Legal Pluralism, Capital and Democracy

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Meneer de Rector Magnificus,
Dames en Heren,
Ladies and Gentlemen,

1. Introduction

Recent decades have demonstrated the continued relevance of traditional rule systems and customary law for the regulation of the lives of citizens in the Global South. Most of these citizens navigate family relations, access to natural resources, and settlement of disputes through customary law as administered by family heads, elders and traditional leaders. The state legal system is often a much less direct instrument of governance in their lives. Statutory laws are less well known, state courts harder to access, and attempts to enhance knowledge, access and preeminence of state law institutions have often had limited impact. Customary systems, with tribal leaders and unwritten customary laws, were supposed to disappear with modernity, but are undergoing a resurgence in various regions of the world, such as Indonesia (Davison and Henley 2007) and Canada and Australia (Tobin 2014) and Sub-Saharan Africa (Englebert 2002:51-64; Oomen 2005:1-9; Ubink 2007).

This continued relevance and prevalence of non-state justice systems poses serious governance challenges to sovereign states. How to effectively govern a country where each locality has its own norms, leadership structures and dispute settlement institutions; where many relations and rights are regulated by customary law? These questions are further complicated by the distortions wrought on traditional rule systems during the colonial and postcolonial period that have impacted negatively on traditional rule systems' legitimacy. Traditional authority and customary justice systems originated in the pre-colonial era when land abundance and mobility formed a check on the behavior of chiefs, whose power depended on the number of their followers. Dissatisfied groups or individuals could break away from a chief and move elsewhere. In the colonial period, these systems have been heavily distorted, largely due to their inclusion in direct and indirect forms of colonial rule. Also in the post-colonial period, state recognition of traditional leadership has led to new "processes of reordering and transformation" (Buur and Kyed 2005:15) and donor engagement with customary justice systems has been critiqued for increasing inequality through the imposition of elite versions of customary justice.

It is now quite commonly accepted that customary law and traditional rulers are here to stay. However, traditional authority and customary justice systems are now to function in very different contexts, as part of broader nation states with democratically elected leaders and often democratically elected local government, ostensibly committed to inclusiveness, such as regarding women, in a strongly globalized world. And characterized by capitalist economies instead of subsistence economies. In fact, many of the globe's most valuable resources and most vulnerable communities are governed by traditional rule systems. This confluence of tradition and modernity leads to all kinds of pertinent questions: How do non-elected traditional authority structures relate to and coexist with elected, decentralized local government structures? Can male-elderly leadership based on ethnicity – which is still the norm in most traditional rule systems – be reconciled with the idea of inclusive democracy? How do customary justice systems that used to regulate communal resources in pre-capitalist societies operate in capitalist societies where access to land and natural resources provide huge money-making opportunities? What role do international entities and norms play in the regulation of customary justice systems? One can think here for instance of the influence of large foreign mining or biofuel companies on land relations, but also of corporate social responsibility norms and international human rights norms on local processes and negotiations.

These questions are the topic of my talk today. While they have a wide relevance for the Global South, I will explore them for Africa, where most of my research has been focused. The talk is organized as follows. First, I will explain the field of legal pluralism, where my academic work is squarely located, and discuss the main debates that have characterized it. Then I will describe the resurgence of tradition in Africa since the 1990s, provide an overview of colonial and post-colonial distortions to African traditional rule systems, and finally, turn to the present-day context in which these 'traditional' institutions are to function, focusing on democracy and capitalism. I will illustrate these issues through a discussion of South Africa. I will conclude with an appeal for a research agenda to more thoroughly explore what role traditional rule systems can play in contemporary democratic, capitalist societies.

2. Legal Pluralism

Legal pluralism is generally defined as the presence in a social field of more than one legal order (Griffiths 1986:1; Merry 1988:870). One can think of state law, religious law such as Islamic law, customary law and the normative orders of various social fields. It builds on the thinking of Ehrlich, who coined the term 'living law' to explain how legal norms may arise outside or independently of the state (Ehrlich 2002:493). The concept of legal pluralism was originally established as "a sensitizing concept" responding to legal centralism, i.e. the ideology that law is and should be the law of the state and that other normative orderings are hierarchically subordinate to state law (Von Benda-Beckmann 2002:37; Griffiths 1986:3). It was also a response to classical legal anthropology, which until the 1950s or 60s tended to concentrate on small, isolated, untouched societies. Researchers approached the customary legal systems of these societies as autonomous legal systems, largely disregarding the colonial government and its actors and thus unconcerned with any interaction between state and local normative systems and the resulting complex normative structures (Von Benda-Beckmann 1996:740).

The term legal pluralism was thus coined to put the issue of competing legal orders center stage. Originally, studies of legal pluralism focused on the relationship between state law and customary law in former colonies. Now it is widely recognized that "virtually every society is legally plural" (Merry 1988:873). As Engel (1980:427) explains, all societies display a divergence between 'law in action' and 'law in the books' and "there is evidence that the divergence is not random or haphazard but systematic." Studies of legal pluralism now include such diverse fields as the New York garment industry (Moore 1973), farmers and cattle ranchers (Engel 1980; Ellickson 1994), prisoners (Gómez 2018), sumo wrestlers (West 1997), and stand-up comedians (Oliar and Sprigman 2008).

In the decades following the introduction of the concept of legal pluralism, two interrelated theoretical controversies dominated the debate. These centered on the definition of law and on whether legal pluralism should be understood as a juristic or as a comparative-analytical concept. In the first debate, "étatists" argued that only normative orders emanating from the state could be considered law. On this basis, they rejected legal pluralism as a concept. Legal pluralists asserted that non-state normative systems can also be labeled law. They pointed out that state law is not the dominant normative order always and everywhere, and that it does not differ so fundamentally from other forms of normative ordering that any comparison between state and non-state normative ordering is prima facie faulty (Von Benda-Beckmann 1996:743-4; Tamanaha 1993). Griffiths (1986:4) articulates that "(l)egal pluralism is the fact. Legal centralism is the myth, an ideal, a claim, an illusion."

This debate is closely connected to the distinction between what has been called weak and strong legal pluralism. The first term, weak legal pluralism, refers to a situation wherein the state recognizes more than one normative system as law. The latter, strong legal pluralism, describes a situation where, regardless of recognition by the state, multiple

normative orders exist and exert authority over people's lives (Vanderlinden 1989; Griffiths 1986:5-8; Woodman 1996:157-8). Legal pluralists point out that, "[f]rom an empirical point of view, it is inadequate to regard the state as the sole source of normative ordering" (Corradi 2012:90). Weak legal pluralism may be the formal rule in many countries; the empirical reality is one of strong legal pluralism (Himonga et al. 2014:47). Therefore, the "jurisitic" view of legal pluralism cannot serve as an analytic framework for comparative socio-legal research as it establishes a priori the relationship between state law and other law, instead of treating this as an empirical question.

The focus of studies in legal pluralism is on "the dialectic, mutually constitutive relationship between state law and other normative orders" (Merry 1988:880). Moore (1973) advocates approaching a research field as a 'semi-autonomous social field', as this will draw immediate attention to interconnections of the social field with other social fields and the larger society. This approach emphasizes that individual behavior and processes of interaction, struggle and negotiation within and between semi-autonomous social fields determine what the law effectively is at a particular time and location (Griffiths 1986:36).

Legal pluralism provides justice seekers with a choice of normative systems and related fora, within the restrictions of the social, cultural and political contexts in which justice seekers operate. The threat of forum shopping and the cumulative effect of litigant choices affect forums and press them to accommodate justice seekers' preferences and demands (Hoekema 2004:21-2; Merry 1988:883). Keebet Von Benda-Beckmann (1981:117) details how situations of legal pluralism not only provide opportunities for justice seekers to shop for fora, but also for fora to be selective of which cases they want to hear in order to pursue their local political ends.

The studies mentioned thus all reject dualistic distinctions between state law and non-state forms of ordering in favor of dialectic analysis of their interrelations. De Souza Santos (2002:437) speaks of 'interlegality', to denote that people experience the various normative orders as "different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions." Vernacularization (Merry 2006), and hybridity (Lemay-Hébert and Freedman 2017) are other terms that have been introduced to describe these interrelations.

If it is the interaction between state law and other forms of normative ordering that shapes the legal experiences, perceptions and consciousness of people, and that determines positions of individuals and institutional actors in their dealings with one another, it follows that the impact of state regulation of customary law and customary dispute settlement institutions is an empirical question. Introducing new state legislation often has different outcomes than expected or intended, as it may add a new layer of normativity to the existing (plural) normative structure. Laws and norms emanating from the state can be mobilized by institutional actors and justice seekers as resources in the negotiation of local law and social relations and for challenging or consolidating power relations (Corradi 2012:93-6; Oomen 2005:211-2). As such, "[m]uch that is new co-exists with and modifies the old, rather than replacing it entirely" (Moore 1973:742).

General acceptance of the concept among lawyers and social scientists only happened at the end of the twentieth century, when the expansion of globalization and the proliferation of international and transnational law started to take on dimensions that clearly refuted the argument that nation-states are the only legitimate source of lawmaking. As a corollary, opposition against the notion of legal pluralism within national legal systems and at sub-national level also dissolved (Von Benda-Beckmann & Turner:4; Levitt and Merry 2009).

As said, within this field of legal pluralism, my work focuses on the relationship between the state and customary justice systems in Africa.

3. A Resurgence of Traditional Authority and Customary Law in Africa

After independence, many African governments tried to curtail the power of traditional leaders ruling on the basis of customary justice systems. They saw them as remnants of colonial rule, dividing their country into ethnic tribes, and thus as impediments to modernization and nation-building (Kyed and Buur 2007:1). While customary law was recognized in many African countries as a source of law, there was a clear tendency in some legal fields to see it as temporary, to be slowly modernized and taken over by state law. This "replacement paradigm" was for instance quite prominent regarding customary land rights. Since the 1990s, this has changed quite dramatically. In a 'resurgence of tradition' (Englebert 2002) numerous African states have enhanced and formalized the position of traditional leaders in their legislation and constitutions, past kingdoms have been restored, and Councils or Houses of Chiefs created. Englebert (2002:54) sees in these and other union-like structures – that have also forged international links amongst themselves – 'the rise of chiefs as a class'. Donor organizations have also displayed more and more interest in traditional leaders, increasingly treating chiefs as legitimate local counterparts in development programming and providing grants to traditional funds. In addition, rule of law programming as well as transitional justice programming now became increasingly interested to engage with customary justice systems (Branch 2014; Sage and Woolcock 2006).

Some scholars connect the resurgence of chieftaincy to weak or failing states, with traditional leaders seen as "the only remaining and functioning form of social organization" (Lutz and Linder 2004:4). In reality, however, the level of resurgence of tradition seems to be quite low in weak states. Rather, it is relatively strong states with a functioning state apparatus that have witnessed some of the furthest-reaching restorations, alongside democratic local government institutions (Englebert 2002:56-8; Kyed and Buur 2007:5-8). Governments may decide to formalize or enhance chieftaincy for various reasons: (i) to expand and improve the chiefs' role in local service delivery and execution of administrative and governmental tasks; (ii) to better reach the local populace via the chiefs' intermediate position between the government and the local population, and to use its mobilizing potential for developmental and democratic projects; (iii) to prevent resistance against state measures from reluctant or antagonistic chiefs; and (iv) to strengthen government by integrating tradition into the space of governmental power as a symbolic, legitimizing discourse. In sum, the restoration or enhancement of chieftaincy is hoped to make the state more relevant, legitimate and effective (Ubink 2008:13-5). In addition to these rather benign motives, governments (and political parties) may also pursue chiefs for more political and economic motives, viz. in the hope of their help with bringing in the rural vote and to gain access to local natural resources via the position of the chief.

The resurgence of chieftaincy has been aided by democratization, decentralization and liberalization. These processes have opened up new public spaces for traditional leaders and their involvement in law enforcement, dispute settlement, service provisioning and development programming. In addition, these processes distanced the state from the people, which facilitated the resurgence of tradition as an alternative mode of identification (Buur and Kyed 2007; Englebert 2002:58-60; Ubink 2008:14).

Foreign aid was a leading factor in the push for democratization, decentralization and liberalization. Donor organizations and international institutions further impacted the resurgence when they started to display a renewed interest in traditional leaders, whom they saw as suitable, legitimate local counterparts with the capacity to mobilize their population. This is visible from the increasing interaction between donors and chiefs, the attention to traditional authorities at donor-sponsored conferences, as well as to the actual involvement of chiefs in development programming

and the provision of grants directly to traditional funds (Englebert 2002:60; Ubink 2008:11). Since the beginning of the 21st century, we also see an increased interest in customary law in legal development programming. In the early 1990's, law regained an important role in development cooperation. Rule of law programming first largely focused on state legislation and formal institutions such as the judiciary, courts, prosecutors and police (Carothers, 2006; Trubek and Santos, 2006). When it became increasingly clear that interventions in this 'rule of law orthodoxy' (Upham, 2002: 75) had limited impact on development, the blame was laid, inter alia, on the top-down character of law reform projects and their minimal consideration of local contexts and donors' focus on state institutions and norms (Van Rooij, 2012). Responding to these critiques, legal development cooperation then shifted course and aimed to base rule of law programming on the poor's needs and preferences. This included a focus on the users of justice systems rather than legal institutions – embodied in terms such as 'access to justice' and 'legal empowerment' – as well as an increasing interest to work with customary justice systems.

In the field of transitional justice, we see a similar evolution. Transitional justice interventions are increasingly critiqued for their top-down, externally driven approach, detached from local realities and with limited impact on local populations. This resulted in a search for more participatory, bottom-up strategies responsive to local needs and perceptions (Horne 2014; Lundy and McGovern 2008; Robins 2012; Sharp 2013; Ubink and Rea 2017; Waldorf 2006). This new approach emphasizes that the legitimacy and effectiveness of transitional justice mechanisms rests on their embeddedness in and resonance with local norms and values and rituals (Baines 2010; Oomen 2007). As a result, it advocates the inclusion of customary justice mechanisms in transitional justice approaches.

The above shows that there is an increased realization among African governments as well as international donors that traditional leaders and customary justice systems will remain relevant in contemporary African states, with a role in both local governance and national politics, as well as rule of law and transitional justice programming. But these systems, which have their origins in the pre-colonial period, have been heavily distorted in the colonial and post-colonial era, and are now to function in very different contexts. I will now turn to these aspects. For this we need to go back in history.

4. Colonial interaction and interference with traditional rule systems

Traditional rule systems in African pre-colonial societies varied widely, but usually the power of chiefs was circumscribed by a council of elders, representing the major factions of the community, whose support the chief needed to make important decisions. A chief's strength and influence was determined by the number and loyalty of his followers, who would pay tribute in the form of a portion of the first harvest or of hunted or slaughtered animals, who would provide labor for the chief's farm, and who would fight other chiefs or clans with their leader. The abundance of land in the pre-colonial period meant that people dissatisfied with the administrative style or decisions of their chief could quite freely move and settle elsewhere, aligning themselves with another chief or chief-less group. While the position of chiefs was in most places hereditary, this often did not entirely eliminate competition between chiefs. Peires (1977) describes how this provided a chief's councilors among the pre-colonial Xhosa with their most important weapon, viz. the ability to dismiss a chief and have him replaced by a rival.

While careful not to conjure up an imaginary past of equitable, well-balanced, inclusive traditional communities – a version of history convincingly refuted for instance in McCaskie's oeuvre (including McCaskie 1992, 1995 and 2000) about the Ashanti Kingdom – it is undisputed that colonial rule watered down the existing checks and balances. Chiefs' positions

became dependent on colonial recognition (Van Rouveroy van Nieuwaal 1987:11). As a result, the local attachment of the chief and his final accountability to his community gave way to his responsibilities and loyalties towards the government. Colonial governments also distorted the traditional checks and balances in other ways. A case in point is the abolition of the position of *Nkwankwahene*, the elected representative 'chief' of the commoners, by the Ashanti Confederacy Council – supported by the British – in the 1940s in the Gold Coast (present-day Ghana). In Ashanti, sub-chiefs and elders were restrained in their criticism of the traditional administration due to their proximity to the chief. It was therefore the role of the *Nkwankwahene* to infuse the views of the masses in traditional governance, for instance regarding installation and deposition of chiefs, and to act as a channel for common discontent (Busia 1951: 10, 215-6; Wilks 1998:159). Worried about the disruptive potential of frequent actions by commoners against chiefs who were abusing their position, the British government supported the abolition of the channel, rather than addressing the causes of the popular discontent (Ubink 2011).

While under colonial rule traditional leaders lost their independence and found some of their powers circumscribed – prominently among those their 'judicial' powers – they also became more powerful vis-à-vis their subjects. They were given new tasks by the colonial governments regarding labor (the recruitment of contract laborers in countries with white settlers and the organization of communal labor for infrastructural and other projects), taxation, compulsory crop cultivation, and/or recruitment for the army. Such delegated tasks made the chiefs unpopular and negatively impacted on their local legitimacy (Crowder 1978). For instance, in South-West Africa (present-day Namibia), the German occupiers concluded treaties with traditional leaders in the north of the country for the recruitment of contract labor for German-owned mines and commercial farms. This brought enormous material benefits for the chiefs "who employed their absolute authority to maximize their profits" (Keulder 1998:39-40). Contract labor also contributed to the breaking down of traditional norms and authority because returned laborers, influenced by the European life and with money in their pockets, increasingly questioned the local political, social and economic order in their home communities (Soiri 1996: 40-42). In the last stages of colonialism, during the height of the struggle for independence in Africa, traditional authorities were mobilized to oppose full independence and the educated African elite fighting for it, which again diminished their local standing and legitimacy.

Another consequence of colonial interference was the marginalization of women in traditional rule. The colonial rulers' gender ideology was not in consonance with the existence of powerful women. Further, they perceived a strong need to maintain the authority of male elders over women and youth to ensure social order and stability (Merry 1991). This extended to the colonial governments' relations with traditional leaders. Becker (2006:178) describes how in the Owambo kingdom of Ongadjera (present-day Namibia) colonial tribal authority "evolved into all-male domains", when women leaders were all but purged from the local traditional arena and women were largely excluded from participation in traditional courts.

5. Post-colonial state interaction and interference with traditional rule systems

The above makes abundantly clear that colonial rule had a considerable impact on non-state normative orderings. Also in post-colonial Africa, state interaction with customary justice systems affected the nature and power of these systems. The regulation of traditional authority structures and customary justice systems is intertwined with questions of political power and state sovereignty, control and subjugation, integration and exclusion. The increased recognition of customary norms and traditional institutions is informed by political interests.

It provides governments with an opportunity to consolidate local power and mobilize votes, to form or strengthen alliances with strategic local actors, and to increase reach, relevance and popularity of the state through linkages with the traditional rule system. State recognition of non-state normative orderings never entails a wholesale acceptance of these systems without conditions or exceptions. It is usually partial, conditional, and meant to make the customary order governable, subordinate, and in line with certain normative values of the state. Particularly in weak states, a role for the state in the recognition of chiefs and the determination of the 'real' chiefs, can be an important part of the production of the state as a legitimate authority (see for instance Buur and Kyed 2005:19; Kyed 2018; Seidel 2018; Leonardi et al. 2011).

Recognition is not without dangers to the traditional institutions as alignment with states with limited legitimacy may impact negatively on them, and a role for the state in the determination of the rightful traditional leaders may diminish the flexibility of the position (Buur and Kyed 2005:26: Ubink 2018a). Nevertheless, non-state actors are often interested in policies of recognition and the forging of stronger ties with the state, which they aim to use to consolidate and expand their power. Opportunities to do so manifest themselves when no attention is given in the recognition process to local checks and balances, i.e. to regulating the relationship between the traditional leaders and the community members. For example, when Mozambique introduced legislation in 2000 (Degree 15/2000) that recognized local leaders as community authorities with a wide range of tasks – including administrative and governmental outreach, nation-building, rural development, civic education, and upholding local customs and cultural values – the Decree stated these tasks should be carried out with participation from community members, but omitted any mention of the terms for the relationship between chiefs and community members. Buur and Kyed (2005:15) condemn such oversight as "[b]ased on a social ontology of unproblematic group ties". Another example can be found in the Traditional and Khoi-San Leadership Bill in South Africa. This Bill proposes to give traditional councils wide powers to enter into partnerships with "any person, body or institution" (including mining companies) with no obligation to obtain the consent of, or even to consult, the people whose land rights and lives are the subject of such partnerships.

The neutral term recognition – which implies wholesale acceptance of existing norms and structures – thus masks state intervention, regulation and reform, and will inevitably entail a reordering and transformation of authority and power (Buur and Kyed 2005:15; Kyed 2009: 89; Ubink 2018a; Weilenmann 2005: 5).

6. Donor engagement with non-state normative systems

I have described how the colonial and post-colonial state impacted on traditional rule systems and on their checks and balances and local legitimacy. I also mentioned earlier the that donors increasingly started to engage with traditional leaders and how legal development cooperation is increasingly focused on customary justice systems. This engagement often profoundly affects the nature and functioning of these systems. Approaches and expectations of donors and development agencies do not often allow for the amount of research required to gain in-depth knowledge of unwritten customary justice systems, with their geographical variation and local contestation, and local power relations (Harper 2011). Development agencies' imperatives of measurable outcomes, quality control, and working at scale, furthermore leave little leeway for differentiation on the basis of variances in local contexts and their inherent complexities (Sage and Woolcock 2006: 4-9). In addition, donor and development agencies often lack knowledge about the different versions of customary law, the negotiable nature of customary justice, and the power differentials involved in defining customary law (Ubink 2018b). As development agencies increasingly

see 'local ownership' as an important prerequisite for local legitimacy and acceptance, development programming often works through local actors. But which local actors are those? Uncritical acceptance of traditional authorities as community representatives and custodians of customary law, overlooks other, subaltern versions of customary law in the locality and may lead to the adoption of a male-elderly elite representation of customary law (Ubink and Van Rooij 2011). This can be illustrated with the Land Administration Program in Ghana, a heavily donor-sponsored program aimed to enhance the functioning and effectiveness of Ghana's land administration. While this program was ostensibly designed to provide greater certainty of customary land rights for ordinary users (World Bank 2003), smallholders were excluded from the newly formed customary land secretariats. These secretariats were placed squarely in the hands of chiefs. In the end, the programme "sanction[ed the chiefs'] ability to generate substantial profits from the disposal of land, over which the original land users [the smallholders] exert legitimate claims… This [had] the perverse effect that people are disenfranchised rather than empowered" (Ubink and Quan 2008: 210).

Also in the field of transitional justice, reality has proven complicated and programming that aimed to include customary justice mechanisms have received heavy criticism for operating from a myth of community consensus and ignoring, and as such entrenching and reproducing, power differences within communities. Branch (2014) coins the term 'ethnojustice' for this phenomenon, when describing the donor and government-sponsored retraditionalization that took place in northern Uganda through the imposition of a male-dominated version of customary justice.

7. 'Traditional' institutions in present-day society

Several African countries envision a continued role in their contemporary nation-states for traditional authorities and customary law. States' interest in formalizing traditional leadership may stem from ideas of state efficiency and legitimacy; from political considerations regarding a class of sometimes quite powerful actors possibly with influence over the rural vote; and from economic considerations about traditional leaders' access to natural resources. Official arguments often include that rural inhabitants have little access to state courts and bureaucracy and will thus benefit from a recognition by the government of their local leaders, dispute settlement institutions and normative systems. I have described, however, how traditional authority and customary justice systems originally functioned in a pre-capitalist, pre-nation state era, and have been severely changed and distorted during the colonial and post-colonial eras, and lost much of their legitimacy as a result. This implies that a central role for such institutions in contemporary Africa is not straightforward. How are they to function in contemporary capitalist democracies? Societies with large economic opportunities connected to access to customary land, resulting from urbanization, agricultural commercialization, and mineral resource mining. And where chiefly recognition, natural resource management and electoral politics are intricately connected. Let me illustrate this with the case study of South Africa.

1.1 *South Africa*

In South Africa, the colonial and apartheid period left a strong imprint on the legitimacy and accountability of traditional leaders and on the formation of customary law. The powers of senior traditional leaders were deliberately miscast, ascribing them extensive decision-making powers over all aspects of their subjects' lives, including their land, in order to manipulate and control the institution of chieftainship to further "indirect rule" in South Africa (Delius 2008:213; Myers 2008:2), and later to prop up the apartheid government's creation of tribal "homelands". Traditional leaders became government-appointed public servants, and gradually began to rely more on their alliance with the colonial government than on popular support in order to remain in power (Maloka and

Gordon 1996:40). The forced movement of large numbers of people into homelands and under a chief compounded issues of legitimacy and accountability.

The roles and functions of traditional rule systems have been hotly debated in South Africa since the transition to democracy in the beginning of the 1990s. To the surprise of some, as part of the political negotiations traditional leadership was carried into the new dispensation and recognized in the 1996 Constitution, although subject to the Constitution and "according to customary law" (Oomen 2005). To reckon with the strong contestation of traditional leadership and customary law, the recognition of traditional leadership was to be combined with several mechanisms aimed to right the wrongs and distortions wrought on the institution by colonial and apartheid administrations. These included land redistribution and the settlement of chieftaincy disputes and claims. In addition, the newly created Constitutional Court established in a number of decisions that 'living customary law' would trump official versions of customary law as found in apartheid-era codifications or case law (Claassens and Budlender 2016).[1]

While these attempts to undo the colonial and apartheid distortions of customary law and traditional leadership institutions are far from concluded, and the institution of chieftaincy remains highly contested, the last decade or so parliament has introduced legislation that centralizes the power of senior traditional leaders without defining the responsibility and accountability of these chiefs vis-à-vis their people, or checks and balances on their functioning. These legislative instruments draw heavy criticism and opposition from rural communities and civil society, as evidenced amongst others in parliamentary hearings and court cases. The High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, led by former president Kgalema Motlanthe, (hereafter High-Level Panel) in its report castigates the lawmaker for its failure to "dismantle the apartheid and Bantustan [homeland] boundaries that enclosed people in constructed and imposed units of identity. Instead of scrapping the apartheid model of traditional leaders as state employees in charge of often artificially constituted communities it was decided to retain it with a few minor changes. As a result [people's] rights to exercise customary affiliation and to demand accountability from their leaders are neutralized" (High-Level Panel 2017: 488).

The centralization agenda in South Africa is clearly connected to the political power of chiefs, which is increasingly coveted now that South Africa is transforming from a de facto one-party state to a competitive multi-party democracy. Over time, the ANC started to see the traditional leaders more and more as key allies, particularly after the election of Jacob Zuma as ANC President in 2007.[2] Chiefs are a vocal interest group and are thought to have an influence over the voting behavior of their people. In addition, politicians are coveting the gateway to land and natural resources that chiefs present via their custodial authority over land belonging to traditional communities. According to Friedman, land is at the center of the attempts to strengthen the power of chiefs: "a key aim of the government-traditional leader alliance is to make sure [land] deals can be made without giving residents a say".[3]

These latter two issues – votes and land management – are intricately connected, though, and while the vote-broker power

1 See for example *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC); *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC); *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC); *Gumede (born Shange) v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC) and *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC).

2 Cf. Ed Stoddard, *Protests test traditional authority on South Africa's platinum belt*, Reuters, 20 September 2017, https://www.reuters.com/article/us-safrica-platinum-insight/protests-test-tribal-authority-on-south-africas-platinum-belt-idUSKBN1CD06E, last accessed on 2 January 2019.

3 Steven Friedman, "South Africans in rural areas are saying 'no more'. Why it matters." The conversation. 8 November 2017.

of traditional leaders has often been eluded to (De Kadt and Larreguy 2014; Beall, Mkhize and Vawda 2005, 763-4), it is exactly the chiefs' role in natural resource management that is currently making them highly unpopular in many areas. As a result, chiefs are now described by some commentators as a liability in some rural areas, losing votes rather than bringing them in. Friedman for instance describes how the ANC in the 2016 local elections suffered setbacks in provinces with traditional communities living in former homelands, up to an 18 percent decline in North West province: "where the 'state capture' is, according to researchers, most pronounced".[4] Steinberg prophecies that a political party that wants to get the rural vote "should come out against unholy alliances between chiefs, corporations and politicians and argue that tenure vests in individuals and families and the associations they choose to form.[5]

1.2 *Two struggles*

A high-powered struggle over chiefly authority that is currently unfolding in the nexus of vote brokering and natural resource management – and which gives us insight into politicians' attitude towards traditional leaders – concerns the High-level Panel. In its report, this panel recommends to repeal the Ingonyama Trust Act and to transfer ownership of all lands that now vest in the Ingonyama – the Zulu royal house – as trustee, to the national government or some other body designated for this purpose. As the Ingonyama Trust (IT) is a source of substantial income for the Ingonyama,[6] this has led to strong resistance from the Zulu king and his entourage, with King Zwelithini declaring those who want to dissolve the trust the 'enemy', and threatening war, secession, and a voter boycott in the 2019 elections if IT land would be "expropriated". Both these antics of the Zulu king and the IT itself were heavily critiqued in the press, for "stray[ing] back to a South Africa many had thought to be in the distant, and unmourned past"[7] and for being "an anachronous system that harks back to feudal times - even though it was conceived in the dying bastardy of apartheid"[8]. Despite this negative media assessment and the fact that the recommendation of the High-Level Panel is based on extensive evidence gathered via commissioned research as well as roundtables that the IT management of the land seriously infringes on the tenure security of rural dwellers for the benefit of the Zulu royal house, President Ramaphosa hastened to meet the king to distance himself from the High-Level Panel report and assure him that his government has no intention to take the land of the trust.[9] This marked quite an about-turn for the ANC which in the period leading up to this incident had made some strong comments that communities and community members would get title deeds for their land and that traditional leaders should not be seen as the owners of communal land, suggesting that they "were intent on making land rights a reality for the rural poor".[10] This example thus clearly highlights the interconnectedness of natural resources, chieftaincy, and electoral politics.

Another conflict-ridden field with a strong nexus between traditional rule, capitalism and democracy concerns mining on the former homelands of South Africa. This field is

4 Id.

5 Jonny Steinberg, "DA will have to get rural savvy to win 2019 poll", Business Day, 2 September 2016, http://www.bdlive.co.za/opinion/columnists/2016/09/02/da-will-have-to-get-rural-savvy-to-win-2019-poll, last accessed on 4 December 2017.

6 For the period 2015-2016, a rental income of R96.130.563 is reported by the High-Level Panel (page 275).

7 "Is Ramaphosa willing to sacrifice our rights to the Zulu king's blackmail?", editorial, Sunday Times, 8 July 2018.

8 Lebogang Seale, "Bowing to the Zulu king over Trust a mistake", The Sunday Independent, 8 July 2018, https://www.iol.co.za/news/opinion/bowing-to-the-zulu-king-over-trust-a-mistake-15901385;

9 *Daniel Friedman and ANA,* "Zwelithini threatens Zulus will leave SA and take KZN with them", The Citizen, 4 July 2018, https://citizen.co.za/news/south-africa/1969893/zwelithini-threatens-zulus-will-leave-sa-and-take-kzn-with-them; Sibongakonke Shoba and Bongani Mthethwa, "Ramaphosa bends the knee to Zulu king on tense land issue. President 'distanced himself' from report on contentious trust", Sunday Times, 8 July 2018; ANC 'not anti-Zulu monarch'.

10 Clive Ndou, "ANC about-turn. ANC has failed to make a real impact among rural communities and so is forced to placate the Zulu king to ensure rural support", The Witness, 11 July 2018.

characterized by a complicated legal pluralistic landscape of customary governance and authority structures, 'corporatized traditional authority' (cf. Comaroff and Comaroff 2009; Cook et al. 2011; Capps 2016) and state legislation governing mining, traditional authority and Black Economic Empowerment. The extractive industry has a profound impact on customary land dynamics in South Africa. Mining is the country's biggest foreign income generating sector and is largely situated in the former homelands, which are still occupied by what post-apartheid law terms 'traditional communities', governed by customary law and common law. Several studies show how chiefs and elders increasingly control the interactions between mining corporations and the 'traditional communities' they formally represent. They enter into mining contracts and receive and control vast mineral revenues, while community members lose access to land and are confronted with pollution (Action Aid 2008; Manson 2013; Mnwana and Capps 2015:6). Traditional authority in South Africa is increasingly taking on a formal legal structure, in which 'the community' becomes a Black Economic Empowerment (BEE) shareholder in the mine, and the senior traditional leader and his council act as CEO and management board. BEE regulations – regulations that aim to advance economic transformation and enhance the economic participation of black South Africans in the South African economy and inter alia dictate that mining companies should have at least 26 percent of their shares in the hands of 'formerly disadvantaged South Africans' – also offer huge money-making opportunities for wealthy black South Africans, who due to the revolving doors between business and government, are often themselves senior government officials or closely connected to such persons. Boyle speaks of a "trilogy of corruption", between "traditional authorities, political elite and mining houses, almost everywhere mining takes place on communal lands in South Africa".[11]

Participation and accountability are assumed in traditional modes of governance, including mass community meetings that are open to all community members. Sonwabile Mnwana in his research on the Bafokeng and Bakgatla communities – where large-scale mining operations are ongoing – however shows that in these meetings mining activities are discussed in highly technical language, often by white experts in charge of community business investments, leaving very little room for grassroots voices. In addition, elders represented in councils that convene when important mining-related decisions affecting the entire community need to be made often fail to fully grasp "the highly sophisticated, technical and intellectually demanding decisions that pertain to mining contracts and other business partnerships" (Mnwana 2014:835). Mnwana furthermore reports (id.:836) that in 2014 among the Bakgatla, the *kgotha kgothe* meetings (mass community meetings) no longer took place at regular intervals because of community attempts to hold their chief Pilane accountable for alleged corruption and misappropriation of mining revenues.

When rural residents in South Africa's platinum belt tried to organize to hold traditional authority to account, traditional leaders and councilors requested state courts for interdicts against certain groups and people and the police have arrested critical community members. Court decisions have denied commoners *locus standi* to call meetings of the tribe or the village or to mobilize for the removal of the chief, effectively closing off another route of organizing resistance. As Claassens and Matlala (2014:129) point out, this means the traditional leader cannot be held accountable by anyone in the community except for a select few, a statement unsupported by historical and anthropological literature "about the role of councils and interlocking customary structures at various levels in mediating and shaping the exercise of chiefly power (Delius 2008)".

11 Boyle, Brendan (2017). A 'Trilogy of Corruption' Is Tearing a Community Apart; *Independent Online*, April 08, 2017. http://pulitzercenter.org/reporting/trilogy-corruption-tearing-community-apart-south-africa-platinum, last accessed on 3 October 2018.

8. **Conclusion**

We can draw two important conclusions from the South Africa case study. First, that capitalism and the immense wealth and power differentials between rural communities and large companies and economic elites increase the need for effective checks and balances on the activities of traditional leaders. Second, that democracy and the power of the electorate can play a role in demanding more accountability from chiefs, but that it remains to be seen whether these can actually sway politicians who stand to gain heavily themselves from the politics – business – chieftaincy axis.

These conclusions have wider resonance for Africa and the Global South. Parallels can also be drawn with the Global North, where linkages between politics and capital are increasingly visible and the gap between the one percent and the rest increasingly wide. I will thus end with a call for more research to explore these issues and to address the challenge of how to devise a system with new and operative checks and balances on present-day traditional and political leaders, operating in capitalist democracies.

A word of thanks

Now that I have set out my research to you all, the time has come to conclude this session with a word of thanks, as I stand here only through the support of many others to whom I am extremely grateful. I will not mention many names, as I do not have the time and space to name most of you by name today, and I hope you will understand this.

I want to thank the Executive Board of Leiden University and the Faculty Board of Leiden Law School for the trust they have bestowed in me and for their continuing support to the Van Vollenhoven Institute and its law and society scholarship.

In addition, I want to thank my colleagues here at the Van Vollenhoven Institute (VVI). My very first job at VVI was in 1997 or 1998, as a student assistant to Jan Michiel Otto. So I have known some of you since then; others I only met when I returned to Leiden last year after 5 years in the US. VVI has changed quite a lot over the years, but what has not changed is the level of collegiality, cooperation and warmth that exists at the institute. I want to thank all of you for that. I am proud to be part of this club. A special thanks, of course, to Professor Jan Michiel Otto, my predecessor, my promoter, my mentor. For taking me under your wings, planting the idea of doing a PhD-research in the first place, stimulating me to contact every bobo in my field, and for your continued guidance.

I also want to thank the Commission on Legal Pluralism. My first acquaintance with the Commission was during the 2004 course and conference, at the University of New Brunswick in Fredericton, Canada. I was so excited to find a whole group of academics interested in the same things that at Dutch law schools were seen as rather exotic. And I still feel blessed to have found an academic home there.

Speaking of home, I have in my working years spent quite some time away from home. I think fondly of my stay in Besease in Ghana, then in northern Namibia, China, in the US –first a semester at New York University and most recently almost 5 years at University of California, Irvine -- and shorter stays in Malawi, South Africa, Somalia and several other places. To many of these places I did not go alone – Max and Mare have traveled quite a bit for their young life, of course accompanied by Benjamin. I also received quite a few visits in these places from people here assembled. And at all these places there were new people who tried to make me and us find a home away from home. Colleagues, research assistants, new neighbors and friends. But also respondents and informants. Fieldwork is a sometimes daunting but often rewarding business. I have met so many interesting and beautiful people all over the world. I am truly grateful for this beautiful job.

Mom, dad, Andre, the other day in a discussion on privilege – on how your environment can help you along in life without even realizing it does – I recalled my entry into the Van Vollenhoven Institute. As a second year law student I had just concluded Jan Michiel's course on 'law and governance in developing countries' and was raving about it at home, to which you said: why don't you go and ask him whether he needs a student assistant. I thought that was ridiculous, you can't just go and ask for a job. But it turned out you were right… Of course, this is only one of the many examples where your guidance and encouragement, and your belief in me helped me in life. Thank you for that.

And Benjamin, even our connection started at VVI. I thank you for your continued support in my life and for my work, for believing in me, and for sharing this great and wondrous life with me. Max and Mare, last but not least. I was preparing for 'meet the professor', a program of Leiden University to celebrate its 444th birthday and for bringing science into the primary schools. I had to fill in a form and one of the questions read: what is your greatest achievement? And I thought about you guys. But then I could hear Max' voice in my head saying: "mom, that is not really *your* achievement is it?" So I decided to write something about protecting land rights in Africa instead. But let me tell you a secret, I still think it is you guys.

Ik heb gezegd

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