

**HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION AND THE ACCELERATION OF
FUNDAMENTAL CHANGE**

REPORT OF WORKING GROUP 2 ON LAND REFORM, REDISTRIBUTION, RESTITUTION AND SECURITY OF TENURE

ROUNDTABLE 2

“SPATIAL INEQUALITY AND SOCIAL EXCLUSION”

(Premier Hotel, OR Tambo Airport, Kempton Park, 6 September 2016)

1. INTRODUCTION

This session explored the extent to which post-apartheid laws and policies either transformed or entrenched the colonial and apartheid legacy of spatial inequality, which is one of the themes of Working Group 2. The invited experts were: Dr Wanga Zembe of the Southern African Social Policy Research Institute (SASPRI), Dr Sonwabile Mnwana of Wits University, Mr Mazibuko Jara of Ntinga Ntaba ka Ndoda and Mr Henk Smith of the Legal Resources Centre. Each of these presenters addressed an important aspect of the theme from their particular perspective and experience, and participated in Question and Answer sessions and the discussions which followed.

2. OVERVIEW OF ISSUES RAISED: DR WANGA ZEMBE (on Mapping poverty in South Africa: the enduring legacy of the former Bantustans in relation to current levels and forms of poverty)

- The presentation was on the spatial patterning of poverty from an income poverty perspective (as opposed to a multiple deprivation one, though previous work has found that there is a high correlation between the two perspectives).
- Poverty and deprivation are invariably spatially differentiated, especially in the RSA with the legacy of colonialization, segregation and apartheid, entrenched in statutes such as the Natives Act of 1939, the Group Areas Act and the Bantu Authorities Act.
- Indices from census data (2001-2011) consistently show the persistence of spatial differentiation in the form of social and economic segregation way into the democratic era, especially in respect of the former homelands. These areas carry the burden of poverty and inequality in the country. It should be noted that since 1994 the pattern has been one of persistent inequality rather than poverty (ie, while there is still poverty, there continues to be a rise in equality even when research records some decline in poverty).
- Research so far has largely expressed inequality at high levels of spatial segregation (national, provincial and even ward levels) while saying little about the lived experience of individuals. Current work attempts to make this dimension more visible by examining the relationship between inequality and poverty at small area level. (A note on methodology: poverty lines are used here, despite some reservations about whether there are not more realistic measures of poverty that can be employed. The lower bound poverty line is anyone below R604 per capita per month, and the upper poverty line is R1 130, inflated and updated for 2011).
- On the first chart which is an interquartile range by province is shown the concentration of wards by province and the concentration of poverty in those wards. The Eastern Cape (EC), KZN and Limpopo are at the high poverty rate end of the distribution. (Though this is of course predicated on income poverty, it is interesting to note that even when using multiple deprivation as a measure, the result is almost identical: the Eastern Cape and KZN – and a little bit of Limpopo – carry the burden of poverty). In the EC it is basically all of the municipalities in the former homelands, mainly Transkei and a little bit of Ciskei. Contrast this with Gauteng where poverty indicators are stronger in some areas (such as Alexander) which

rub shoulders with big pockets of wealth (eg Sandton). Similarly in the Western Cape (WC) where in Cape Town the contrasts are along the same lines.

- Comparing the former homelands with the rest of RSA: the homelands have an income poverty rate of 73% (using the lower bound income poverty line) and 82% (using the upper bound income poverty line). In the rest of RSA **excluding the former homelands** the numbers suddenly drop to 46% and 55%, respectively.
- Other findings show more persistence of inequality than persistence of poverty in areas such as Nelson Mandela Bay, Kouga, and Buffalo City while there are areas of “perfect equality” in Transkei, but this is the perfect equality of poverty – where poverty is so widespread that there is virtually no inequality.
- A new study in collaboration with the HSRC and the University of Liverpool in the UK examines, using quantitative and qualitative methods, the lived experience of inequality and how it affects people’s perceptions of the choices they have as to: where to live, where to work, where to walk, where to experience recreation and leisure.

3. OVERVIEW OF ISSUES RAISED: DR SONWABILE MNWANA (On The impact of the TLGFA and related traditional leadership laws in restricting people’s ability to exercise their rights and enforce accountability against traditional leaders: case studies of Bakgatla ba Kgafela and Xolobeni)

- The presentation is centred around mining, which in some areas has been on the go for decades while, in others, it has only recently expanded due to the platinum boom.
- The research on which the presentation is based has found: (i) significant resistance at village level to mining and to tribal authority; (ii) disputes over communal property, mainly land; (iii) disputes over political power; (iv) some revival of ethnic tensions, according to some observers. Reasons for this are not entirely clear – but they appear to have something to do with lack of development and with dispossession.
- Central part of the argument in the presentation is that this dispossession does not have a theoretical explanation yet. (Unlike the colonialists when they took the land, who had a slate of theories and justifications, such as the belief that Africans were at a lower rung of the evolutionary ladder and could thus not hold private rights to land, but could only have these rights held in trust on their behalf at some level of tribal hierarchy). Current policy as exemplified in legislation on traditional authorities and communal land appears to be still pursuing the colonial model since the consequences continue to be the same, and even worse in some cases.
- As more land is fenced off for mining operations there is significant dispossession, and the resistance being witnessed is due to the fact that power is structured in a particular way under current legislation. The TLGFA, CLARA, TCB all crystallise(d) power at the level of Traditional Authority, especially power over property, in a way that has no pre-colonial precedent.
- Given examples of traditional leaders (eg, in the Eastern Cape) who understand the nature of power over land and concede that they are not owners, why is it that as soon as there is interest shown in the land by mining capital this power is suddenly shifted and crystallised at the level of traditional authority? The answer must surely lie in theories that stress the social processes through which power over communal land is accessed, distributed and controlled (citing the work of Okoth-Ogendo).

- Two processes coincide with the expansion of mining into communal land: (1) *Re-tribalisation*, where the state has introduced pieces of legislation that significantly empower chiefs over communal property and has imposed tribal identities on people living within certain boundaries. In this model, the boundaries are apartheid boundaries within which some residents do not identify with the traditional authority concerned and in any case, whether they identify or not, they do not want the chief to have control of their property or to mediate any relationship between them and mining companies; (2) *Post-1994 redistribution*, through the Minerals Policy Reform which was seen as a positive move, by and large, which addressed past injustices particularly that of historical exclusion of Africans from ownership in mining structures. But the reality was that some communities were persuaded to convert royalties they were receiving from mining houses into equity stakes (the so-called “Bafokeng Model”) without much to show in terms of development
- The Bakgatla case study highlights the issue of lack of accountability and transparency and the resistance these defects foment. Briefly, the issue is illustrated by numerous calls for the traditional leader to be removed, the skirmishes in the High Court, and the role of law in decisions that have not empowered the people, including a series of cases where the community lost on the ground that they had no *locus standi*, and how these were eventually halted by the Constitutional Court.
- There are other examples of unredressed hardships, for instance in Limpopo, where Anglo American Platinum moved people by force and with woefully inadequate compensation, leading to new forms of marginalisation within the family. Because the mine sought out and engaged only with the head of household, the multi-layered rights over the land held by other members of the family were displaced. Such displacement is even more stark when relocation is analysed where, from the accommodating and facilitative customary law living arrangements (where siblings can live in the same homestead together with their spouses and families), the transition to a four-roomed house favours the one identified as head of household and leaves the other family members out in the cold. The plight of unmarried women living in the homestead must also be highlighted – despite the fact that they are the ones who use the land, the quest for a head of household means they cannot be listed as owners at home, nor can they get allocated a stand at the relocation site.
- One can thus conclude that: (1) Current legislation – in flagrant violation of living customary law - unduly entrenches the powers of traditional authorities over the rights of their subjects and in the process has created new forms of marginalisation thus exacerbating dispute and conflict; (2) RSA still does not seem to have a theory of land ownership that drives policy and legislation; (3) a shift is required towards recognition of different layers of rights and of the historical and existing character of shared power over land by individuals and different productive units in the home; (4) *because of the existing gap in current legislation in dealing with the forms of dispossession discussed here, it is recommended that mining on communal land be put on hold until a more sustainable, radical, redistributive and inclusive mining-led model is established for rural development.*

4. OVERVIEW OF ISSUES RAISED: MR MAZIBUKO JARA (On Tribal boundaries and identities put in place by the Bantu Authorities Act of 1951 on rural South Africans and the consequences for power relations and land rights in communal areas)

- Two quotes sum up the core of the presentation: from **Michel Trillont** on how legacies of the past (especially legacies of domination) continue to live because they get renewed in the present; and from **Westaway** who provides a way of theorising the land question (in part addressing Dr Zembe's concern) by referring to the notion of segregation as not just racial segregation, but actually the allocation of land in a particular territory and the specifications for its reserved use by certain people. Viewed in this way, 1994 did not signal discontinuity with segregation. "The Bantustan subject has not yet obtained citizenship, she is now a domestic tenant or a serf that is dependent for survival on the benevolence of the wealthy estate or those who are seen as custodians of tradition and custom.
- The presentation covers: *reintroduction since 1994 of a new apartheid geography based on colonial and apartheid thinking; *link with post-apartheid economic planning; *some positives from the Constitution; *analysis of government legislation on communal land and land reform; *crisis in rural government; the case of Ntamo v Premier of the Eastern Cape.
- Issue of boundaries clear from the maps provided: traditional councils (formerly tribal authorities) legitimised by TLGFA – their outer boundaries coincide almost exactly with the boundaries of the former homelands. Thus the Black Authorities Act is revived by the back door, via the TLGFA. "Those portions of the country that were reserved for designated African groupings in terms of the 1913 Land Act are still after 1994 governed distinctly and differently from the rest of South Africa" (Ashley?). In sum, 1994 amounted basically to institutionalised deracialisation but not necessarily democratisation.
- Is customary law the answer? Customary systems worked in particular ways with centralised power at the level of villages and bigger regions, but that centralised power was always subordinated to serve the colonial government and mining companies as they arose at the time. Also, one should not forget distortion. Whatever existed as customary law was perverted for example through the Natal Code of Zulu Law, or whatever George Grey did in the Eastern Cape through "villagisation". Add to that the forced removals of the apartheid era and dumping of people in reserves, and the homelands can be seen as "degraded commons" – whether the issue was overpopulation, overstocking or soil erosion.
- The point about government's economic planning is simply that, having started off with 13% of the land mass (already offering limited opportunities, despite talk of KZN and Transkei being agro-ecologically resourced) is its central logic. This seems to designate these areas as those in which to invest social welfare, not economic development or investment. Citing the example of the Chris Hani Municipal District, the spatial perspective that has shaped this kind of economic planning is the demarcation of strategic and non-strategic areas where, for instance, Kouga gets everything but the former homelands get nothing in terms of economic investment, thus enforcing the apartheid geography (confirming that the areas proven by Dr Zembe's statistics to be poor in fact remain poor).
- In contrast to this thinking, there are the opportunities opened by the Interim Constitution which began the dismantling of the homeland system and introduced proper dialogue between the notion of custom and the discourse of constitutional rights. (Cites research in Keiskamashoek and Msinga). These progressive developments have given impetus to women to achieve empowerment and relative autonomy.
- As to current legislation, the TLGFA is a major problem, especially sections 20 and 28. The confirmation of apartheid boundaries and the listing of 15 areas of responsibility of traditional councils (without clearly defined scope) lead to fears of a 4th tier of government which is not constitutionally sanctioned. The TKLB goes so far as to give powers to any government department to

delegate powers to a traditional council. The spectre of a 4th tier grows. And though CLARA was declared unconstitutional, it does mean there is still no clarity on communal land, and the Constitution's mandate is still not met. Basically the land tenure system that has emerged is fostering dependency and creates a particular power relationship in the context of collapsed land administration in some former homelands. These three pieces of legislation create a framework that is built on welfare, chiefs and headmen and distorted customary law which is a version of traditionalism.

- If one theorises this development in answer to Dr Mswana's question, one can see the traditional leadership system and rural governance framework as a system of social control (what may be characterised as neo-colonial indirect rule) which re-tribalises the countryside. (See Mamdani's "citizen versus subject"). What is completely absent in the discourse is a notion of thoroughgoing democratisation and transformation in the countryside. The case of Cala Reserve where the community are asserting their right to an elected traditional leadership thus raises a fundamental question: if people can assert such a right, what does that mean for councillors. These headmen are not necessarily paid and they enjoy a particular kind of legitimacy which is not based on party political legitimacy. (The case of *Ntamo v Premier* comes in here). **Secondly**, where there are minerals, as in the North West, Limpopo and parts of KZN the issue of ethnicity enters the picture. As the Comaroffs state: ethnicity has become incorporated as a basis for accumulation in a primitive sense. In fact one sees ethnicity as some re-introduced mode of production where there is a combination of cultural capital but combined either with mining or finance capital where culture is commodified. **Thirdly**, traditionalism takes us backwards away from the imperative to build a united nation that transcends divisions of the past because now conservative and reactionary discourses are being introduced in society in quite fundamental ways, including male-centered formulations of these discourses.
- All this surfaces the complication that is the crisis of rural elected government, where the weakest municipalities are also the former homeland municipalities. No doubt these would also match Dr Zembe's stats of the poorest municipalities.
- *At the end of the day we need to craft some careful recommendations that take into account violations of rights, as well as considerations about power and vested interests.*

5. OVERVIEW OF ISSUES RAISED: MR HENK SMITH (On The interface between the TLGFA and MPRDA in relation to mining deals on communal land)

- The presentation tries to look "for good things in law" in the sense that it seeks to empower communities to further their causes through law if they so wish. There is much excitement in noting that, despite setbacks, communities will seek to protect themselves through law if there is some structure and some opportunity to organise.
- The presentation also draws on work on a model law that involves five countries and several NGOs and which advances the notion that agency of communities and organisations can be promoted and enhanced, in place of the constraints of the common law, current statutory provision and mining vision. The presentation is, in this sense, an exercise in the art of the possible.
- Today's topic – the interface between the MRPDA and the TLGFA – is worth exploring because the shortcomings of these two statutes, and the failings of other oversight mechanisms, are central in understanding how community assets are getting diluted. One might tinker with these instruments to

render them more accountable, but this might not necessarily work for communities if it simply leaves intact the development path chosen by Anglo American for Rustenburg. In our view more needs to be done to transform and empower, and the key is **customary law** and the **constitution** which, working together, allow for a project that goes beyond tinkering with oversight mechanisms.

- This approach would answer the question: “how do we make it possible for communities to exercise choice, to participate, and how to ensure that it happens in an environment where there is a measure of structure, whilst also allowing for the creativity of all our institutions?” (In this context it becomes interesting to note that the MPRDA Amendment Bill currently with the portfolio committee was sent back because it was rushed through Parliament and not consulted upon with the NHTL, where the embedded issues of customary law may have received an airing).
- (In answer to a side question) – Referring the Bill back is both a good and a bad thing. Good because the President now seems to realise that there are customary law issues that were ignored in 2000 and 2002; that you cannot have a natural resources law without understanding the impact that it will have on customary law rights that govern people’s way of life and livelihood. Bad because despite this realisation, the opportunity has been missed in a response that gives chiefs too much power.
- One measure of the government’s legislative performance over the last 10-20 years is to look at the White Papers it has produced, which are a yardstick for assessing whether legislation has been achieving what it set out to do. A quote from the centrepiece: “**In particular the rights of members of group-based land holdings must be protected especially the process of inclusive decision-making in all matters pertaining to the management of the jointly-held land asset of all the rights holders or co-owners in the area so that they are in a position to decide about matters that will affect their land rights**” (page 18 paragraph 39). It is thus not acceptable for a chief, tribal authority or a committee to reject or accept proposals unless their view is based on a majority decision.
- This is the centrepiece of the Interim **Protection of Informal Land Rights Act (IPILRA)**, which is still the lodestar. In the 1995 discussion document (page 4 paragraph 8) the possibility of rural transformation is raised in the form of community participation in mining, while the White Paper of 1998 (page 5 paragraph 8) recognises the rights of workers and communities and emphasises the the high cost of mining to communities and the need for redistribution. The MPRDA departs from these principles.
- On extractivism, see page 8 paragraph 16: “extractive economic institutions give advantage to particular groups or enable rents to be captured and resources to be extracted on terms that benefit a few at the expense of the majority”, and again: “extractive economic institutions tend to be linked to exclusive political institutions which concentrates power in the hands of elites who maintain extractive economic institutions for their own benefit and to entrench their political power”.
- (In answer to a side question) The conclusion is that the MPRDA does not expressly require the consent of the community land rights holders prior to the granting of mining rights. If you do not have that bargaining position you cannot influence a decision to mine your land, you have to look for opportunities elsewhere: in this case, customary law. But guidelines to apply customary law are routinely ignored. (In 2015 the Director of Land and Rural Development in Limpopo denied knowledge of the guidelines and never tried to apply them to mining lodges, game farms etc.
- The MPRDA says all mineral rights vest in the state [Bafokeng example of model which enables chief to transact with mining companies and other entities without consulting the community, contrary to Tswana customary law]. This does not preclude the application of customary law beyond the framework provided by the legislation – on the contrary, customary law can be infused in the memorandum of incorporation of the company and into the common law. The CPA Act is a good example, a benchmark of good principle, recently blessed by the Constitutional Court.

- Finally, a summary of the shortcomings of the MPRDA, in the context of a confusing array of BEE models, housing and living standards, industry good practice of 2009 and the four sources of community participation in the legislation.
 - BEE – it is frustrating (simply codified CSI, never goes beyond 1% for the income year. Every country in the world does better than this, eg Chile. The prescribed 26% does not come to anything for the communities
 - Contending actors and conflicting rationalities. Weak and fragmented state, and probably corrupt state functionaries, even criminal organisation when one considers how some mining companies operate.
 - Communities and organisations which often choose to engage with the state and assert their demands through court challenges and in the streets rather than through dialogue and collaborative processes which are the foundation of customary law.
 - The idea of citizenship as entitlement and consciousness of rights, but not of responsibility
- Against all this, it is possible to conclude that there is enough substance in the constitution and in customary law to protect and promote. The message should be transmitted that these principles are available should communities choose to use law to advance their issues.

6. DISCUSSION

In a wide-ranging discussion which included questions answers, the following points emerged:

- It would be helpful if the data on poverty and inequality was extended to uncover any visible trends such as poverty along lines of gender, generation or race, and also to explain phenomena such as why poverty is deeper in the Eastern Cape than in Limpopo. A useful approach might be to drill down to mining areas and others with productive assets, and to discover if there is a link between employment/unemployment, wages and inequality. (The multiple-deprivation index would have been helpful here).
- The approach by the government and traditional leaders that customary law does not allow individual ownership is problematic. Part of the problem is that the whole “big picture” issue of how to integrate traditional leadership into a democracy is still a work-in-progress and has thus not been fully teased out yet. This links with the absence of theory that Dr Zembe decries. The *status quo* serves certain interests: thus, while some chiefs in the EC have openly conceded that they have no ownership rights over land, in other provinces they are sycophantically called owners by high government officials in what amounts to a web of corrupt accumulation networks. (This explains the establishment of the Ingonyama Trust days before the democratic dispensation). This faultline is set to grow wider if the TKLB (which includes a provision giving traditional leaders power to negotiate deals without consulting their communities) is passed.
- In this web of power and vested interests, how can it be proved that these powers (already bestowed, or mooted) have no pre-colonial precedent? Not only that, but what will constitute proof that the customary law on which such powers are ostensibly based is also being distorted? The answer lies in showing that these principles reside in living customary law and are thus part of South African law *today*, not as a historical curiosity. (Such proof is possible, with the aid of *some* history: see Nomboniso Gasa’s input about the EC House of Traditional Leaders opposing CLARA when that legislation was first unveiled; and other cases of African litigants challenging these interpretations as far back as the 1800s).

- On the subject of mining, consider the MPRDA. It places mineral deposits in the hands of the state. Right there, it wrests benefits away from the labour-forwarding areas. Further, the 26% percent empowerment portion specified in the Charter goes to the usual elites, leading to conflicts especially with unemployed youth. In a new move, mining companies then devise the approach of allocating the 26% to “communities”, who tend to be neither organised nor defined, making it easier for them to be represented by charlatans. Into this toxic mix, add corrupt bureaucrats, seeking their slice of the pie. This is the problem: legislation should seek to ensure that communities benefit directly (though the question remains whether 50 000 people can benefit under this model, when they have been dispossessed to the point where the areas in which they exist are getting increasingly food-insecure).
- There is also a need to refute the PR of mining houses that mining brings development to rural communities. When this PR is backed by roads, water and CSI projects it is important to bring information showing that, despite these apparent signs of “progress”, there is little real betterment of people’s lives. To put this another way, can the value of mining to the community be *quantified*? Taking the Bafokeng example, do the Bafokeng Stadium, tarred road, and Lebone Private School count as development? More to the point, how did the chief appoint the people to the Supreme Council who were later to approve the expenditure of R88 million for the stadium? (The answer is not in legislation, but in customary law so why did people allow it?)
- All these examples echo the theme of dispossession; the laws that perpetuate this (for instance, by ceding deal-making powers over communal land to chiefs) must be repealed. The Bafokeng and Xolobeni examples raise the question of what exactly the consultation requirements of customary law are: the former case in the face of Judge Landman’s retrogressive decision that customary law has not developed to the point of requiring consultation; the latter on the basis of the chief’s denial of any right on the part of the community to question his decisions, backed by a provincial government which has misconstrued his powers. These cases provide rich material for arguing for the inclusion of fundamental customary law requirements of multi-layered consultation in mining agreements. Such a push cannot be met by the retort that it is impossible to consult 42 villages. The issue is not about whether the decision maker is the kgosi or the council – it is about accountability. If there is a problem with the number of villages maybe there is a problem with the size of the unit. Communities that claim traditional status should be in a position to assert the customary law of the unit in enforcing accountability.
- Formalising prior and informed consent is important and the HLP should play a role in pushing parliament to do so. (Though this also sets up a tension with the option of litigation in that the parliamentary process of substantive and meaningful public participation may be set up against the right of communities to do the same). The tools already exist, in the form of the Constitution [section 25(6)] and IPILRA.
- Also, the issue of elected traditional leaders needs to be highlighted. The topical case of Cala goes back to 1883 and the events that followed in the wake of the Tembuland Commission and the issue of private title deeds. But it is not an isolated case: in the Free State legislation provides for elected headmen, as it in KZN where “iziphakanyiswa” may be appointed.
- This “counter narrative” needs to be aired and publicised. It involves the core elements of –
 - Distorted versions of customary law which deny the nuanced and layered individual entitlements over communal family and public land;

- Distorted versions of customary law which create an “uncustomary” regime of control of communal land by traditional leaders with no obligation to account to their communities about its use and the fruits of such use;
 - Customary law rights in favour of consultation with the community on matters involving their communal assets;
 - Elected traditional leadership as a historical and contemporary fact;
 - The removal of apartheid boundaries as the basis of chiefly power and jurisdiction. The National Party mythology now sought to be smuggled into legislation flies in the face of rich historical data to the contrary.
- The High Level Panel is well placed to create the space for these issues to be aired.

7. LEGISLATION REFERRED TO IN SUBMISSIONS

TLGFA; CLARA; MPRDA; IPILRA; CPA Act; TKLB; TCB; Free State Act; KZN Amakhosi and Iziphakanyiswa Act; Natives Act 1939; Group Areas Act; Bantu Authorities Act 1951; Glen Grey Act 1894; Communal Land Tenure Bill; Ingonyama Trust Act.

8. RECOMMENDATIONS

- **Legislation should be enacted to deliver the benefits of mining or other productive activity on communal land directly to communities.**
- **The High Level Panel should use its position to influence the opening up of spaces for the “counter narrative” to be heard, so as to confirm the existence of opposition to corrupt and illegal practices and what arguments are entailed in such opposition.**
- **Reverse the use of Bantustan boundaries as the basis for the jurisdiction and authority of traditional leaders over rural communities, to clear the way for voluntary affiliation.**
- **Declare a moratorium on mining on communal land until a more sustainable, radical and inclusive, mining-led, redistributive rural development model is established.**
- **Repeal the Ingonyama Trust Act**
- **Oppose the expanded powers proposed for traditional leaders in the TCB and the TKLB**
- **Legislation should be passed which takes as its starting point the identification and infusion of customary law principles into the governance of rural communities, especially with respect to the management of communal land, transparency and accountability around decisions for its use, and the rights of communities to be properly consulted prior to the making of such decisions. Such legislation should build on emerging jurisprudence and the work of social movements in this area.**