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INTERVIEW

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An exploration of legal pluralism, power and custom in South Africa. A conversation with Aninka Claassens

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Aninka Claassens is an academic and practitioner who has worked since 1982 as a land activist and academic in the field of legal pluralism in South Africa. During the apartheid era she worked for the women's anti-apartheid organization the Black Sash, supporting rural communities who resisted forced removals from their land and homes. In 1990 she moved to the Law Faculty at the University of the Witwatersrand where she became involved in land policy work alongside her ongoing role in supporting rural communities involved in anti-bantusan resistance and land re-occupations. She joined the ANC land desk and participated in the drafting of the early land reform laws that were introduced between 1994 and 1999. However, as the ANC policy direction began to shift in favour of supporting traditional leaders rather than the land rights of vulnerable groups, she became involved in litigation, challenging laws such as the 2003 Traditional Leadership and Governance Framework Act of 2003 and the Communal Land Rights Act (CLRA) of 2004. The CLRA was ultimately struck down by the Constitutional Court in 2010. She also supported litigation upholding participatory and inclusive versions of "living" customary law in the face of discrimination derived from distorted versions of "official" customary law. In 2009 she joined the University of Cape Town and later founded the Land and Accountability Research Centre (LARC), which she directed until 2019. LARC forms part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights and living customary law in the former homeland areas of South Africa.

Aninka's research is mainly focused on the nature and content of customary law in South Africa, particularly regarding the tensions between the jurisprudence of unwritten "living" customary law emanating from judgments of the Constitutional Court, and the autocratic versions of custom inherited from colonialism and apartheid that have been reinforced by traditional leadership laws enacted since 2003. These laws have sought to transfer freehold ownership of the "communal" land in the former homelands to traditional leaders at the expense of pre-existing customary law ownership rights that have vested in families over generations. The laws have also sought to centralize decision-making power and authority in the hands of

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traditional leaders thereby transforming rural citizens into tribal subjects. The laws have been strongly resisted by rural people in parliamentary public hearings and in the courts.

Janine (J): *Thank you, Aninka, for agreeing to this interview. South Africa provides us with an interesting case study of legal pluralism, among others because of the many connections and interrelations between the state justice system and customary justice systems. My goal for this interview is to have you sketch that story for people interested in legal pluralism but not well-versed in South African law, history and politics. Can you start by outlining how the current situation of legal pluralism in South Africa came into being, what important historical context we need to comprehend the current constellation of legal pluralism in South Africa?*

Aninka (A): We had a segregated legal system from colonialism onwards. That segregated legal system did not operate in a way that was "separate but equal." Instead, it was used to subject the black population to major controls, and to deny them basic property and citizenship rights.[1] So, we had legislated discrimination right through colonialism from the late 1700s to 1910 and then into apartheid between 1948 and 1994. The entire legal and court system was different for black people than it was for white people. The only part of the legal system that was the same were the criminal courts. Black people were consigned to being dealt with according to customary law, whereas white people were dealt with according to Roman Dutch law and English common law. Black people went to separate courts run by headmen and native commissioners. There was even a separate Native Appeal Court. Another key difference was that the legal system was based on the *administration* of black people, as opposed to the *government* of white people.

Many countries have *de facto* co-existing legal systems, and South Africa falls into that category too, because in practice we have different communities using different legal systems, including Muslim communities and to a much lesser extent Jewish communities, but in addition to those *de facto* systems that co-existed in practice, we had an incredibly strong legislated hierarchy that segregated the legal system for Africans and "whites." And that has been one of the key challenges of democracy and attempts to re-integrate the legal system: how do you deal with that legacy of segregation? And that legacy of segregation operated at multiple different levels because you had the ten former homelands[2] of South Africa each with its own separate "government" and legal system. Some homelands were formally "independent," others had not yet been granted independence by Pretoria in 1994 when the transition to democracy took place.

During the build-up to the change of government in the early 1990s, an important question was what would happen to customary law and what its status would be in the new South African legal system. And that was a very thorny issue, because, as legal scholars have written, the South African legal system is a highly formalist one. You have on the one hand a highly formalist legal system, and on the other a customary system with unwritten customary law. How you bring those two into one country's integrated legal system has been a big challenge.

J: *Can you also explain how the history of Apartheid and homelands impacted the customary justice systems that existed then?*

A: South Africa had many of the features of British colonialism, in that in large parts of the country it had a system of indirect rule by traditional leaders which came from other British colonies. It was in a sense perfected here by Theophilus Shepstone, the secretary of Native Affairs in Natal. Instead of deploying expensive resources to subjugate and govern black people directly, the government relied on traditional leaders to play that governance role to some extent. It is well documented how they developed a version of customary law in conversation with traditional leaders and male elders that was autocratic and patriarchal and very different from accounts of more inclusive and responsive customary practices. You had a coming together of the patriarchal features of western or white law, and the patriarchal features of customary law in which women – black women – had absolutely no chance, because where there had been leeway in the African system or leeway in the white system, now all avenues were foreclosed. Whereas the issue of legal standing for women was not an explicit concept in customary law it was denied to white women during the colonial era, and so the legal standing of African women was also denied and they became perpetual minors. At the same time the notion of inheritance by the oldest son, which came from a distorted version of customary law, was superimposed on the denial of legal standing. Many of the versions of codified custom that were adopted by Shepstone in respect of women's status were fiercely debated and rejected at the time.

There were two basic models of the governance of African people during the 1800s. There was the Shepstonian model of indirect rule through traditional leaders in the British colonies being largely in the southern and eastern areas of the Cape and Natal, where the homelands Transkei, Ciskei, and KwaZulu-Natal were later established. The other model originated from the Boer (Afrikaner) republics in the northern and central parts of the country, being the Transvaal and the Orange Free State. In the Boer republics black property rights were completely denied and the policy was one of outright conquest and subjugation. In 1927 elements of those two systems were moulded together in the Native Administration Act, and then perfected during Apartheid under the National Party from 1948. So the roots of segregation and of the distortion of custom have deep origins in British colonialism but also in the blanket denial of black property and citizenship rights in the Boer republics.

J: *When you say this Shepstonian understanding of customary law and traditional authority was fiercely denied and rejected, how do you know that? Where do you find evidence of that?*

A: Interestingly it shows up a lot in historical litigation by African litigants who denied that chiefs had the power to sell land or that they had unilateral power over land. There are a number of famous court cases where people went to court to say "actually this land belongs to us, it does not vest in the chief, and the chief cannot unilaterally evict people or expel people without consultation and consent."[3] In those cases, we see some extraordinary reasoning by the judges, who come out time and

again and say: "The Governor General is the supreme Chief. If chiefs did not have these autocratic powers, where would he derive his power from as Governor General"? So overt legal reasoning that this kind of autocratic approach to decision-making and to property was at the very core of the whole segregationist model.

J: *So the courts did not use that reasoning to challenge the power of the Governor General, but they used it to explain why the chiefs should have autocratic power?*

A: Yes, exactly. They said, if the chiefs did not have autocratic power, what power would the Governor General have?

J: *And he has it, so that cannot be true.*

A: Yes. It is really quite shocking when you read the incredibly racialized reasoning in those cases. For example, the law said that before there could be a sale of land, the tribe must agree and there must be a tribal resolution. And there was so much litigation by African people saying: "there was no resolution, we never agreed," that government actually amended the Black Administration Act to say that whatever the Native Commissioner said had happened was deemed to have happened. And in those judgements the judges said: "We cannot keep on bothering ourselves with these arguments and this proof and these debates among African people about what happened and what did not happen. We are just going to have to have a cut-off point and this cut-off point is what the local Native Commissioner says has happened. There will be no debate about that because whatever he says will be deemed to be true."

An analysis of cases at the level of the Native Court of Appeal shows that African intellectuals such as Sol Plaatje, members of the *Bunga* (an elected council in the former Transkei), and other respected African leaders gave evidence about the nature of land rights and also about women's rights. In their testimonies, these men would object to the terms of official customary law because they regarded it as out of touch with actual practice in relation to inclusive decision-making processes and especially in relation to women. Tara Weinberg cites cases in which *Bunga* members gave evidence that their daughters and sisters had always inherited land, contrary to the official version of customary law which prohibited women from inheriting land.[4] Laws such as the 1927 Native Administration Act were amended over time in response to resistance from people. It is remarkable how people used the law, and how despite the odds being stacked against them, they really did not give up on the insistence that they must have decision-making authority, and that they did have property rights. At the heart of much litigation about state versions of customary law was that central claim to property rights and to decision-making authority.

J: *You are saying, Aninka, that in South Africa there are a lot of characteristics of indirect rule that are also seen in other areas. One big difference with other countries, however, is that large groups of people have been forcibly moved to another location. In that process, groups were placed under leaders they did not recognize before or were hierarchically placed under other groups.*

A: Yes, the scale of dispossession and forced removals in South Africa was exceptional, even by the standard of colonization in other African countries. If you compare South Africa with Zimbabwe, at the time of independence, about half of the land in Zimbabwe was so-called communal land, whereas only 13 percent of South Africa was in the former homelands and regarded as communal. The rest was in white hands, or in the hands of the state. And we had 3.5 million people forcibly removed between the 1960s and the 1980s, so the physical scale of displacement was enormous, and it happened relatively recently. The physical upheaval of grand Apartheid was devastating in its impact on families and pre-existing social structures. Not only were black people moved from so-called "white areas" into homelands, but as they were moved, they were separated according to language. So people were moved from Johannesburg or Pretoria and they were divided. If one family spoke Zulu, they would be moved to KwaZulu. If the neigbouring family spoke Tsonga they would be moved to Gazankulu. The cities were melting pots - there was a great intermingling of groups. Forced removals attempted to impose separate ethnic identities on people via separate homelands but it could not succeed. Even the homelands were melting pots. It has been shown that in Bophuthatswana, in the north-west, the majority of people were not Tswana speaking. And because that completely contradicted the philosophy of separate development and ethnic self-determination, you had really brutal processes of removing people and grouping them according to language, even when they had no connection to the area they were being removed to. That had a much worse impact in certain parts of the country than in others. For example, in the Eastern Cape, the Transkei and Ciskei have historical antecedents in the native reserves created during colonialism but in the former Transvaal up in the North, the homelands there were only conceived after 1951 and the Bantu Authorities Act which paved the way for the creation of formal homelands: one for Tswana people, one for Sepedi speaking people, one for Ndebele speaking people, etc. And a lot of those removals continued well into the 1970s and early 1980s. Many people in the north were clustered into artificially created "tribes" within living memory.

In other areas where the homelands had far deeper historical roots spanning many generations things were often very different and the institution of traditional leadership more deeply embedded. In the North, because the Boer republics had denied African land rights, there was very little land set aside for black people in terms of the 1913 Act. Most of the land set aside in 1913 was in the old Cape and Natal. Because of the dire shortage of land for African people in the North, people got exemptions from the Land Act to club together and buy land there. And literally tens of thousands of families bought land.[5] However, when the homelands were created from the 1960s onwards those people who had purchased that land found themselves subsumed under Bantu Authorities and under chiefs. And that was the most bitter, terrible disillusionment for them because they were multi-cultural, spoke different languages, they had clubbed together, they had raised the money and purchased the land and the next thing the homeland incorporated them, and they were put under the power of a chief when they were actually the landowners. Ultimately a lot of the strongest resistance to the bantustans and to the post 2003 traditional leadership laws came from those groups of people.

J: *So what did that mean in the early 1990s during the transition to democracy? As you know, I have done research in Ghana, where a lot of people were critical about chiefs, but very few people seemed to discuss whether they needed chieftaincy as an institution. But this was really the discussion in the early 1990s in South Africa, was it not? What do we do with traditional authorities, with customary law in the new dispensation, in the new democratic South Africa?*

A: During the 1980s there was a very strong anti-Apartheid movement in South Africa and a big part of that were rebellions against the homelands and against chiefs. There were severe abuses by many chiefs in these areas at that time, including support for forced removals and demands for regular payment of tribal levies or taxes, which were enforced by imprisonment.[6] There were states of emergency to put down that opposition, which varied from place to place, but it was serious and it led to massacres in several areas where people were marching against the chiefs and saying we are fighting for a united South Africa. Then you had these negotiations for the new South Africa and at those negotiations the homeland leaders were pushing very strongly that the homelands be retained. Stupidly, they went into alliances with the white right wing, so they lost that battle. The outcome was that the homelands would be reincorporated into a unitary South Africa.

But quite a lot of people within the ANC were anxious about the scale of youth mobilization and the levels of violence in the anti-bantustan revolts, and so the ANC included a significant number of chiefs in the first parliament after 1994 as ANC members of parliament, including chiefs whom people had really mobilized against and chiefs who had been quite violent. So, almost immediately you had a kind of ANC culture of reconciliation, respect for tradition, for elders, which was quite shocking to a lot of those young activists who had been tortured and risked their lives in rejecting apartheid and the bantustans.

To illustrate this, in this period, before '94, I went to a meeting at Madiba's [Mandela's] house in Soweto, where discussions were taking place. I was there with some of the Black Sash people, a women's organization that had been working closely with these comrades who had been involved in the rebellions up in the North. A group of people led by a very respected ANC person, Job Mokgoro, said to Madiba: "we are so hurt by the fact that when you come to be introduced back into South Africa, you are going to meet the very chiefs who suppressed us, and not coming to our ANC branches, while our ANC branches have been involved in this extraordinary struggle." It was an incredibly respectful conversation, and Mandela said: "I did not understand that fully, I am really sorry about that." But it was quite clear that Mandela was being managed by committees of people who had decided that the ANC is a broad church and that the chiefs should be brought on board.

At the same time, there were ongoing negotiations about the future constitution and the future Bill of Rights. The chiefs argued, really strongly, that the right to equality for women must be subject to customary law. There was a vocal women's lobby at that time, and the chiefs again really misplayed it. They misplayed it by going into alliance with the right-wing whites. But they also misplayed it by coming out so strongly against women's rights at that moment. Because of their excessively

patriarchal views, they lost that point and customary law was made subject to the Bill of Rights, not the other way around.

And then of course we had the long struggle around the terms of recognition of traditional leaders in the Constitution. There we had Mangosuthu Buthelezi[7], the chief minister of the Kwazulu homeland, arguing that chiefs must be recognized as having governmental powers. Ultimately, he lost that argument and was joined by other groupings of traditional leaders to challenge the certification of the Constitution but they lost that challenge. Their basic argument was: "during the homeland period, we were government; we had governmental powers over the people who lived in the homelands (which at that point was almost 50% of South Africans – it is a smaller percentage now) – and we want those governmental powers." And they have never given up that argument. They lost a number of key issues right at the beginning: the homelands were reincorporated into a unitary South Africa and customary law was made subject to the Bill of Rights. Despite this, however, they have managed to make a whole series of gains since 2003.

J: *The ANC's stance towards chiefs, was that also connected to the fact that the most important ANC leaders at the time had all been on Robben Island for so long, and had thus not witnessed those really big revolts and the heavy violence involved in those… had not very clearly understood how bad things had been?*

A: Yes, I think it was a combination of ANC leaders having been on Robben Island and not around during those revolts, and other ANC people coming back to South Africa from exile abroad. And the United Democratic Front (UDF), which had been the popular movement in South Africa that provided an umbrella for all these uprisings ceded too much authority to the ANC when its leaders returned. The ANC enjoyed great respect because of its past role under the leadership of Nelson Mandela and people in the country tended to think the best of the ANC in exile because of the strong contrast with the apartheid government that had shrouded all its activities in secrecy.

It is important to stress that even the UDF did not organize these rural uprisings (let alone the ANC which played no role in them). They were spontaneous and localized expressions of pent-up frustration and fury with the terms of life under apartheid and under the bantustans. That said, they were also very widespread and spread like wildfire from area to area. The entire civil service of the Kwa Ndebele bantustan went on strike, for example, and the army was deployed and used extreme violence in putting down these rural rebellions. The ANC at that point was out of touch with the terms of the local struggles in South Africa in the late 1980s and early 1990s, fundamentally out of touch. And to me, that history still has not been properly written – the depth and scale of those local struggles. Instead, we have this history of the ANC as the liberation movement, whereas actually people themselves on the ground did an enormous amount and risked their lives to get rid of Apartheid by making South Africa "ungovernable."[8]

There were people living in South Africa who were close family members of jailed ANC leaders who were highly respected as a kind of placeholder or internal wing of the ANC. Some of the most influential among them were worried about

the way in which some of the comrades had themselves become violent and ungovernable. And there was a level of violence that scared everybody – necklacing[9] and violent attacks on people suspected of being informers and that kind of thing. This was an understandable and valid concern but in retrospect those leaders allowed this concern to blind them to the dynamics in the 'faraway' and unfamiliar rural uprisings against the bantustans, disregarding what people who associated their actions with the ANC-in-exile had sacrificed and what they were fighting for.

J: *You were saying that the chiefs lost the battle for continuation of the homelands, as well as for women's rights falling under customary law, but since then they have made a lot of gains?*

A: After their initial misreading of the political context of the transition era traditional leaders formed quite a strategic and effective lobby. Besides the very conservative chiefs who sided with Apartheid and with the right-wing Afrikaners, there was another movement, called CONTRALESA, which affiliated with the ANC just before the change of government in the early 90 s. Obviously they had seen the writing on the wall. The ANC was very welcoming to those chiefs who said they supported the ANC. CONTRALESA soon actually began to identify very strongly with the demands of that other lobby, the lobby that had wanted governmental powers. It did not take them long to say: "we too need to be government; we too don't want equality for women." And so there was this concerted and united lobby of different traditional leadership groupings saying: "we need direct power."

The problem for them is that the Constitution is very explicit that we have three levels of government and they are all elected; national, provincial and local. How then can they get governmental powers? What they have really been struggling for is to get two things: one, ownership of land, of that whole 13 percent which made up the former homelands, because if you own the land, you can control the people – it is a sort of feudal connection. The other thing that they have really been struggling for is to get governmental authority. In a sense, they want to become a fourth tier of government.

The chiefs' first massive battle was to get freehold title to the land in the former homelands, although under Mandela and the first ANC government that proved impossible. However, straight after the first term when Mandela stepped down as President in favour of Thabo Mbeki, Mbeki's new minister of land stopped all the work that was being done on securing and recognising customary land rights belonging to families and individuals. Instead, she proposed that the title for land in the former homelands should go to tribal institutions headed by traditional leaders. That led to a massive court battle to challenge the law at issue, the 2004 Communal Land Rights Act, on the basis that giving ownership to traditional councils would undermine people's tenure security. Ultimately the Constitutional Court struck down the Communal Land Rights Act on procedural grounds – that Parliament had failed to consult widely enough when adopting it.

Since then, there have been several attempts by government to give traditional leaders governmental power via new laws, such as the Traditional Leadership and Governance Framework Act and the Traditional Courts Bill of 2008. These laws are

all doomed to fail due to the structure of the constitution, but despite that, *de facto* the government has ceded traditional leaders its own governmental powers at various levels and that is what we are seeing more and more on the ground.

J: *Why is government enhancing the power of traditional leaders? In one of your articles, you link this to extractive resource management. Can you explain that, and could there also be additional reasons?*

A: South Africa has always obtained its primary wealth from mining and the tragedy is that the epicenter of mining moved to the former homelands around the time of the transition because that is where platinum and other precious metals were discovered. Just as mining companies had made alliances with the colonial and apartheid governments, they now made similar deals with the black ANC elite. They transferred various mining assets to black people, all of whom were senior ANC people. The first generation of ANC political leaders were gifted shares and directorships of mining companies. That is how they have made their fortunes. The suppression of basic human rights in the interests of the dominance of mining interests is a fault line that has run right through South Africa's history. Now, as then, traditional leaders are regarded as the only community partners that the mines need to negotiate with and compensate. Currently we've got people who are of a different colour, and a different political party, profiting from the same historical terms: the denial of black property rights and the suppression of black decision-making authority in the mineral rich former homelands.

But I have revised the extent to which I think mining revenue is the overriding driver because I have also seen the privileging of the interests of traditional leaders and the devolution of government power to them in provinces that do not have the same mineral resources. There are striking continuities in the attitude towards ordinary people as tribal subjects who owe traditional leaders obedience rather than respect for them as active rural citizens who are entitled to hold both chiefs and government to account. The ANC seems to default to using traditional leaders as its familiar elite partners and the primary access point through which it will operate in former homeland areas. About two years ago I went to an ANC land conference and I was amazed at how many traditional leaders there were as ANC delegates to that conference. Rather than chiefs having successfully lobbied the ANC they seem to have effectively taken the ANC over in former homeland areas. The composition of the leadership of the ANC reflects different interests from those assumed by rural activists who fought against the bantustans in the 1980s and 1990s.

J: *In Ghana there was big change in the relationship between traditional leaders and government from the time of independence – of course in Ghana this was in 1957 so it was a very different timespan – to now. At independence, the traditional elite and the new, modern, nationalizing elite were very antagonistic. Similar to South Africa, the traditional elite had been part of indirect rule, had at first been fighting against independence, and was largely illiterate, whereas the new state elite consisted of the independence fighters who had been imprisoned and were well educated. If you look at it now, you see that, when a traditional leader needs to be succeeded, the*

communities pick the one with the best education, the best contacts, best international relations, jobs, etcetera. That means that more highly-educated people end up being chiefs, and that now the traditional elite and the modern elite are basically one and the same group who have been together at universities et cetera. Is that also part of the story in South Africa?

A: Even historically, the two groups were intertwined, at least in some areas. For instance, in the Eastern Cape, the traditional elite and the ANC educated elite were often family members.[10] This is also apparent in Mandela's family and the family history of his second wife Winnie Madikizela Mandela. There were political stand-offs between family members during that period, but there were deep bonds too, mainly due to schooling at the same schools and universities, including schools that were set up for the sons of chiefs.

J: *How is all of this related to electoral politics? In a lot of countries, you hear that governments are also interested in keeping the chiefs on board because they may bring in the rural vote. Now what I find very interesting about this for South Africa is that the last couple of years – and I think this might be more related to provincial elections than national elections – the story is that areas with a lot of mining for instance, where communities are really opposed to their chiefs' actions, the ANC lost up to 18% of the vote compared to the last elections. This led to analyses in South African media that an alliance with chiefs might actually be leading to a loss of votes for the ANC in certain rural areas.*[11]

A: The analysis of the losses indeed showed that ANC was losing in the most corrupt rural provinces, which are the ones with the big mining deals. However, I think the ANC did believe that the chiefs would bring the rural vote, which shows how out of touch they were in a context where they were attempting to ram laws favouring the interests of traditional leaders down people's throats, and there was strong resistance to such corrupt mining deals and the laws that facilitate them. But you know, president Ramaphosa has been very polite, sometimes even subservient to various traditional kings, including the Venda king, the king in Swaziland and the late Zulu king. And these same kings have been exposed as seriously implicated in corruption scandals, autocratic violent rule, and dispossessing people of their land. It is very interesting to me to see whether the ANC will continue to believe that chiefs bring the rural vote, because some (but not all) chiefs are becoming bywords for grand-scale corruption and violent oppression.

There are, of course, areas where rural people support traditional leaders, there is no doubt about it, especially where local government has collapsed, and where the homelands have a real embedded history, such as in the Eastern Cape and KwaZulu-Natal. But much less so where they were creations of the 1970s and 1980s and where they are associated with corruption and dispossession. So yes, you do have people who see tradition as stabilizing, but many chiefs are associated with the former President Zuma's ANC, and both the recent ANC and certain chiefs are associated with corruption. I doubt that the ANC will want to be re-enforcing

perceptions of that nexus of unaccountable power straight after its serious losses in the local government elections of November 2021.

J: *But is the connection between ANC and the chiefs perhaps so tight now with all those chiefs having senior positions within the ANC, that by now supporting chiefs is not even instrumental reasoning anymore – they are just in there?*

A: Perhaps that is the case. It is otherwise difficult to understand why the Minister of Land chose to back the Zulu king in recent litigation about the Ingonyama Trust.[12] Government supported the king's arguments that it was lawful to charge people rent for the land they had been living on for free for generations, and they lost the case. The judgement is harsh against the Minister and says that she failed to uphold her constitutional duties, and that she was party to structural dispossession. And that is a judgement by a traditionalist judge from KwaZulu-Natal. After this resounding judgment the Minister chose not to appeal, which is to her credit.

Because I am an optimist, I hope that this change of stance by the Minister indicates that government may be rethinking its knee-jerk support for traditional leaders under all circumstances. The Venda King has also been exposed to be part of major corruption involving the VBS bank in Limpopo in which the savings of ordinary people were looted by the political elite. I hope that such well-known examples of the impact of government supporting traditional leaders at all costs, despite massive corruption and abrogation of basic rights, may cause it to rethink this approach. The serious violence and scale of resistance to the autocratic actions of King Mswati in neighbouring Swaziland are also writ large for all South Africans to watch. We will see.

J: *So you think this might bring a change, because these cases are too public, too scandalous and it becomes too much, if ANC stands for chiefs and chiefs stand for corruption?*

A: Well, you know, if you look at *kgosi* Nyalala Pilane from the North-West, he has got three constitutional courts judgements against him for abrogating basic human rights. Yet he remains the deputy chair of CONTRALESA. He was found culpable of major financial irregularities by a Commission of Enquiry and has been deposed as senior traditional leader. At what point will he become too politically expensive for CONTRALESA? And if he doesn't, at what point will CONTRALESA become too expensive for the ANC?

J: *But he has so far not been seen as too expensive for CONTRALESA, and CONTRALESA has not been seen yet as too expensive for ANC, so could we also turn that argument around?*

A: Yes. One can, you are right, but I see signs of hope in recent developments. As an illustration, the government was really pushing ahead with the Traditional Courts Bill. Then a very eminent ANC stalwart spoke out publicly against the Bill and LARC pointed out to members of parliament that the legal adviser who said that

the Bill was constitutional had made factual errors. After that the Traditional Courts Bill was dropped in the lead up to the November elections. All of the previous problematic traditional leadership laws have been pushed through during the lead up to elections, because of threats by traditional leaders that they would discourage the rural vote unless Parliament enacts the laws they want. But the November elections were different. Every other election, chiefs are coming with demands; "we won't vote for you unless you give us this and that." We see them getting cars and cattle. But it was dead quiet in relation to the Traditional Courts Bill before the November elections, which is a very, very big change. And that is interesting.

J: *A lot of your writing and activism centers around the different conceptions of customary law that the lawmakers have – which is quite autocratic – and that the Constitutional Court has, which is a more democratic conception. Can you explain that?*

A: Very early on the Constitutional Court came out and said: we respect and recognize customary law, but we do not take the version that we have inherited from Apartheid to be sacrosanct. They cautioned against relying on versions that come from the old authorities, because historically law was used overtly for racial subjugation. The Court said that we need to interrogate tradition; we have to look at the living version of customary law, which animates peoples' values and practices in real life. And they also said that the older version that we had inherited from colonial and apartheid jurisprudence was frozen, not allowed to develop, and that we must accept that customary law is ever-changing and that we must look for its origins in practice and in the values of the community.

I don't think it was by accident that that first arose in a court case about land rights.[13] One of the reasons that customary law is so important is that black people were denied the right to have common law ownership and to have statutory ownership. The Land Act prohibited them from being owners or tenants in 87% of South Africa. As a result, the only legal source of the *de facto* occupation rights they managed to obtain despite legal prohibitions is customary law in connection with the Interim Protection of Informal Land Rights Act of 1996. If you don't recognize customary law, you don't recognize the basis on which most black people hold *de facto* if not *de jure* land rights. And it is not just historical customary law in the former homelands. It is also about beneficial occupation and ownership of land in the rest of South Africa. The law said black people are not allowed to be in white South Africa, except under very strict pass laws. But that law could not keep the majority of people out of the majority of the country. Many people continued to live on farms where they had been the original owners and then they were prohibited from owning it when the whites arrived. Then they were labor tenants and labor tenancy was prohibited, and then they were sharecroppers and sharecropping was prohibited, but they continued to live on that land without wages. Everybody knew that these people have deep roots in this land, and that the white title deed ownership that has been overlaid on it is completely at odds with their kind of bond to the land. So, people had *de facto* rights, but none of these were legally secure. This recognition of customary law, and of rights derived from usage and practice was pivotal to recognizing that these *de facto*, historical rights, have a

status on par with other law. By recognizing customary law, you also recognize the terms on which black land rights existed, which were not recognized on any other terms.

Once the court had said customary law must be the living law, there was a lot of litigation, particularly about women's rights, where the courts went even further. For instance, in the *Bhe* case[14], they said, let us look at the Black Administration Act, which said that only men inherit and let us look at the Act's purpose in a segregated legal system, and let us acknowledge that its main purpose was not about regulating inheritance, it was about subjugating black people; and therefore, let us disregard that Act as the source of a valid or legitimate customary precedent. With those cases concerning customary law the Court did something radical, which it has failed to do with other aspects of the South African legal system; it challenged the precedents that had come down from the Native Appeal Court about the powers of chiefs, the nature of customs. Those official customary law precedents no longer stand as a matter of course. That is a radical thing for the courts to do, because in general a feature of the negotiated transition was that whatever laws were already at the statute books must stand, and precedent continues to reign supreme in most other areas of law.

This created the opportunity for the courts to take note of the claims that rural people had never ceased to make; that they have customary decision-making authority, that they have customary property rights. The jurisprudence of "living law" created an arena for these counterclaims and alternative versions of custom to be argued and debated. The Constitution states that traditional leaders' powers derive from customary law, and that customary law is subject to the Constitution. This shifts the terrain of contestation over the powers of chiefs to contestation over the content of customary law. If customary law is autocratic, they get autocratic powers; if customary law is participatory, they don't get autocratic powers.[15] So, that jurisprudence of living law has really opened up a new way of testing all of the problems that we are seeing of eviction and dispossession on mining-rich land, not just against statute law, but also against customary law. The customary law protections are emerging as more comprehensive and subtle than the statutory protections built into early land reform laws such as the Interim Protection of Informal Land Rights Act of 1996.

But the dilemma of how you ascertain the content of custom remains. This is a difficult thing to do when people are arguing from different points of view about what the practice is. Furthermore, there is a problem in courts determining the content of customary law because they solidify it and make it precedent bearing, whereas by its nature, it is not a precedent based system. So, you have these fundamental contradictions between how the courts operate and the nature of customary law leading to two different schools of thought. The one school of thought is: to protect customary law it must be segregated from the national legal systems and recognized on its own terms. That is what the traditional leaders are saying and how they justify the Traditional Courts Bill. Customary law must have its own arena and people living within the former homelands must be bound by it. They must not be able to opt in and out of traditional and other courts of law. The other school of thought is expressed by former chief justice Pius Langa in the *Bhe*

judgment. He says: we have to bring customary law into the mainstream; our legal system currently does not reflect the values and experiences of the majority of South Africans; it is a very Eurocentric legal system. We have to respect customary law and customary values and we have to mainstream them and we have to bring them into an amalgam of South African law, by which he is saying that the dominant western legal system is not really South African.

Previously, during the 1950s, ANC leader and university professor Z.K. Matthews had said something similar in his Yale Masters dissertation. He said that we can't choose segregated customary courts because this contradicts the idea of a unitary South Africa that belongs equally to all.[16] It would reinforce the ideology of Apartheid and separate homelands for different "ethnic groups." So he chooses amalgamation of the different legal traditions as a better model. The problem with amalgamation is that customary law is very vulnerable, because it is unwritten and because of the way our formalist court system works. There is also the way in which our lawyers are educated, which has an enormous knock-on impact in terms of judges' attitudes. Our legal system and legal training elevate the idea of law as certain, predictable, rule-based. It thus denies the inherently processual and contingent nature of all law as it operates in practice. But then we've got this other system of law, which is not rule-based – well, it is rule-based but not to the same extent, it is not written down. This system is not taught respectfully, and it is regarded as anomalous, messy, full of contradictions, unpredictable. This raises questions as to how it could be amalgamated on equal terms? Especially given the legal system's denial that even "formal" law is far more contingent and less rule-based than it is assumed to be. I think we have seen the Constitutional Court bending over backwards to try and do that, to try and say: we value this system, we must value African values, we must accommodate them. But we still have a highly formalist legal culture and a very exclusive and formalist way of teaching law in South Africa.

J: *In your writing you analyze that the Constitutional Court has a democratic conception of customary law: customary law is what the people practice, not something that a leader comes up with. The lawmaker, on the other hand, takes a much more autocratic approach: customary law is what the leaders say is customary law. We see this approach in the recent traditional authority laws. All these laws are about chiefs can do A, B and C, and there is nothing about their accountability or participation of others in decision-making processes etcetera. What is interesting though, is that also among courts there seem to be differences – and maybe that links to what you are saying about this system being very formalistic and judges being trained in a certain way – and the lower courts are not necessarily in line with the Constitutional Court. It seems that some of the lower courts are using this very autocratic conception in the new laws to decide cases. Is that a correct reading of what is happening?*

A: Yes. Unfortunately, a lot of the lower courts come out of the old homeland legal system, and they just use the same old precedents, and these precedents often rely on autocratic versions of customary law. And they continue to grant interdicts that chiefs apply for to stop people from having meetings, even though there is a Constitutional Court judgement saying that this must stop.[17] Lower courts are not

well-informed about the jurisprudence coming out of even the Appellate Division or the Constitutional Court. So, you do have serious problems, especially in the former homeland provinces where the magistrates might well have been prosecutors under the bantustans. But you also get something else, which is very interesting, which is that you get magistrates in courts in North-West, who are also from chiefly families, who just mix and match customary law and civil law and come up with solutions that are a real blending of the two.[18]

J: *And how does that play out? Does that lead to interpretations that mainly benefit the chiefs and their families, or to interpretations that are more just?*

A: They are more acceptable. They are fairly balanced. So, there are very interesting things happening at local-level courts. A lot just churn out the same old apartheid precedents that they have always used, and there isn't sufficient judicial education to inform them of other precedents. But there are also other, very interesting things happening. I have been very interested in some of the cases coming out of the Eastern Cape High Court where you have had very progressive judgements on a range of matters, to do with headmen appointments and evictions of women, so I don't think one can generalize. I used to generalize that the lower courts tend to be much more conservative, but recently I have seen a lot of interesting judgements. Even though you have quite conservative tendencies and deep path-dependency in some of the former homeland areas, you have also got these other interesting dynamics of judges and magistrates trying to draw on both statute and living customary law. And I have been very interested to see some judges in quite isolated places elaborating about the nature of customary land rights from some of the Constitutional Court judgements and you wonder how they knew about those cases. I think it is quite a mixed picture, actually.

One big problem is that there is no formal link between customary (so called tribal or traditional) courts and state courts, and the interface is terribly messy. Preliminary research findings in KwaZulu-Natal[19] studying prosecutions in Magistrates Courts near to former homeland areas found that an incredibly high proportion of cases about things like rape, assault, and theft were not resolved in the Magistrate Courts, but were referred for "alternative mediation." In practice this seems to be a euphemism for saying they are going into the traditional court system, but without any formal referral between the two systems. Yet traditional courts are meant to have limited criminal jurisdiction; they are not meant to do violent assault, rape or any crimes involving "blood" that involve serious injury or loss of life. But people do approach some traditional courts to deal with those serious crimes. A traditional court needs to be able to say to the police or a state court: "this person has come to us with this, and we are referring it to you and you need to give us feedback." And when a Magistrate Court refers a case to a traditional court, it similarly needs to say: "We are referring this to you and you need to give us feedback." Traditional courts need to be able to rely on the police, in relation to crimes that get reported to them, but they can't, and to interact with state courts, but there is no mechanism for this. Basically, what the traditional leader lobby wants is for the Magistrates Courts to refuse to hear cases where the litigants live within the former homelands,

and for the police and Magistrates Courts to refer the litigants to traditional courts. Some of the Magistrates Courts are already doing that, just refusing to prosecute, or to hear disputes where the litigants live in the former homelands and it gives people who don't subscribe to traditional courts no access to the formal courts; they have nowhere else to go.

J: *We were talking about living customary law and official customary law. And I see the importance of these terms in helping to understand that a lot of the official customary law both deliberately and unintendedly distorted customary law, as part of a project of racial subjugation. But is living customary law not also a problematic term? You were already hinting that it can be very hard to prove, but there is also the side of it in a way being normatively empty. The fact that a custom is "living," is being practiced, does not mean it is also constitutional. Official customary law is often disqualified for being distorted, but that doesn't mean of course that the living one is just, is in line with constitutional values and rights. I was wondering whether the Constitutional Court has a tendency to use the argument of living customary law trumping official customary law only in those cases where the living law is moving towards compliance with the Constitution? For instance, when they see it granting greater rights to women, like in the Shilubana case.*[20] *There you see this argument that living customary law trumps official customary law. But do you think there is a measure of cherry-picking, where this argument is used by the court in cases where the living customary rule does not contravene the Constitution, where it is moving in the right direction so to speak, but not in cases where the lived norm is constitutionally problematic?*

A: Sure. People are, of course, worried that we will have bad living customary law precedents. They are concerned that if you say customary law is whatever the practice is, it could end up endorsing any practice, whether good or bad. But just remember that the validity of customary law is still subject to the Constitution, so any bad practice that is against the Constitution won't stand on that ground.[21] Additionally, the courts have talked about the need to develop customary law, so where it is in conflict with the Constitution then it needs to be developed, and it needs to be developed in a direction that will bring it in line with the Constitution. So, there are clear limits and there has been quite a strong debate, especially around the *Bhe* case, which centered around the question whether the rule of male primogeniture [the rule that the first-born male would inherit the property] was constitutional. After the decision in this case [the court struck down male primogeniture so needed to put something in its place to regulate inheritance until Parliament could amend the law], many people said that the court should have looked more for an alternative based in living customary law. But I think for a court to develop living customary law without the resources or the evidence to fully understand changing practice on the ground could be more dangerous than what the court did, which was to default it to the Intestate Succession Act which provides that all siblings inherit and have a stake in family decisions about the property as an interim measure pending the introduction of a new law by Parliament. For myself, I find it comforting that customary law is subject to the Constitution. If it came to a

conflict, the Constitution must triumph. But I also respect and value colleagues who find that problematic because they feel it results in western values trumping African values. They feel very strongly that we must search for the African values rather than default to western precedents such as the Intestate Succession Act. My concern is that I think that the court could get it wrong. The minority judgment, for instance, suggested that the eldest child should inherit irrespective of their sex, but research findings indicate that it is often the youngest child who is chosen to inherit because she or he (it is most often a daughter) has provided most care for the elderly parents and invested most in the upkeep of the family home after their older siblings left home and established themselves elsewhere.

In my experience, there is a wide variety of different values people draw on when they make claims that affect customary rights and practices. These may not be limited to customary repertoires exclusively – they may also draw on other values that are prevalent in society. I supported a large survey on residential land rights of rural women, spanning research sites in three former homeland areas.[22] The survey found that many more single women (unmarried and widowed) were claiming and obtaining residential sites than prior to 1994. Their claims were based partly on custom, focusing on their birthright or their rights as family members, but they were also bringing in equality.

I think it kind of preempts and blinkers the debate to search for living law developments that are exclusively "customary" in nature; to assume that there will always be a customary thing that will be different from the Constitution if you look hard enough. I think living law developments may entail values that draw on both customary and Constitutional precedents because people don't live in separate worlds, they live in the real world where all these values co-exist and intermingle with one another. I worry that if judges start making up what they think the best customary law would be – because of lack of deep empirical evidence in front of the court – it could be very dangerous.

J: *And your opinion is that judges seldom would have that empirical knowledge, so it is not really possible for them to analyze how customary law is locally developing?*

A: Well, more and more, courts are saying to the parties: go back and bring us evidence of this. They did that for instance in the *Mayelane* case, which centered on the question of whether permission of the first wife was necessary for a husband to marry a second wife.[23] In this case the parties all brought different evidence. And the judges amazingly said: we are not concerned that the evidence differs, because it all underlines certain values, and in any case, we want to develop the customary law in line with the Constitution. They said: we take cognizance of all these different accounts but those variations are not inconsistent with the nature of customary law or the values we seek to give effect to. We are going to say that the first wife must give permission. To my mind that is a flexible and realistic approach that is unusual for a formalist court to follow.

J: *So the judge told the parties to bring evidence to show that it is or is not customary for the first wife to give permission for a second marriage, and then one party came*

with evidence that supported that the first wife has to agree with this, and the other party came with evidence claiming it is quite normal to do it without?

A: It is not as simple as that. There was a whole lot of evidence. But, it wasn't yes she must give permission, no she must not; it was yes she must be notified, yes she can object, but in practice there would be all kinds of social conventions that make it difficult for her to refuse. All the evidence was quite nuanced; it wasn't "this" versus "that." And out of all this evidence the judges concluded that the first wife certainly was not left out of the decision, that she has to be informed and she has to condone it, if not agree. And the court said we are going to develop that condonation into agreement. And in a way that kind of addresses your concern. For a lot of lawyers, it is like "good God, how can they say these things don't contradict each other." But for a lot of scholars of customary law it is a massive relief that they don't see things in such binary terms and that they have said that you can have variations. This case involved a marriage between Tsonga speakers and it just so happens that in Tsonga culture each wife does not have her own house property, so it is different from elsewhere in South Africa. If you had looked at the same issue in KwaZulu-Natal, you would have gotten very different evidence. But yes, it is an example of the court saying: there is a whole lot of nuance here and we accept that nuance, we accept the differences, but there is enough to show that the first wife has got a big stake in it and we are going to say that she must agree.

J: *As an activist with the Land and Accountability Research Centre, you are involved in proving these living customary laws. How do you go about doing that?*

A: In the beginning I used to think that living customary law was just the most brilliant defense against autocratic versions of customary law. To me it was like a brilliant loophole, something that we could use to strike down all those autocratic versions that animate the traditional authority laws. But, over time I have come to realize that it is far more than that, in that it embodies values that are really meaningful to people. And often it has a content that solves problems in a way that just striking down the old, the bad, would not have. What we are discovering now with land rights is that often the processes of consultation in customary law are different from just simple majority. They have to do with decentralized decision making, getting mandates, dividing things up by village, involving the headmen to canvas issues and report on village mandates. And because it slots into people's known world and values and is familiar, it has a power that is much greater than defaulting to majorities. So, I have become steadily more … enamored is the wrong word, but I have started to see the richness of what incorporating customary law on its own terms brings to the legal system. It started off for me as a shield; a shield against these autocratic versions. But the first place where I saw it doing far more than that was in land rights. Because it fleshes out the content of the land rights. And because there are procedures and processes of consultation and consensus-building that are far richer than just ordinary majoritarian democracy.

J: *So if I understand you correctly, the notion of living customary law helps to not just fight autocratic versions of customary law, but it allows you to go back to a different version of customary law or to develop a customary law that is more based on participation, shared decision-making, consensual decision-making … is that what you are saying?*

A: I am saying that for law to be legitimate, it must match with people's values. Our South African law has been an instrument of such oppression and segregation, and it is still experienced as doing that by most people. The rich can still litigate their way out of everything, the poor can't. And if we want to have a rule of law then the law must be legitimate for most of the population and it must resonate with people's values and experiences. I now see customary law as a way in which it can do that positively; not just protectively, defensively, but positively. I have a long engagement with this where I really started off quite utilitarian, like a nice way around the problem. Now I see it as a much richer thing with much more potential. But, there remains the contradiction that if you bring it out of those living processes into this kind of court arena, it gets changed in that process. And what will the consequences of that be? But, to go back to your question about how we prove it, that has got to be empirical. Not: what is the rule, how ought people to do this, but the last time somebody got land here, what process did they follow? So, it is really about collecting empirical evidence about practices, and hopefully finding authorities who have written about that at a bigger scale, historians and anthropologists. And in this, anthropologists become really, really crucial because they do studies over long periods which show changing practice and dynamics at issue.

J: *But that for me is part of the problem, because what you might find in your empirical evidence is that the distortions that were wrought on the system actually mean that the way it is now is quite autocratic. And in such a case you may want to prefer to go back to an earlier, more participatory, version. But which one is the living law? If maybe that distortion has been very successful, if the more autocratic version is very successful, then living customary law will no longer help you, will it?*

A: Well, it depends what you think law is, and what you think rights are. In my experience, all of these things are about claims that people make, and the societal process of adjudicating those claims. And in my experience, once you scratch the surface, you find those claims all over the place, and you find that they have often been honored. And by being honored they have become socially acceptable. In a sense that social acceptance transforms claims into "rights." So, legally women have been denied inheritance for over a hundred years, but everywhere you go you find women inheriting land and you find men saying women are entitled to it. Under the overlay of the official, that is what they are actually doing. Another example is the Ingonyama trust. Here the practice has changed, with the Ingonyama trust forcing people to sign leases on land they owned.

J: *But this was heavily contested at the same time.*

A: Exactly! When you spoke to these people they all said: we wouldn't have signed the leases if officials hadn't lied about them and they hadn't threatened us with being expelled from the community. We were never told we would have to pay rent every year. So, I do think that – and I suppose this for me is the reassuring thing – wherever you go when you just start asking people: how did it happen before? How does it happen now? What do you think about that? A lot comes out about past practice that was in defiance of the law, or claims, or explanations of why they are putting up with a chief because they have no other option, but that they have continued to reject and resist actions which they insist breach customary law. And I think that as long as you can show that they have continued to resist it, you can point to that as proof of distortion as opposed to living customary law.

If you talk about the impact of the legal pluralists, there was a conference of the Commission on Legal Pluralism here at the University of Cape Town about 10 years ago, and I will never forget reading this article by Franz von Benda-Beckmann about the practice of law where he says: we all talk about law as if cases are argued as "as…therefore." They are justified as "this is the law and these are the facts and therefore this is the outcome." But if you look at how lawyers actually argued, they argued as: "if these were the facts, if this were the law, then…" This shows that law, in its making, is contingent. It looks predictable, it looks inevitable in the kind of judgements that come out of this process but this hides that contingent versions are being argued with contingent precedents being used.

I think it is the same with rights. We get this sort of idea that rights are fixed in law, whereas there is all this litigation about the content of rights, all based on "if…then," but it turns out as "as…therefore." And once you start to see your western dominant legal system in that light, then there isn't such an enormous schism between it and customary reasoning or customary processes. There is contingency inherent in both. The more you recognize that, the more you see how our formalist legal system needs this veneer of certainty and predictability to justify and suppress all these other versions of law. And yet these other versions and repertoires have never stopped bubbling under the surface. That is why I love Chanock's work, because he goes into all those historical cases and he shows the basis on which people, even then, were challenging discriminatory laws. And you kind of think: how could these people not have given up? They had everything stacked against them and yet they never gave up. They kept on challenging the "as…therefore."

J: *He literally says that the fact that something gets declared as customary by the courts does not make the other versions any less customary.*[24]

A: And I think that this is what our formal legal system tries to do, it tries to elevate the knowledge and the experiences of judges and professors over the countervailing knowledge and experiences of ordinary people and yet, ordinary people are the source of law's authority. If most people gave up on the law there would be no means of enforcing it. That is why this living customary law jurisprudence has radical implications – it goes back to the people as the source of law. The legal establishment's denial of ordinary people as the source of law's authority creates a crisis with the rule of law. There comes a point where law is so disconnected from

what is considered normal and fair and accessible, that people really do lose confidence in it, and then you have got a really serious crisis in your society.

J: *A lot of your writing is also about democracy and citizenship, and there we also see that either/or dichotomy; either you have full citizenship and then customary law has no space in it, or, like the chiefs are saying, to make customary law a strong system it needs to be segregated and people don't have access to state courts. Whereas I think that a version, in which you accept customary law as it is defined by the people, with more interlocking levels of decision-making and participation, would allow much more for customary justice to be something that people choose, but can also opt out of. And allows for a democracy and citizenship that includes traditional leadership without then excluding for those same people the level of the state.*

A: I think there are two key issues here, that are at the heart of segregation in South Africa –then and now. One of them is citizenship, and that is about decision-making authority. Are you subjects without decision-making authority, or are you citizens with decision-making authority? The second is, do your vested rights in land constitute property, or do you not have property? If you look at all these traditional leadership laws, they are basically saying that land and property belong to the traditional leaders and they have all the decision-making authority. And that has not changed from colonialism until today. To me, decision-making authority is key to citizenship and the recognition of property rights is also fundamental to citizenship.

J: If the decision-making issue were "solved," would that then also impact the property issue?

A: Well, yes, and vice versa. And that is the deal that the chiefs made. There were some reforms in the 2003 Traditional Leaders and Governance Framework Act.[25] Chiefs agreed to them because they thought they would get ownership of the land, and to them that is the jewel in the crown. If you have got the ownership over the land, you can terrorize and evict and do whatever you want to, and ordinary people will never have real decision-making authority. So, obviously chiefs are not all bad, at all, but unfortunately, I think property is the really big one here in South Africa, it always has been, because of our history of dispossession and everyone's deep familiarity with what that means in terms of power.

J: *And that is also where the levels of state, business and traditional authority all combine against the interest of the local people. Let me ask you one last question: If you had to make an overall assessment, is it moving in the right way or is it moving in the wrong way?*

A: The law is moving in the wrong way. But the damage there is limited because government repeatedly fails to get the laws through parliament as they manifestly contradict the Constitution. Much more serious is that government behaves as if the laws have been passed and treats traditional leaders as if they are already

landowners and already have sole decision-making authority over people living in the former homelands. It supports them by withholding finances and starving areas of development unless they align with traditional leaders. The practice of people having to pay levies in order to get basic services is getting more widespread; and people are ending up having to pay for their land – even people who bought land or got land thirty years ago are now told to pay the traditional leaders or they will be evicted. So I think on the ground things are moving in the wrong direction.

I think at the level of the public discourse, because traditional leaders have been so deeply implicated in corruption and the ANC has to move away from that to survive, it may slowly start distancing itself from the worst of them. If you look at the very problematic politicians who are going down for corruption, those are the ones who had the closest links to traditional leaders. The kind of heyday of corruption that the ANC enabled has tarnished the institution of traditional leadership. Just as the excesses of apartheid and the homelands really tarnished the institution in people's eyes. They may have just gone too far. What is worrying is that as the state budget contracts and South Africa finds itself more and more in a failed state situation, government and traditional leaders will default to the way the homelands operated, and they will default more and more to taking less and less account of people as citizens.

J: *And at the same time you might say that for people, if local government can do less, that would also mean more dependence on the traditional leaders. Okay, so a bit of a mixed bag but despite you being a positive person, still quite a gloomy picture.*

A: Yes. But the politics at a macro level casts a very deep shadow. Just as the Constitution casts an incredible shadow, but a positive one, and in terms of that, women agitated for change, and got change; lots of things changed. This kind of symbolism of a corrupt ANC in bed with corrupt chiefs might just really backfire and if the political language starts to shift, like the Minister of land putting her foot down with the Ingonyama Trust in KwaZulu-Natal, it will have ripple effects the whole way down. So, on that basis I am hopeful.

J: Thank you so much for this very interesting interview, Aninka, and I hope we will continue our conversation in the near future.

Notes

1. Chanock (2001).
2. In 1959, with the enactment of the Promotion of Bantu Self-Government Act No. 46, all black people living in South Africa were classified into ethnic groups and were to be divided into these groups, each living in their own territorial "homeland." The homelands were also known and despised as "bantustans."
3. See for instance the Native Appeals Court case Hermansberg Mission Society v. Commissioner of Native Affairs and Darius Mogale (1906 T.S. 135), discussed in Klug 1995. See also Chanock (2001).

4. Weinberg (2013).
5. Feinberg (2015).
6. See for example Delius (1996).
7. Buthelezi was also the leader of the Zulu Inkatha Freedom Party which was implicated in working with the apartheid government to violently attack supporters of the UDF and the ANC. Tens of thousands of black South Africans were killed in violence in KwaZulu and in the Witwatersrand where many Zulu migrant workers lived and worked.
8. The UDF supported and spread the call for South Africa to be made "ungovernable." This was an important political rallying cry, but it was people on the ground who gave this call meaning and shape.
9. "Necklacing" was a gruesome form of mob justice, by which a car tire was wrapped around a person's body and then set alight with gasoline. It was used by the black community to punish black government collaborators and police informants, all in the name of the struggle.
10. Gibbs (2014).
11. Steven Friedman, "South Africans in rural areas are saying 'no more'. Why it matters." The conversation. 8 November 2017; 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.
12. Due to the Ingonyama Trust Act, all land in the former KwaZulu homeland vests in the Ingonyama – the Zulu royal house. In the last decade, the Ingonyama Trust Board has enacted a campaign of misinformation and pressure to have the people living on this land convert their ownership rights to lease rights that require annual payments to the ITB. The issue came to a head in a court case brought by civil society organisations and some brave rural residents who challenged the leases as unconstitutional. The judgment, which was handed down in June 2021, declared the lease programme to be unconstitutional and in contravention of the customary ownership rights of the residents of Ingonyama Trust land. It was damning of the role of the Ingonyama Trust and of the Minister of Land Affairs who had supported the Trust in the litigation. *Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others (12745/2018P) [2021] ZAKZPHC 42; 2021 (8) BCLR 866 (KZP); [2021] 3 All SA 437 (KZP) (11 June 2021).*
13. *Alexkor Ltd and Another v Richtersveld Community and Others* (2003) (12) BCLR 1301 (CC).
14. *Bhe and Others v Magistrate, Khayelitsha and Others* (2005) (10) SA 580 (CC).
15. Ubink and Duda (2021).
16. Matthews (1934).
17. *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC).
18. Personal communication by John Comaroff (2011).
19. Dee Smythe and Diane Jepthas, Pathways to Justice Project, Centre for Law and Society, University of Cape Town, http://www.cls.uct.ac.za/pathways-justice-rural-kzn.
20. *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC). This case centered around the question whether a woman could become the senior traditional leader of a community.
21. Art 211(3) of the 1996 Constitution states that: 'The courts must apply customary law when that law is applicable, subject to the Constitution'.
22. Budlender et al. (2011) and Claassens (2013).
23. *Mayelane v Ngwenyama and Another* [2013] ZACC 14, 2013 (4) SA 415 (CC), 2013 (8) BCLR 918 (CC).
24. Chanock (1989).
25. The Act stipulated that a minimum of 40% of traditional council members had to be elected by the community and one third of its members needed to be women.

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