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Land Reform Opportunities Meet Democratic Challenges in Traditional Areas

Gendered Lessons from Vernacular Law and IPILRA

SINDISO MNISI WEEKS

Introduction

Lomhlab' uyathengwa ungaboni sihleli kuwona:
njalo ngonyaka s'khokh' imal' yamasim' enduneni . . .
Njalo njena k'khon' imbizo . . .
S'hlala sibizw' emakhosini;
S'hlala sibizwa phezulu;
S'hlala sifunw' esikoleni
bathi k'khon' imbizo. . . .
'Ngaboni siphila kulomhlaba; siyaw'khokhela . . .
Nithi siyithathaphi imali?'

(This land is purchased; don't see us living on it [and think that it is free]:
every year we pay money for the fields to the headman . . .
[And] there are always meetings . . .
We're constantly being called to the chiefs;
We're constantly being called above;
We're constantly wanted at the school [where meetings are held];
they say there's a community gathering [where we must contribute money]. . . .
Don't see us living on this land [and think that it is free]; we are paying for it. . . .
Where do you think we get the money from?)

These are the bleak and regrettably timeless words of the catchy *maskandi* 'protest' song released by Phuzekhemisi NoKhethani in 1992. This music of the people (of KwaZulu-Natal, at least) spoke to the democratic aspirations of millions of South Africans in the countryside who had experienced the imposition of traditional leadership and deprivation of secure rights – mainly to what was characterised as 'tribal' land in so-called communal areas – as a profound aspect of apartheid's oppressive

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design. Their hope was that with democracy would come 'freedom accompanied by full citizenship [and] equal rights' (Mnisi Weeks, 2015: 124). Those dreams are yet to be realised.

More than a quarter of a century after the struggle for equality under the law technically succeeded with South Africa's entrance into democracy in April 1994, and the finalisation of the Constitution of the Republic of South Africa in 1996 (the Constitution), land reform and redistributive justice continue to elude the majority of South Africans (Ntsebeza & Hall, 2007; Zenker, 2014; Cousins, 2016; Beinart, Kingwill & Capps, 2021). This is especially true if one takes a gendered view of the many challenges and poorly used opportunities to realise equitable land reform that rural women have experienced since South Africa's establishment as a constitutional democracy. With this in mind, this chapter approaches the much-debated, alleged need for amending the Constitution from the perspective of rural women (and, by extension, children)[1] living under traditional governance; how have their hopes for land reform and redistributive justice fared in South Africa as a purportedly constitutionally transformed democracy? Although that is the focus, the chapter situates women's struggles within the wider context of the insecure land rights of rural communities generally (involving men as well as women) and thus sheds light on broad concerns with rural democracy and governance and how they impact land matters. The chapter therefore asks, with reference to land and rural people's social and economic security, how significant local political rights are for redistributive justice in the former bantustans.

The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) was passed to temporarily defend the rights and interests of people 'beneficially occupying' land to which they did not have formal rights (that is, they were openly occupying land in rural areas as if owners but without permission or the exercise of force). The expectation was that IPILRA would shortly be replaced by legislation – such as the Communal Land Rights Act 11 of 2004 (CLARA) – that would provide permanent tenure protection to informal rights holders (Zamchiya, 2019; Tlale, 2020). However, the Constitutional Court duly struck down CLARA in 2010,[2] while IPILRA has continued to be renewed annually. It has now been over a quarter of a

[1] There is clear evidence that most black and rural children in South Africa live with their mothers, many of them in households that do not include their fathers (most of the year) (see Statistics South Africa, 2019, 2020; Van Heerden et al., 2021).

[2] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC). Had the Act been implemented, it would have severely undermined the tenure rights of millions of black, rural South Africans.

century since South Africa gained its independence, yet legislation to strengthen tenure security and related institutions in the former homelands is yet to be implemented. The Communal Land Tenure Bill (BX-2017) (Department of Rural Development and Land Reform (DRDLR), 2017) has yet to make its passage into law and is likely to meet the same fate as its predecessor. As the World Bank (2018: 44) correctly summarises, '[a]t the heart of the long-standing stalemate regarding tenure reform in communal areas is the significant power given to traditional leaders'.

The uneasy fit between customary conceptions of land and the cadastral property system, as well as between customary law and state law systems, has been extensively canvassed in the literature (Kingwill, 2013; Cousins, 2016; Beinart et al., 2021). Less thoroughly explored are the ways in which IPILRA tried to get around these dissonances by taking a bottom-up approach to decisions pertaining to land occupation, use and access under the Constitution, grounded in vernacular normative conceptions and the unused opportunities that it presents for inclusive land reform. The ways in which IPILRA's objectives have not been realised articulate with the reasons why transformative constitutionalism and its lofty ambitions have been limited in their effect in rural South Africa.

This chapter asks whether the 'transitional justice'[3] arrangements in the Constitution, professed to be deeply transformative, positively yielded (especially gendered) restorative and redistributive justice on the ground. Answering in the negative, the chapter demonstrates that the problems of ongoing tenure insecurity and the misappropriation of people's land rights in 'communal areas' may not lie predominantly with the Constitution per se, or with the way the constitutional and other courts have interpreted section 26(6) and (9) as well as legislation such as IPILRA. Rather, they appear to lie mainly with the ruling party's turn towards an interpretation of 'tradition' and 'customary law' that entrenches the undemocratic governmental powers of traditional leaders at the expense of rural people. Hence, this chapter goes beyond concerns with the property clause to highlight the centrality of political rights, especially in local government, thus emphasising that the quest for redistributive justice certainly includes, but also extends well beyond, rights to land.

The chapter thus highlights the complicity of traditional leadership institutions in historical and contemporary land dispossession as evidenced by

[3] This points to the fact that part of the Constitution's purpose was to transition South Africa from apartheid into democracy peacefully. This is especially evident in the interim Constitution of the Republic of South Africa Act 200 of 1993 and the process of confirmation that the Constitution had to undergo.

the residential lease programme of the Ingonyama Trust Board (ITB). It also reflects on how this complicity may sometimes put vernacular law in conflict with itself: on the one hand, some traditional leaders elevate to the level of (official) customary law self-serving values such as the centralisation of land ownership and control vested in the institution (which is rhetorically conflated with the traditional leader as an individual), in order to aid in their personal enrichment (Buthelezi et al., 2019; Ubink & Duda, 2021; Wicomb, 2021) and, on the other hand, this centralisation campaign is vehemently defended against the 'alter-Native'[4] values embodied in living customary law (that is, vernacular law) that argue in favour of the necessary diversification *and diffusion* of land-holding and decision-making power (Mnisi Weeks & Claassens, 2011; Tlale, 2020). Perhaps surprisingly to some, as potential levers, these values offer greater chances of achieving widespread poverty reduction in communities that desperately need it.

The backdrop is the recognition in the Constitution of the status of customary law (ss. 39(2) and 211(3)), rights to property (s. 25), political participation (s. 195(e))[5] and access to justice (s. 34). In this chapter, the transformative impact that these protections were meant to have is read alongside the provision in section 211(1), that '[t]he institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution', and in section 212(1), that '[n]ational legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities' (Nkhwashu, 2019). The valorisation of the institution of traditional leadership independent of a democratic following, which is what has been produced by the legislature's interpretation of the latter provisions, is explored through two recent cases that have clearly revealed the threat that uncritical and unbridled, government-backed traditional authority and power have yielded for South Africa's constitutional promise. The first is *Ingonyama Trust*[6] and the second is *Maledu*.[7]

[4] The chapter builds on ideas and arguments that are explored further in Mnisi Weeks (2021: 165–205) and my larger project, Mnisi Weeks (2024).

[5] See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

[6] *Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others* 2021 (1) SA 251 (KZP). The Ingonyama Trust was established in terms of the KwaZulu Ingonyama Trust Act 3KZ of 1994 by the then government of the KwaZulu bantustan for the purposes of holding all the land formally owned and/or belonging to it. The Trust is mandated to manage the land for the 'benefit, material welfare and social well-being of the members of the tribes and communities' that live on the 2.8 million hectares of KwaZulu-Natal under the Trust's administration. Key to note is that the sole trustee is the Zulu paramount (until his death in 2021, King Goodwill Zwelithini).

[7] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another (Mdumiseni Dlamini and Another as Amici Curiae)* 2019 (2) SA 453 (GP).

The Preamble to the Constitution articulates the lofty vision of 'the supreme law of the Republic', undergirding the striving of '[w]e, the people of South Africa', to:

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person.

Yet the cases of *Ingonyama Trust* and *Maledu* show that the cumulative impact of the socio-economic and politico-legal realities in post-apartheid South Africa have yielded limited land rights protection for traditional peoples and, consequently, not altered the conditions of material and social precarity that affect these groups. The fact that the recognition and development of customary law has to pass constitutional muster has been largely ignored (Budlender, 2021).

Two Cases in Point: *Ingonyama Trust* and *Maledu*

Following the release of the Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) in October 2017 (HLP, 2017), former President Kgalema Motlanthe publicly observed that the ITB in KwaZulu-Natal (KZN) was taking advantage of residents on land registered to it. In the lead-up to the report, Motlanthe had heard hundreds of rural South Africans, especially in mineral-rich areas like the Platinum Belt in the northern territory and land under the ITB's jurisdiction, testify to their experiences of land confiscations, insecurity and destitution. At a May 2018 land summit, he said of the ITB, '[p]eople who have lived there for generations must pay the Ingonyama Trust Board R1,000 rent, which escalates yearly by 10%' (Nhlabathi, 2018). This was after the ITB had advertised to the people in its jurisdiction (many of whose families had lived there for generations) that they have insecure tenure and should 'upgrade' their apartheid-era 'Permission to Occupy' (PTO) certificates by entering into long-term leases with the ITB.[8] This, it was

[8] PTOs were an apartheid construct of quasi-tenure for 'tribal' residents of land that was subsequently registered to the Ingonyama Trust in KwaZulu-Natal and administered by the ITB.

claimed, would provide them with the proof of residence needed to register to vote, open bank accounts, register cellular phones or obtain rural allowances from employers.

For instance, in November 2017, the Ingonyama Trust advertised in a number of KwaZulu-Natal newspapers saying it was 'inviting' PTO holders to come to the ITB 'with a view to upgrading these PTOs into long term leases in line with the Ingonyama Trust tenure policy'. Contrary to the Trust's claims, the PTO certificates held by many of the people who 'voluntarily' took the Trust up on its widely publicised policy-based offer (some of whom were later to become the applicants in the case against the Trust and ITB), were in fact upgradeable to ownership in terms of the Upgrading of Land Tenure Rights Act 112 of 1991. Alternatively, for those who did not have PTOs, their informal land rights established by long-term occupation were likely to be considered customary ownership and thus entitle the people to compensation under IPILRA. The ITB had thus deceived people holding rights that are more akin to ownership into trading them in for the status of tenants and then going on to extort escalating annual rents from them.

At the time that Motlanthe was speaking, the ITB was allegedly continuing to issue this solicitation via its Facebook and Twitter accounts and advertisements, despite the fact that in March 2018 the Chair of the Portfolio Committee on Rural Development and Land Reform had directed the ITB to stop this practice, and a senior official of the Department had confirmed that the Trust's income-generating scheme was unauthorised and violated both the Constitution and the Public Finance Management Act 1 of 1999. These flagrant and defiant actions were what ultimately led to the lawsuit against the ITB and the relevant Minister, to which discussion I now turn.

The Ingonyama Trust Case

Ms Hletshelweni Lina Nkosi was one of several thousand women stripped of their land rights by a traditional leadership institution. Following the Ingonyama Trust's 2007 launch of its 'PTO Conversion Project', she was notified by Trust officials that her PTO certificate no longer had validity in law. IPILRA says that '[t]he holder of an informal right in land shall be deemed to be an owner of land' for various purposes (IPILRA, s. 1(2)(b)). By contrast, the Trust told community members that to have a *more* formal and secure title deed under the Upgrading of Land Tenure Rights Act, they had to sign a lease agreement with the

Trust, which resulted in a *down*grading of their property rights to those of rental.

Ms Nkosi was led to believe that she *had to* sign the lease. Yet when she tried to sign the agreement, she was further informed that single women were not permitted to do so. Fearing eviction and the loss of her home, Ms Nkosi co-signed the Trust's lease with her partner. These allegations formed part of the application brought against the Ingonyama Trust, the ITB and the Minister of Rural Development and Land Reform (the Minister) by the Legal Resources Centre (LRC), acting on behalf of the Council for the Advancement of the South African Constitution (CASAC), the Rural Women's Movement (RWM) and seven informal land rights holders. In this case, CASAC and RWM were acting in the public interest; Ms Nkosi and the other six informal land rights holders represented a class of people whom the Trust had swindled.

The applicants requested that the court declare the actions of the Trust unlawful and in violation of the Constitution. The ITB persisted in arguing that the leases it had fraudulently persuaded the parties to enter into provided stronger tenure rights than those they already had and would help the residents secure financing from banks and enable them to establish businesses. The truth of the matter was that converting their strong informal land rights into formal but weak land rights under the guise of leases would diminish their tenure security.

On 11 June 2021, Madondo DJP (with Mnguni and Olsen JJ concurring) issued a landmark decision in the applicants' favour. As the LRC had argued,[9] the unlawfulness and unconstitutionality of the Trust and ITB's actions lay in concluding, under false pretences, residential lease agreements with residents on the land held in trust – some, if not all, of whom had PTOs or other informal rights protected by IPILRA. Thus, the resultant leases over 'residential land or arable land or commonage on Trust-held land' were invalid, and the Trust or ITB has to refund all money received pursuant to these invalid agreements to the people who had made lease payments.

Given the Minister's assigned responsibility to ensure adherence to property rights,[10] she was in breach of her duty by 'failing to exercise, or

[9] *Igonyama Trust*. See also https://lrc.org.za/11-june-2021-lrc-and-casac-welcome-landmark-ruling-declaring-actions-of-the-ingonyama-trust-unlawful-and-in-violation-of-the-constitution (accessed 30 October 2023).

[10] Sections 25(1) and 25(6) of the Constitution, read with section 7(2) of the Constitution, and, specifically, compliance with IPILRA vis-à-vis the land held in trust.

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failing to ensure the exercise by her delegate, of the powers conferred by chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy)'. The decades-long failure of the DRDLR to 'implement an alternative system of recording customary and other informal rights to land of persons and communities residing in Trust-held land' necessitated the implementation of PTOs under chapter XI of the KwaZulu-Natal Land Affairs Act in the interim. The Minister was therefore ordered to report to the court on how her department had fulfilled this obligation.[11]

The Maledu Case

Nearly three years prior, the Constitutional Court had confronted a different yet similarly predatory assault on rural residents' 'informal' customary land rights in the *Maledu* case. The first applicant of thirty-seven in this case was Ms Grace Masele Mpane Maledu, a resident of Lesetlheng village, which formed 'a community-based organisation consisting of persons claiming to be owners of the farm' in the Rustenburg district of the North West Province (para. 10). She and the other applicants asserted occupancy and ownership of the farm on which they conducted farming operations following their forebears' purchase of the land in 1919, in accordance with a decision made by their community in 1916 (para. 12).

In 2004, the Department of Mineral Resources (DMR) granted the first respondent, Itereleng Bakgatla Mineral Resources (Pty) Limited (IBMR), a prospecting right over the farm. Later, on 19 May 2008, the DMR awarded IBMR a right to mine for platinum group metals and associated minerals on the same farm. IBMR then contracted the second respondent, Pilanesberg Platinum Mines (Pty) Limited (PPM), to do the actual mining. IBMR applied to the DMR to excise from its mining right the Sedibelo-West portion of the farm which IBMR was to cede to PPM. In 2014, IBMR and PPM began preparations to undertake full-scale mining operations on the farm, which the applicants resisted by applying to the courts. IBMR and PPM challenged them on the grounds that the

[11] The ITB's application for leave to appeal was denied by the Supreme Court of Appeal on 23 August 2022. Legal Resources Centre (LRC) (2022). 24 August 2022 – Supreme Court of Appeal dismisses Ingonyama Trust Board application for leave to appeal. Available at https://lrc.org.za/24-august-2022-supreme-court-of-appeal-dismisses-ingonyama-trust-board-application-for-leave-to-appeal/ (accessed 30 October 2023).

Lesetlheng Community were not the owners of the land and had not been entitled to special consultation, consideration or consent.

However, the reason joint ownership of the Lesetlheng village farm had not been registered in the purchasers' names was the existence of pre-1994 racist legislation. The farm was registered as held in trust by the designated Minister. Furthering the Lesetlheng Community's legal disadvantage and dispossession was the fact that the community was not legally 'recognised as an autonomous and separate entity by the government of the day'. Instead, the farm's title deed 'reflected that the Minister held it in trust on behalf of the entire Bakgatla-Ba-Kgafela Community', of which the Lesetlheng Community was a subunit (*Maledu*, para. 12). This was not an unfamiliar scenario. The drafters of IPILRA had pre-empted such situations resulting from apartheid's messy history. While the Lesetlheng Community could legitimately fall under IPILRA's definition of a 'community',[12] the government entirely disregarded the law and its statements on the nature and interpretation of vernacular law pertaining to land 'held on a communal basis' (*Maledu*, paras. 12–13).[13]

The Court answered the crucial question, 'did the surface lease deprive the applicants of their informal land rights?', quoting section 2(2) and (4) of IPILRA, which provides the consultation requirements as follows:

> (2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community. . . .
> (4) For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given

[12] IPILRA, s. 1(1)(ii) defines 'community' as 'any group *or portion of a group* of persons whose rights to land are derived from shared rules determining access to land held in common by such group'. This reading could be reinforced with application of s. 1(1)(vi) of IPILRA's further definition of the 'tribe' under which the 'informal right to land' protected by the legislation could be registered and collectively held in trust 'includes (a) any community living and existing like a tribe; and (b) any *part of a tribe* living and existing as a separate entity' (emphasis added).

[13] The community's arrangement aligned with IPILRA's definitional provision in section 1 that 'informal right to land means: (a) the use of, occupation of, or access to land in terms of (i) any tribal, customary or indigenous law or practice of a tribe; (ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in ... [the South African Development Trust or the government of Bophuthatswana, as had that occupied by the community]'.

> sufficient notice, and in which they have had a reasonable opportunity to *participate*. (*Maledu*, para. 107, emphasis added)

In response to the applicants' claim that the *kgotha kgothe* – the traditional meeting of the Bakgatla Ba Kgafela – had deprived them 'of their informal land rights in terms of the customs and usages of the Bakgatla', the respondents sought to show that the resolution adopted by the Bakgatla Ba Kgafela at that same meeting fulfilled these requirements (*Maledu*, para. 108). However, given that 'this resolution does no more than merely indicate that it was adopted and signed by Kgosi Pilane and a representative of Barrick' (para. 108),[14] the court found that 'there is no shred of evidence to substantiate the respondents' assertions that the applicants were deprived of their informal land rights in conformity with the prescripts of section 2(4) of IPILRA' (para. 108).

It was central to the Constitutional Court that the rightful owners of the farm – albeit as 'informal' rights holders under IPILRA and thus, by extension, under the MPRDA – were not consulted and did not give approval for any of these undertakings. Even though they were evidently the active occupiers and users dependent on the property, they were dispossessed and stripped of their primary source of livelihood and subsistence by the signature of Kgosi Pilane, following the approval of whoever had gathered to approve the transaction on behalf of the Bakgatla Ba Kgafela Community as a whole. The disregard of the requirements stipulated in IPILRA was used defensively by the applicants to ensure appropriate recognition and advanced protection of the rights of customary residents such as Ms Maledu, although these requirements were actually intended to be used proactively by bodies such as the DMR and the DRDLR.

From these two cases, it is evident how the higher courts have applied the Constitution to protect and advance customary rights to land in the face of the clear determination of the government and traditional authorities to shield and/or push the interests of traditional leaders. The political economy and land reform challenges that are revealed are that the ITB is more interested in rents than the productive use of the land or the

[14] As the court's footnote 95 explains: 'IBMR partnered with a company called Barrick Platinum SA (Pty) Ltd (Barrick) for purposes of conducting prospecting, because IBMR did not have the necessary capital and expertise. The Bakgatla Ba Kgafela Community transferred 15% of its shares in IBMR to Barrick in the process. The farm was successfully prospected. Barrick later withdrew and the Bakgatla Ba Kgafela Community then bought back the 15% shareholding.'

security of its dependants, while the *Maledu* case is fundamentally about the traditional institutional leaders' focus on extracting profits from mining. This tells us that land is a primary site of politico-economic contestation between ordinary people and their leaders – contestations that centre on the control of assets and the extraction of value from the land on which rural people (and especially women) depend for their material security or, in the case of traditional leaders, their prosperity.

Discussion

In the remainder of this chapter, I argue that the *Ingonyama Trust* and *Maledu* cases show that the cumulative impact of the socio-economic and politico-legal realities in post-apartheid South Africa has yielded limited land rights protection for people in traditional areas and, consequently, the conditions of material and social precarity that affect them have not been altered. The main reason for this failure is the disproportionate power given to traditional leaders in our democracy. As intimated by Phuzekhemisi NoKhethani, the *maskandi* musicians quoted in the introduction to this chapter, these powers are exercised under the guise of 'tradition', in ways that further deprive an already impoverished 'subject' population, with land tenure the primary site of contestation.[15]

Land as Primary Site of Contestation

In terms of section 25(6) of the Constitution, '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. Section 25(7) goes on to prescribe that '[a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress'.[16] In 2004, in *Alexkor v Richtersveld Community*

[15] Phuzekhemisi reiterated these sentiments when he participated in a musical seminar and panel discussion on rural democracy on 22 February 2023: www.customcontested.co.za/invitation-musical-seminar-in-preparation-for-the-constitutional-court-legal-challenge-to-the-traditional-and-khoi-san-leadership-act/ (accessed 30 October 2023).

[16] 19 June 1913 is the date given for when the Natives Land Act 27 of 1913 came into operation.

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(paras. 36–37),[17] the Constitutional Court affirmed that traditional communities' land is included under section 25 (paras. 50–64).[18] That being so, 'Parliament must enact the legislation referred to in subsection (6)' of section 25 of the Constitution (ending tenure insecurity). The government also bears the obligation, under section 25(5), to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'. However, as described in the brief discussion of IPILRA, CLARA and the CLTB earlier, the government has not fulfilled this constitutional obligation.

A detailed look at the land distribution statistics for the country demonstrates the persistent impact of apartheid's discriminatory land policies. In 2019, the Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA), which drew on the 2016 Agricultural Households Survey by Statistics South Africa and the DRDLR's Land Audit of 2017, reported that white people owned 72 per cent of South Africa's individually owned farming and agricultural land – precisely 26,663,144 hectares of the total 37,031,283 hectares (PAPLRA, 2019: 43). People classified as 'coloured' owned 15 per cent, Indians 5 per cent and the African majority owned the smallest amount of this land, at 4 per cent. The DRDLR's Land Audit (2017: 2)[19] also found that men owned 72 per cent of the total farm and agricultural land it audited, in marked contrast to the mere 13 per cent owned by women. A 2022 report by Statistics South Africa, *Women Empowerment, 2017–2022*, confirms the gender imbalance, noting that in 2007 and 2018 South African men 'recorded the highest percentage of owners who farm for themselves full-time or part-time in both years (80,9% and 79,5%) compared to their female counterparts' (Statistics South Africa, 2022: 59). Yet while the extent and persistence of racial inequity are well established, the gendered dimensions are less so, this imbalance complicated by the fact that there is an assumption that men are the farmers and their female partners not, even though the latter may be very active in the actual farming on male-owned land.

Of course, individual land ownership is not the only consequential category of private ownership, since some land is also owned by

[17] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460.

[18] In para. 103, the Court 'declared that . . . the first plaintiff [the Richtersveld Community] is entitled in terms of section 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof'.

[19] As the DRDLR website advises, '[t]he land audit provides such private landownership only on the basis of land parcels registered at the Deeds Office as of 2015'.

communal entities such as community-based organisations (CBOs) and trusts. Referring to doctoral research by Donna Hornby (2014), the Institute for Poverty, Land and Agrarian Studies (PLAAS) described what appears to be a 'successful redistribution project at Besters in KwaZulu-Natal, where 21% of the district's commercial farmland, along with tractors and beef cattle herds, have been redistributed to 13 Communal Property Associations made up of 170 former labour tenant and farm worker households' (Hornby, 2014, cited in PLAAS, 2016: 28). Yet still, the rate of delivery in land reform is far from satisfactory. Indeed, by March 2017 less than 10 per cent of commercial farmland had been redistributed, well short of the government's proposed target of delivering 30 per cent of this land by 2014. According to a 2018 World Bank report, '[a]lthough 80 percent of land claims had been settled by 2016, the amount of land transferred is still small. The target of transferring 30 percent of arable land to black landholders by 2014 was not achieved, and there is limited information on the current level of transfer' (World Bank, 2018: 43–44; but see also Sihlobo & Kapuya, 2018).[20]

As the World Bank accurately notes, IPILRA continues to govern tenure security in South Africa. Although when it was passed a quarter of a century ago it was envisaged as stop-gap legislation, it has since had to be renewed annually. IPILRA is aimed at securing 'the rights of people occupying land without formal documentary rights, such as rights to household plots, fields, grazing land, or other shared resources' (World Bank, 2018: 44). However, its effectiveness is limited by the absence of a robust, supportive land administration system that is run by a well-staffed department whose employees enable extensive community consultation. Rather, based on the prevailing presumption that only consultation with traditional leaders is required, the formal administrative processes needed to identify and record rights properly and resolve disputes are currently lacking. This is despite the fact that the Department of Land Affairs (as it was named at the time IPILRA was passed) has internal policies aimed at clarifying the process for systematically documenting rights and thus preventing disputes, as required under the Act. These policies are not

[20] Sihlobo and Kapuya concluded that, in total, 17,439 million hectares of white-owned land have been transferred since 1994, under the 'willing buyer, willing seller' policy. This is 21 per cent of the 82,759 million hectares of South African farmland that is in freehold. Of this, 11 million hectares had been transferred via restitution and redistribution programmes, with an additional 4,027 million hectares being due to state procurement. The remainder is accounted for by private land purchases.

often implemented. Given the scale and public nature of the Ingonyama Trust and Itereleng Bakgatla land rights violations, this leads one to suspect that the political will is wanting.

Like the World Bank, Songca (2018) concludes that the unresolved apartheid-instituted role of traditional leaders in rural land holding and management is also part of the problem. The World Bank aptly observed that '[a]n important provision of the act [IPLRA] is to ensure proper community consultation in cases where external investors wish to access communal land' (World Bank, 2018: 44). The fact that the DRDLR has mostly failed to enforce these protections (due to an apparent lack of political will, a shortage of trained personnel and the absence of comprehensive legislation) has led to some external investors violating them, especially in the case of the exploitation of mineral resources by extractive industry. The World Bank also describes the 'best'-case scenario, where some potential investors have declined to invest due to uncertainty on how to negotiate leases on communal land or a lack of confidence that they can trust that the arrangements will be respected.

As demonstrated by the *Maledu* case, the violation of communal land rights protections can be observed from internal investors too; after all, the IBMR was an entity established by members of the Bakgatla Ba Kgafela traditional community. Indeed, as the Parliamentary Monitoring Group reported following a parliamentary committee briefing by the Deputy Minister of Mineral Resources on 14 November 2018: 'The Ingonyama Trust and Itireleng [sic] Bakgatla Mineral Resources cases have been challenging because the traditional rulers played double roles. DMR is working on how the Ingonyama Trust and local chieftaincies affect land but it has to be thorough.' The flagrancy of the persistence of 'chieftaincies' with their exploitation of the informality of ordinary rural people's land rights, even ignoring multiple warnings, was striking – but so was the government's relative inaction when it came to protecting these rights and people. In the end, it was a lawsuit that got the government to adopt a just position in both *Ingonyama Trust* and *Maledu*. In both cases the government seems to have left the options it had available to it, especially in terms of IPILRA, all but entirely unimplemented. This is despite the abundant encouragement and advice it has been offered on how to do so.[21]

[21] For instance, in 2011 I was involved in efforts to help the Department develop a way to implement IPILRA effectively; unfortunately, nothing ultimately came of this.

Traditional Leaders Stand in the Way

As the *Ingonyama Trust* and *Maledu* cases show, some traditional leaders have exploited the weak regulatory and enforcement environment to acquire more land through the further dispossession of the already dispossessed people in their areas. In his comments on the ITB situation of May 2018 quoted earlier, Motlanthe was speaking in his capacity as a member of a team established by then still new President Ramaphosa to 'clear existing confusion' on the African National Congress' (ANC) position on 'the land question' (Madia, 2018). Motlanthe's remarks received some negative attention, particularly from traditional leaders (Staff Reporter, 2018; see also Friedman, 2018) as well as allies of traditional leaders such as Mangosuthu Buthelezi, who criticised him for making the following comments:

> The people had high hopes the ANC would liberate them from the confines of the homeland system. Clearly now, we are the ones saying land must go to traditional leaders and not the people. . . . some [traditional leaders] pledge their support to the ANC. Majority of them are acting as village tin-pot dictators to the people there in the villages. (Motlanthe, quoted in Madia, 2018)

Motlanthe's comments were, of course, not unwarranted, and not only with reference to the ITB. The fundamental issue is who owns the land. Is customary land owned by the traditional leaders and/or kings or by the people who have lived on the land (burying their ancestors, grazing their cattle, gathering grass, wood and water), often for generations? As Motlanthe boldly observed, thus far it appears that – whether by commission or omission – the ANC has come down on the side of traditional leaders in this debate. One measure of this is that the legislation passed on governance and land tenure since the ANC took over in 1994 has been built largely on the foundations of preceding apartheid-era legislation. The ANC has thus preserved structures that were invented by the Native Administration Act 38 of 1927 and the Bantu Authorities Act 68 of 1951 and then branded 'tribal' by South Africa's past segregationist regimes. The rhetoric of the government and traditional leader lobby seeks to persuade the public that these legislative actions are protecting and continuing ordinary rural people's culture and traditions. However, close examination of the evidence reviewed by the courts in the *Ingonyama Trust* and *Maledu* cases clearly shows that they are not.

Organisations such as PLAAS, the Land and Accountability Research Centre and the LRC have worked on this for decades.

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'Citizens' with No Consultation and No Choice are 'Subjects'[22]

While the rights claimed by traditional leaders over so-called communal land are allegedly premised on a version of customary law, they are based on a distorted and/or opportunistic version. Within a dominant political economy framework that privileges individual and exclusive forms of ownership and decision-making over property, this version exploits the fluidity and ambiguities of customary law's distributed power model and its system of nested and overlapping land rights (Cross, 1992: 305–31; Okoth-Ogendo, 2008: 95–108). This results in communal land tenure processes that, especially at the intersection between informality and formality in South Africa's pluralistic legal system, effectively amount to 'no consultation and no choice'. The consequence is that people who are already vulnerable are left even more tenure-insecure than they were previously. As the hunger for the commercialisation of land and minerals in traditional areas grows, the dehumanising processes and dispossession of property that follow set up what can be experienced as an intimate relationship between selling land and selling people (many of them women) – in the haunting words of one elderly woman featured in *This Land* (2019), a documentary about the struggle of black, rural people to protect their rights on communal land in KwaZulu-Natal: 'They want to sell us.'[23]

The practical implication is that the oft-repeated aphorism *Inkosi iyinkosi ngabantu* or *Kgosi ke kgosi ka batho*, which can be translated as 'a traditional leader is a traditional leader in, through and because of the people [who follow him]', is effectively replaced by a problematic inversion. This says that 'a community is a community because of having a senior traditional leader' or, even more troubling, that 'people are (a) people in, through and because of (being under) a senior traditional leader'. In this way the process is not just one of dispossession but also one of dehumanisation.

Given that *Inkosi iyinkosi ngabantu* is part of the popular discourse of most South Africans, one might think that it would form the foundation of the recognition accorded traditional leaders in legislation. However, the Traditional Leadership and Governance Framework Act 41 of 2003

[22] The distinction between citizens and subjects, discussed further below, comes from Mahmood Mamdani (1996).

[23] *This Land* (2019), directed by Miki Redelinghuys, www.afridocs.net/watch-now/this-land/ (accessed 4 March 2023).

(TLGFA) disregarded it. Its replacement, the Traditional and Khoisan Leadership Act 3 of 2019 (TKLA), also does not describe 'traditional' structures as dependent upon consultation with the people who are to be governed by them.[24] With this legislation in place, the government has ensured that the holders of informal land rights on rural land need not be consulted on issues involving their land (Manona, 2012; Mnwana, 2014: 21–29; Beinart et al., 2021; Ubink & Duda, 2021). The power granted by the government to traditional leaders – converting cultural and political power into economic and legal power, encapsulated as 'Ethnicity Inc.' by Comaroff and Comaroff (2009) – is demonstrated in both the *Ingonyama Trust* and *Maledu* cases described earlier.

The insistence of the Portfolio Committee on Justice and Correctional Services on embracing the recommendations of traditional leaders in its deliberations in 2017 on the Traditional Courts Bill (B1D-2017) must be read against this background.[25] Specifically, the Committee insisted that permitting people to opt out of the jurisdiction of traditional courts would undermine the power of these courts, thereby dangerously re-enacting apartheid's repressive principles of depriving rural residents of choice – choice that sections 30 (on 'Language and culture') and 31 ('on Cultural, religious and linguistic communities') of the Constitution assure them. The Portfolio Committee's direction to the Department of Justice to remove the explicit right of people to opt out is a rejection of the fundamental customary law principle of *Inkosi iyinkosi ngabantu/ Kgosi ke kgosi ka batho*. Implicit in debates on traditional governance has been the question whether ordinary rural people are, in the words of Mamdani (1996), 'citizens' or 'subjects'. This move highlighted the extent to which they remain subjects (women even more than men).

IPILRA tried to stake a claim for ordinary rural people as citizens worthy of consultation in all matters pertaining to the land that they

[24] Ignoring protests and petitioning by ordinary rural community members and organisations, President Ramaphosa signed this Act into law on 20 November 2019, with 1 April 2021 set as its commencement date (Gerber, 2019). However, on 30 May 2023 (after this chapter was finalised) the Constitutional Court declared the Act invalid, following a procedural challenge to the legislation's constitutionality. The order of invalidity was suspended for twenty-four months to give Parliament the opportunity to remedy the deficiency.

[25] This Bill to 'provide a uniform legislative framework for the structure and functioning of traditional courts' was passed into law and signed by President Ramaphosa (after this chapter was finalised) on 16 September 2023 and published as the Traditional Courts Act 9 of 2022 on 27 September 2023. The date when the Act will come into operation remains to be announced.

'occupy', 'access' or 'use', arguably with consent required in the case of land which they 'occupy'. However, this was completely ignored in the case of *Maledu* and fraudulently violated in the case of the *Ingonyama Trust*. The result is the exacerbation of rural poverty.

Poor Democracy Makes Vulnerable People Poorer

In the most unequal country in the world, poverty remains strongly racialised and gendered. Ninety-three per cent of the 30 million South Africans declared poor (55.5 per cent of the total population) are black (Sulla & Zikhali, 2018). The 2019 General Household Survey found that 16.2 per cent of rural residents had inadequate access to food and 12 per cent experienced severe inadequacy (compared to 11.7 per cent and 6.4 per cent, respectively, in urban areas) (Statistics South Africa, 2021: 92). The rural figures are based on 'an under-representation of poor rural households' (Statistics South Africa, 2021: 93), meaning that the extent of rural poverty is likely greater than they reflect. Against this backdrop, women, in rural areas especially, have remained at a substantial disadvantage, even as rural men (especially those in traditional provinces) have experienced significant hardship as well. While roughly 41.6 per cent of South African households were female-headed in 2021, the prevalence of female-headed households is highest 'in provinces with large rural areas such as the Eastern Cape, KwaZulu-Natal, Free State, Mpumalanga and Limpopo' (Statistics South Africa, 2022: 14). These households have seen a slight reduction in very high unemployment rates (56.2 per cent in 2021 versus 57.6 per cent in 2017), but a higher proportion of female-headed than male-headed households continue to be without a single employed household member (Statistics South Africa, 2022: 13–15).

Women's labour force participation is highest in Gauteng and the Western Cape and lowest in the rural provinces with substantial traditional leadership presence (Statistics South Africa, 2022: 20–21), while men's labour force participation rates are generally higher than those of women (Statistics South Africa, 2022: 22). This is explained by the reality of differentiated responsibilities and concomitant obstacles, specifically: 'childbearing, lack of affordable childcare, gender roles and work–family balance', resulting in '[l]abour force participation rates by sex and the presence of children in the household . . . showing a linear relationship between the number of children in the household and participation rates irrespective of sex' (Statistics South Africa, 2022: 21). In sum,

unemployment rates for women are higher than the national average and increase with the number of children in the household (Statistics South Africa, 2022: 34).

While COVID-19 worsened every group's unemployment and poverty rates, once again the rural provinces (especially Eastern Cape, Limpopo and Mpumalanga) were generally hardest hit (Statistics South Africa, 2022: 48). In both 2017 and 2021, women's primary sources of income were social grants and remittances while men's were business and 'salaries/wages/commission' (Statistics South Africa, 2022: 47). Nearly double the proportion of women in rural areas (51.8 per cent) depended on social grants than in urban areas (26.9 per cent), reflecting the higher 'unemployment rate in rural areas and the fact that women are more likely than men to be unemployed' (Statistics South Africa, 2022: 47).

Looking at the facts of the *Ingonyama Trust* and *Maledu* cases (which demonstrate material dispossession without informed consent and due consultation), one might justifiably argue that the two problems of endemic poverty and impoverished democracy for traditional communities are deeply related. Both reveal how traditional leaders' and institutions' relatively unchecked powers are depriving poor, rural people of resources, resulting in deepening poverty for the most marginalised people in society. The impoverishment of democracy is enabled by prevailing legislation. Traditional communities are still defined by apartheid boundaries while the TLGFA's 'transitional arrangements' extended recognition to pre-Constitution traditional leaders, 'tribes' and 'tribal authorities', subject to democratising conditions that have not been fulfilled.[26] The historical continuities with the apartheid era are further entrenched by the 'transitional arrangements' set out in section 63 of the TKLA of 2021. This provides for the continued recognition of the 'traditional leaders', either by the TLGFA, prior to its repeal, or 'in terms of any applicable provincial legislation which is not inconsistent with the Framework Act, as the case may be', 'subject to a recommendation of the CTLDC, where applicable'.[27] The TKLA gives these same structures another two years to comply with requirements (in s. 16(2)) that their councils be reconstituted to include elected

[26] TLGFA, 2003: ss. 28(1)), 28(3), 28(4).

[27] The CTLDC 'means the Commission on Traditional Leadership Disputes and Claims established in terms of section 22 of the Framework Act [the TLGFA]' (TKLA, 2021, s. 63 (23)).

representatives (40 per cent of members, as against the 60 per cent appointed by the leader), and for one-third of their members to be women.

Conclusion

In this chapter, I have shown the intimate relationship between impoverished democracy and the material poverty of vulnerable rural people that began under colonialism and apartheid and persists today. As the chapter has sought to demonstrate, the main reason for the failed transformative and redistributive impact of the country's democratic Constitution in the realm of land tenure security and gender equality is the disproportionate power given to traditional leaders.

My argument is that IPILRA has provided the tools to address both these issues simultaneously and that utilising them would likely result in positive effects in traditional communities in both the political and economic spheres. Indeed, as demonstrated in the *Ingonyama Trust* and *Maledu* cases, fidelity to IPILRA would have gone a long way towards shoring up both the physical and the cultural survival of the affected communities. The corollary is also true: the government's failure to enforce IPILRA is costing lives and denying communities their tenure security. These two cases show the cumulative impact of the socio-economic and politico-legal realities in post-apartheid South Africa that have yielded limited protection of land rights for people living under traditional governance. This has left the conditions of material and social precarity that affected these groups under apartheid fundamentally unaltered and, in some instances, even worse than before.

It would be possible to enact legislation that secures people's customary rights in land and extends rights to women where these are being denied without having to resort to a constitutional amendment. The enforcement of already existing legislation such as IPILRA would accomplish much the same result. This chapter has detailed these missed opportunities that are in keeping with the Constitution. It therefore contends that amidst the sensationalist deliberations about expropriation without compensation of white-owned land, the opportunities for effectively advancing tenure security as well as other redistributive justice objectives that are already present in the Constitution have been obscured. Ultimately, it is essential for the public to pay keen attention to, and effectively address, the politics of traditional leadership and the transactions taking place concerning

land that is already beneficially occupied by ordinary rural people, a majority of whom are women and children. This is because these politics and transactions have thus far renewed the very foundations on which apartheid was built. They are thus essential if largely ignored dimensions of the substantially failed efforts at land reform in South Africa.

As the *Tongoane* case reminds us (in para. 79), rather than being complicit with apartheid-era structures and processes that, while labelled 'traditional', were re-engineered as instruments of domination and dispossession (Mandela, 1959; Luthuli, 1962: Mbeki, 1964), it is essential that laws promulgated to regulate customary communities take seriously the 'living' laws that predate them. These include fundamental principles of governance such as *Inkosi iyinkosi ngabantu/Kgosi ke gosi ka batho*, which give expression to democratic values and rights to choose that are also protected in the Constitution. That is partly what IPILRA sought to achieve. Although it has been ignored, it tried to ensure that the processes of consultation and consent that are embedded in vernacular law are respected in rural communities that were previously dispossessed under apartheid, in ways that are expressly inflected by the protection of rights enshrined in the Constitution. Of course, IPILRA is not enough on its own. Yet adherence to it might at least curtail the ongoing undermining of the slight gains that ordinary rural people have made through the country's transition from apartheid to democracy. The failure to do so is preventing both transitional and restorative justice from being realised in South Africa's traditional areas.

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