(1) – “National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities, yet our Government chose to abandon that alternative vision and chose apartheid ways of doing things. They failed to define the role of traditional leaders in the new dispensation as mandated by the constitution yet they give them Government functions.

f) Alternative policy proposals do ARD members make?

ARD constituency has echoed their challenges with the current post-apartheid policies during the public hearings convened by the Motlanthe High Level Panel which was appointed by the speakers of Parliament. We need to honour the Constitution of the country and ensure that customary law is recognised as a living law. People must be at the centre of every law-making process, and in summary the alternative proposals are contained in that report, we want to see policies that will;

- Restore living customary law and make sure that the voices of the affected communities are heard. The right to give consent or refuse must be respected.
- Include affected communities and land rights holders in the processes of drafting laws from the inception to the final word, we cannot have a situation where the President recognise and withdraw traditional leaders without consulting the communities and giving them first right to make an opinion
- Recognise living Customary law and bottom up approach, multi layered nature of consultation and decision making.
- Policies in the democratic era cannot be about fixed boundaries, fixed identities, fixed customary practice that relies heavily on the apartheid geographies. It should be all about voluntary affiliation irrespective of the geography. culture knows no boundary.
- Eradicate all apartheid laws that discriminates women and promotes patriarchy. We need to stop the gender disparities seen in traditional communities

2 Conclusion

Recognition of customary rights in communal areas are politically important because unlike the typical image of rurality, in South Africa rural populations are extremely dense as a result of apartheid. South Africa's proportional representation system therefore means that capturing votes in rural areas where tenure is under one form of traditional leadership or another is critical to electoral outcomes. But the land in those areas is a small percentage of the overall land. Attempts by traditional leaders are now looking at retaining their powers while expanding the amount of land that comes under their “jurisdiction.

Rather than fighting inequality, the trend towards government led reforms of communal tenure have continually gone in favour of centralisation of power in the hands of traditional leaders and central government. Whereas once the driving force might be electoral, increasingly over the past decade, it

has been the logic of accumulation that has driven these reforms as land value has increased and the economy has weakened.

Solutions to this problem which ARD is trying to address is to rebuild rural movements, continue to lobby against accumulative elite impulses and occupy a larger political space, particularly in the run up to elections. Rural communities themselves have to build a distinct loud and powerful political constituency, even as the ANC is able to count on large swathes of the rural vote in elections. While we have very sound analysis of the problems, e.g. we don't have the movements to push them through. It is clear also that the legal and policy processes are so captured by different interest groups, that we are faced with a situation of policy paralysis and juridical stalemates. Orderly land reform processes which are owned by people rather than hijacked by political parties, aspiring black elites in collusion with white colonial land barons are unlikely to happen under the current conjuncture.

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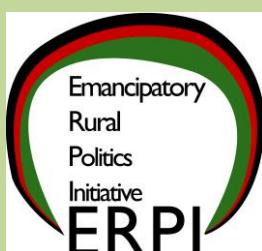
LAMOSAs Concourt judgement

ARD Mobilisation Concept documents

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The Emancipatory Rural Politics Initiative (ERPI) is a new initiative focused on understanding the contemporary moment and building alternatives. New exclusionary politics are generating deepening inequalities, jobless 'growth', climate chaos, and social division. The ERPI is focused on the social and political processes in rural spaces that are generating alternatives to regressive, authoritarian politics. We aim to provoke debate and action among scholars, activists, practitioners and policymakers from across the world that are concerned about the current situation, and hopeful about alternatives.

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