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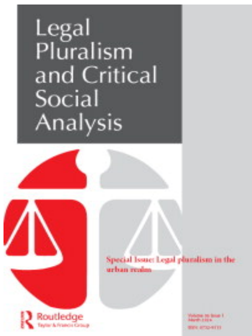

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The mine, the community, and the chief–mining governance and community representation in conditions of legal pluralism

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ABSTRACT

The corporate oxymoron "mine-hosting communities" implies a mutually beneficial relationship between mining companies and surrounding communities. This belies that many communities resist mining activities and downplays the salience of representation and decision-making power in mine-affected communities. Much mining occurs on lands of traditional communities, where mining companies often treat chiefs as uncontested representatives with decision-making power regarding communal lands, ignoring customary law's nested and layered nature. Anthropological studies show that positions of traditional authority are currently highly contested due to chiefs capturing the spoils of land commodification and extractive resources. Concentrating on South Africa, this article explores how increasing contestation of the representative power of traditional authorities – in communities, the legislature, and the courts – impacts mining governance and studies the emergence, functioning and downfall of an alternative form of representation of traditional communities. It demonstrates how the hybridity of representative structures and the interaction of statutory and customary laws and institutions result in a configuration of legal pluralism that enables actors to skirt obligations of both legal registers. With its analysis of mining governance in South Africa, this article underscores the importance of a critical understanding of the complex and constantly renegotiated configurations of legal and institutional pluralism.

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Introduction

In the last decades, the international mining industry has faced increased international scrutiny of its activities and the social, economic, and environmental impacts of mining on affected communities. Both national and international law increasingly regulate the rights of communities in mining-related decision-making and the obligations of mining companies towards such communities. In addition, Corporate

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Social Responsibility (CSR) guidelines progressively focus on good relations between the mine and affected communities.[1]

Communities on whose territory mining activities are undertaken are often described with the term "mine-hosting communities".[2] Jenkins (2004, 28) writes: "the community construct [as constructed by the company] is based on a set of positive assertions about social values and policies, most of which serve to place the company at the heart of the community. Widely used affirmations are the community as a "neighbour", as a "host", and a sense of togetherness…" "Mine-hosting community" is thus a term deliberately constructed by the mining sector, to imply a willingness of communities to welcome the mine in their midst, which in its turn signifies an underlying belief within these communities that the mine will be beneficial to them.

The term can be understood as a 'corporate oxymoron', in the sense meant by Benson and Kirsch (2010), whereby corporations deliberately manipulate language to 'overcode' reality in order to call attention to one term while obscuring the other. The oxymoron also suggests, according to Benson and Kirsch, that this relationship is normal and even desirable. The term mine-hosting community masks a much less favourable reality. Research has widely exposed the harsh impact of mining on affected communities all over the globe. Meyersfeld (2017, 53) for instance notes that "[m]ining companies enter a market with a beguiling proposal of jobs and local economic development. However, this narrative is rarely reflected in reality." She concludes that mining-linked economic development must be exposed as the stuff of fiction and mythology. Contrary to the mine-constructed narrative of welcoming communities, in many localities people heavily resist or are internally divided about the arrival of a mine in their territory. This indicates the salience of representation and decision-making power in these communities.

Several studies point to the complexity of identifying who comprise the community and who can legitimately represent it (Ballard and Banks 2003; Jenkins 2004; Kapelus 2002; Mnwana 2014a, 2015; see also United Nations Economic and Social Council (UNESC)) 2005, para. 15). Kapelus (2002, 282) points out that it is in the interest of the mining firm to present the community as having an uncontested legitimate authority, as that allows the company to negotiate agreements with only one authority, rather than several parties with potentially conflicting interests. Often, the mining company designates the community's elite as the legitimate authority. Disagreements within the community – about mining-related decision-making power and the distribution of benefits – are purposely ignored.

Much extractive industry is situated on land inhabited by traditional communities,[3] which are governed by a combination of state and customary law and governance institutions. Mining companies often treat traditional leaders as the representatives of such communities, with the power to make decisions regarding communal lands. In-depth qualitative studies on customary governance, however, have convincingly demonstrated that the role of traditional leaders is increasingly disputed and that the presence of extractive resources on communal land heightens conflicts around representation and decision-making power. An analysis of mining governance and community-mine relations therefore demands a critical understanding of "territorial governance and control and an engagement with the reality of legal and territorial pluralism whereby multiple actors vie for legitimacy and authority" (Mnwana 2015; Leonard 2018, 291; Huizenga 2019, 711, see also Akiwumi 2016). Such endeavour asks for an analysis of the structures of customary law and governance and their interrelationships with mining corporations but would further benefit from posing the pertinent question whether traditional communities can also be represented by a different body, one less directly linked to the contested traditional authority.

To analyse these issues, the article focuses on South Africa, where mining companies' historical implication in apartheid-era crimes and support of the apartheid system (Truth and Reconciliation Commission (South Africa)) 2003, 151–155) pose a particular challenge to good company-community relations. A significant part of South Africa's mineral resources is found beneath rural land in former *Bantustans* or "homeland" areas occupied by what post-apartheid law terms "traditional communities", governed by both African customary law and state law, under the leadership of chiefs (referred to as "senior traditional leaders" in the applicable law). While South Africa's mining industry reportedly represented 8.2% of the country's GDP in 2020 (Minerals Council South Africa 2020), it has brought few benefits to former homelands' marginalized communities (Mnwana 2014a, 2014b; Capps 2016; Claassens 2019; Huizenga 2019; Ubink and Pickering 2021). This has led to severe struggles over the authority of the senior traditional leaders to represent the community in mining-related decision-making. Mining deals are the object of heavy contestation in South Africa, with coalitions of community members, civil society organizations and human rights organizations pitted against senior traditional leaders, large-scale mining companies, and politicians. In some localities a different form of representation of traditional communities – village-level not-for-profit companies – was set up to deal with issues of mine expansion and village relocation.

This article studies both the "classic" model of representation of traditional communities by traditional leaders and this alternative form of village-level not-for profit companies. Besides struggles playing out at community level, the legislature and the courts have also been vibrant arenas for the fight over the representative power of chiefs and the rights of customary landholders to be involved in mining-related decision-making. Through the study of South Africa, this article aims to understand how mine-affected traditional communities – operating in a context of legal pluralism – are represented both in law and in practice, and as such to enhance our understanding of community representation in mining governance, and contestations related thereto, in legally pluralistic contexts.

We organize the rest of the article as follows: First, we outline the literature on mine-community relations and situate aspects of community representation and decision-making in a context of legal pluralism. Then, we present the approach and methods we employ in the study. This is followed by three sections discussing the way mine-affected customary communities in South Africa are represented, in law and in practice. The latter includes both the "classic" model of community representation by traditional leaders and the alternative form *via* village-level not-for profit companies. Finally, we discuss our findings and report our contributions to the literature in the concluding sections, which demonstrate the necessity to grasp the complex and constantly renegotiated configurations of legal and institutional pluralism to understand company-community relations in traditional communities.

Situating company-community relations in a context of legal pluralism

Around the turn of the century, the idea gained increasing traction that companies ought to look beyond their shareholders, employees and customers and consider their external stakeholders: people who affect or are affected by corporate policies and practices, including local communities. The predominance of the stakeholder approach[4] led to research into the objectives of corporations and their actions vis-à-vis stakeholders (Jamali 2008). These studies focused, for example, on the way company reports portray community relations (Jenkins 2004), on issues such as stakeholder classification and prioritization (Garriga and Melé 2004, 59), on the impact of CSR on a company's financial performance (Carroll 2008), or the "reputational liability effect" of CSR (Graafland 2018). However, these studies are critiqued for "rely[ing] on the company as the primary unit of analysis" (Hamann 2004, 59), which limits our understanding of the complex dynamics of the relationship between the company and its various stakeholders (Banerjee 2000, 41).

With a growing interest of anthropologists in mining (Ballard and Banks 2003), external stakeholders have come more into focus. Rajak (2011, 18), however, notes a tendency of anthropologists studying CSR and other novel forms of ethical economy, to do so primarily from the perspective of the "targets", and urges us to also interrogate the agency of corporate actors. Welker (2014, 18) furthers that one should not presume a clear separation between corporations and their stakeholders. She sees corporations as having a 'partible, permeable and composite dynamic', shaped amongst others by the actions and beliefs of affected communities and other stakeholders. Taken together, both academic fields thus support the significance of studying the intricate multiform interrelationships between communities, companies, and other stakeholders.

Analysing the form and functioning of the corporate-community "partnership" includes pertinent and potentially volatile questions regarding who make up the community and who can represent it (Kapelus 2002; Ballard and Banks 2003; Rajak 2011, 176; Mnwana 2014a). Early stages of engagement between companies and communities involve the selection of people who can claim positions of authority and representation in the community and act as gatekeepers (Luning 2012, 209). Consultants involved in the Canadian Convention of Prospectors and Developers did not see any inconsistency in simultaneously arguing for giving local communities the power to give or withdraw their consent to mining activities, and having external actors – industry and consultants – determine the criteria by which a group would qualify as a community (ibid., 208). It is in a company's interest to present the community as having an uncontested legitimate authority, with whom the company can communicate and negotiate agreements (Kapelus 2002, 282). Companies tend to designate the community's elite as the legitimate authority to represent the community in decisions relating to the company, ignoring or downplaying alternate voices within the community. At the same time, companies are seen to employ divide and rule tactics in mine-affected communities (cf. Luning 2012, 210). Rajak (2011, 206) shows how CSR activities often represent exclusionary processes "of identification, isolation and elevation of an elite group of beneficiaries, making the company the architect of a new class of empowered subjects". In another study, Dolan and Rajak (2011, 5) conclude from studies in a range of geographical locations in various continents:

> The CSR movement projects an inclusive vision of empowerment and social responsibility … [b]ut in practice … they often prove to be exclusive, privileging certain actors, agendas, and interests, while marginalizing others, despite a rhetorical, if not often institutional, commitment to principles of collaboration and participation.

Studies highlight the unequal balance of powers in interactions between large companies and communities. The dominance of companies is compounded within the mining context, where the different actors involved frequently have radically different agendas and interests, and a starkly unequal balance of powers. Covey and Brown (2001, 8) believe that while "parties do not have to be equal in power" for interest-based negotiations to work "they do have to recognize each other as capable of imposing significant costs or providing valuable benefit." The lack of a sufficiently level playing field leads to limited consultation of mine-affected communities and a lack of actual community decision-making power regarding mining activities on their lands. Haalboom (2012), for instance, shows how the power dynamics in Suriname combined with the imprecise and ambiguous wording of CSR guidelines allows multinational corporations to prioritize certain aspects of mining, such as environmental, over more holistic concerns of indigenous groups. Banerjee, writing about Australia, concludes that while corporations (and governments and wider society) see Aborigines as legitimate stakeholders, "[a]boriginal notions of development and land use are not really legitimate alternatives to Western notions of progress and development" (2000, 25). Their interests are never considered as having the same weight as that of the company or the state, and their interests, although "addressed", can never ultimately be considered viable. In a different study he asks how we can expect a mining firm to empower stakeholders if those stakeholders have directly opposing agendas to industry (Banerjee 2008, 64).

A significant portion of the world's resource extraction takes place on the land of indigenous peoples or traditional communities[5] (O'Faircheallaigh 2012; Standing and Hilson 2013; Working Group on Mining and Human Rights in Latin America 2014; Rorato et al. 2020), governed by a combination of state and customary law and governance institutions. This context of legal pluralism has a profound impact on issues of community representation and decision-making regarding mining-related issues. The complex character of such communities is often not sufficiently understood or catered for by policy makers, consultants and companies (Luning 2012, 206; Mnwana 2015, 500). In-depth empirical research in traditional communities bears witness to increasing contestation over traditional authority positions and shows that the commodification of land heightens conflicts around representation and membership and increases divisions within communities. Amanor (2008), for instance, describes how in Ghana the state deliberately empowers traditional leaders to control land and natural resources by supporting a version of customary law that portrays customary systems as egalitarian while in fact allowing the chiefs to appropriate communal land and allocate such land on the market, to the detriment of community members. Writing about the same country, Kidido et al. (2015) highlight that determining claims, claimants and proportions of mining compensation is complicated by the complexity of the tenure arrangements under customary law, and Apoh et al. (2017) recommend adopting a clear legal definition of who hold authority to make decisions about customary land. Arizona (2022) demonstrates how in Indonesia communities compete for formal recognition as "adat (indigenous) communities" and for the authority to represent local communities in the articulation of customary land claims vis-à-vis government and mining corporations. Apapoe (forthcoming) shows how in the gold mining sector in Suriname some traditional leaders apply for gold mining concessions from the state, ostensibly on behalf of their communities, but often without their communities' knowledge and accountability regarding the revenues, and how this results in conflicts between traditional leaders and community members as well as between various levels of traditional leadership. A range of studies (including Akaateba 2019; Benjaminsen et al. 2009; Chimhowu and Woodhouse 2006; Green and Norberg 2018; Ubink 2008; Ubink, Hoekema, and Assies 2009) furthermore show how processes of formalization and certification of land provide chiefs and elders with tools to strengthen their administrative power, to the detriment of ordinary community members and vulnerable groups. These and other studies thus clearly demonstrate traditional leaders' increasing capture of the wealth of communal lands to the detriment of many community members, which has made their role and governance powers the object of heavy local contestation and resistance.

Methods and approach

In this article we study two different patterns of representation of traditional communities, namely *via* chiefs and *via* not-for-profit companies, which are studied *via* different methods. The first pattern, involving community representation by traditional authorities, has been relatively well-documented in the literature, and is therefore largely analysed on the basis of a literature review. Besides academic literature, there are numerous recent investigative reports from governmental[6] as well as non-governmental institutions[7] and mining struggles in rural communities, courts and legislative arenas have drawn ample attention from the media.[8] The second author furthermore has insight into these processes from her involvement as grass-roots lawyer and activist in South Africa's mine-affected communities. The second pattern, involving representation of traditional communities by not-for-profit companies, has been much less documented. Here, a case-based approach was chosen. Case studies are used to generate in-depth, multifaceted understanding of a particular project, policy, institution, or system, as their complexity and uniqueness are explored from multiple perspectives in their natural real-life context (Bennett and Elman 2006; Simons 2014). The case-based approach leads to a deep understanding of context and experience, from which inferences can be drawn. With such method, this study aims to reveal processes and mechanisms of community representation, not to generalize the specific content or context (Simons 2014, 8, 22; Small 2009, 10).

Mapela traditional community was selected as case study. Mapela is a community in Limpopo province affected by Anglo American Platinum Limited's (Amplats) Mogalakwena mine with long-term conflicts and unrest around mining activities.

Amplats is "the world's largest platinum mining company and the recipient of many awards for its sustainability reports and practices" (Farrell, Hamann, and Mackres 2012, 198). Amplats' website proclaims: "The places where we mine should be the first to benefit from the value we create. Around the world we're helping communities secure lasting prosperity."[9] Amplats also publicly commits to an extensive program of community engagement.[10] Despite this rhetoric, the impact of mining operations on the surrounding Mapela community has been devastating (Curtis/ Action Aid and M 2008; Mnwana, Mtero, and Hay 2016, 15-23), which has resulted in a fraught relationship between traditional authority institutions and community members. When Amplats wanted to extend some of its operations and this necessitated the relocation of a number of villages in the Mapela community, village-level not-for-profit companies were formed to represent communities vis-à-vis the mining company in the relocation negotiations (Mnwana, Mtero, and Hay 2016, 24).

Several insightful reports have been written about mining activities in Mapela traditional area.[11] To complement these studies and gain a deeper understanding of the formation and functioning of the not-for-profit companies in Mapela, the authors used two core methods. Authors jointly conducted in-depth semi-structured ethnographic interviews (cf. Bennett and Elman 2006; Bernard 2017) between August and November 2016 with respondents from several villages close to the Mogalakwena mine, particularly three villages that had been relocated due to mining operations, Ga-Pila, Ga-Sekhoalelo and Ga-Puka (Mohlohlo). Interviewees included traditional leaders, directors of the not-for-profit companies, villagers, including members of the "concerned groups", as well as officials at the South African Human Rights Commission and the mining company. Interviews generally lasted between 30 min and two hours. Interviewing these actors, all involved with the not-for-profit companies in different ways and times, allowed us to gauge multiple perspectives on these institutions. Data were recorded in meticulous fieldnotes, shared and compared by the authors, and analyzed to understand the functioning of the not-for-profit companies from their initiation phase towards their informal disbandment. In addition, second author conducted participant observation (Bernard 2017) by working as an activist and grassroots lawyer in this area. This author's involvement as grass-roots lawyer and activist in South Africa's mine-affected communities provided the authors with important background knowledge of the complex context within which the research was carried out, particularly regarding community-mine dynamics in the research site as well as the region more broadly. It also permitted the authors to have access that they would not otherwise have had, given that the communities involved had significant levels of mistrust towards researchers due to negative experiences in the past (for example, speaking with mine employees posing as researchers, or not having seen any positive outcomes of previous research in which they had played a role). Better access to the communities within the research site also meant that the authors were able to be put in contact with people who were key to understanding the full context.

South Africa's legal framework - whose decision, whose consent?

Which actors in South Africa's traditional communities have powers of representation and decision-making regarding communal land in the mining context is the subject of several laws, most prominently the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). The MPRDA establishes that mineral resources "are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans." As custodian, the State may grant mining licenses.[12] IPILRA was enacted to give effect to section 25(6) of the Constitution, which entitles persons or communities with land that is legally insecure due to past racially discriminatory laws or practices, to tenure security.[13] The Act provides that persons may only be deprived of an informal right to land held on a communal basis in accordance with the custom of the community, and provided that a decision is taken by the majority of the holders who stand to lose their land rights. The term "informal rights to land" is construed broadly to include use of, occupation of and access to land under customary law.[14]

Legally, the person with authority to sign surface leases over communally-owned land is the Minister of Land Affairs and Rural Development, as trustee of the land. Due to IPILRA this requires consent from the directly affected informal rights holders (Parliament of South Africa 2017, 264). Despite this, the Department of Mineral Resources advises mining companies to engage with the senior traditional leaders of the relevant communities. In the past, government and mining companies would argue that, when it comes to mining rights, the MPRDA trumps IPILRA, contending that license holders under the MPRDA had an "unconditional right to access the land needed to undertake mining, without any requirement for agreed levels of compensation for those whose surface rights to the land are affected or destroyed by mining" (Claassens 2019, 107). However, the landmark Constitutional Court decision of *Maledu* clarified the legal position, holding that "[t]he existence of a mineral right does not itself extinguish the rights of a landowner or any other occupier of the land in question."[15] Accordingly, the MPRDA does not override the rights of individual land rights holders in traditional communities under IPILRA not to be deprived of their land without their consent. In *Baleni*,[16] the Gauteng Division of the High Court followed this reasoning. The judgment held that, for a mining right to be granted in terms of the MPRDA, the full and informed consent of customary communities, whose rights in land are protected by IPILRA, must be obtained.

Here a third Act, the Traditional and Khoi-San Leadership Act 3 of 2019 (TKLA), comes into play. The promulgation of this Act runs contrary to the principles expounded in the two court decisions. Its section 24(2) provides that a traditional council may enter into partnerships and agreements with "any person, body or institution".[17] Rather than explicitly requiring the consent of the directly affected community, it requires that there be "a prior consultation with the relevant community" as well as a majority decision in favour of the partnership or agreement by *those present at the consultation*.[18] While IPILRA grants decision-making power to directly affected informal land rights holders, the TKLA shifts such power away and places it instead with the "relevant community represented by such [traditional] council." This means that, in cases where only a minority of a recognized traditional community is directly affected by mining activities, the majority of unaffected community members can outvote those members that are directly affected.

Moreover, in setting out the conditions to which any partnership or agreement with a traditional council are subject, section 24(3) of the TKLA states that these are applicable "notwithstanding the provisions of any other law" – an addition which appeared in the text of the Bill *after* the *Maledu* judgment was handed down. In this way, the TKLA attempts to circumvent the protections contained in IPILRA by stating that the TKLA will apply notwithstanding any laws to the contrary. While legal experts deem it unlikely that an interpretation allowing TKLA to trump rights granted by IPILRA would withstand constitutional scrutiny (Land and Accountability Research Centre 2018), the inclusion of this phrase in the Act demonstrates the extent to which "government and Parliament remain hell-bent on entrenching the current practice of traditional councils authorizing deals after nominal processes of consultation, notwithstanding the *Maledu* judgment" (Claassens 2019, 93).

The MPRD stimulates the inclusion of traditional communities in mining activities, and through it, "the state has promoted several measures, including black economic empowerment (BEE) mine-community partnerships, continued royalty payments, and social labour plans as requirements for mining companies" (Mnwana 2015, 502). BEE measures are likely an important explanation for government's stance in favour of centralized powers of senior traditional leaders to conclude mining deals unencumbered by the need for consent from the directly affected informal landholders. One element of BEE, which was intended to advance economic transformation and increase the economic participation of black South Africans in the economy, mandates that a certain percentage of shares of share-holding companies needs to be in the hands of "historically disadvantaged South Africans". Shareholding mining companies thus all need BEE shareholders, and often find them among traditional leaders and the well-connected black business elite that has emerged after the end of apartheid, several of whom have now become "mining magnates" ((Claassens and Matlala 2014, 123-4; Claassens 2019). There is quite a revolving door between provincial and national government and members of this business elite, who are often in and out of governmental jobs during their career. Within the legal community and amongst those that have worked closely on BEE deals, there is a widely held view that officials from the Department of Mineral Resources indicate to mining companies who their BEE partners must be and that the granting and withholding of mining licenses have been crucial aspects of state capture[19] (Ubink and Pickering 2021, 8).

The *Baleni* case displays the significance of community representation and the distinction between IPILRA's "directly affected community" and TKLB's "relevant community". In this case, a mining deal was made between Australian mining company TEM and the Amadiba Traditional Council. The envisaged mining operation was situated in the territory of Umgungundlovu community. Under the Traditional Leadership and Governance Framework Act, the five-village Umgungundlovu community falls under Amadiba Traditional Council and its chairperson Chief Lunga Baleni. The Amadiba Crisis Committee (ACC), however, claimed that since the land is owned both individually and collectively by the Umgungundlovu community, the territorial jurisdiction for decisions regarding those lands lies at the level of this (Umgungundlovu) community instead of the Amadiba Traditional Council. They demanded that "the process for seeking and attaining community consent be determined by the (Umgungundlovu) people themselves" (Founding Affidavit, 2016) (Huizenga 2019, 717) and they reserved the right to be represented by leaders of their own choosing. Mining company TEM was unwilling to accept that anyone but the Amadiba Traditional Council had authority to take and challenge mining-related decisions. Deciding in favour of the ACC, the Gauteng High Court adopted a legal position which supports the findings made by multiple anthropological studies on this subject: in such systems, characterized by multi-layered customary land rights and authority structures (Delius 2008), primary decision-making regarding land matters rests at the lowest level, "with those who inhabit and use the land" (Fay 2005, 199). This contrasts with the legal position which the TKLA attempts to create, in which decision-making power is centralised with the senior traditional leader, leaving little room for directly affected members of the community to have a say over what happens on their land.[20]

The above makes clear that the legal framework itself regarding representation is an object of fierce contestation. We will see in the following section that the deliberately (re)constituted ambiguity around rural land rights and powers of authority provides an important context for struggles over mining at the community level.

"Classic" representation of traditional communities - by senior traditional leaders

As stated, when mining companies wish to start prospecting or operating on land in South Africa's former homelands, the Department of Mineral Resources generally directs them to the senior traditional leaders of the areas in question (Ubink and Pickering 2021). In combination with the way mining legislation and legislation regulating traditional authority has been drafted, this has led to "chiefs … increasingly controlling the interactions between mining corporations and the 'traditional communities' they formally represent" (Mnwana and Capps 2015, 6). The resulting contracts that senior traditional leaders and traditional councils enter into with mining companies and their impact on mine-affected communities have received increasing scholarly attention. These studies decribe mining deals in various areas of South Africa, characterized by top-down decision-making lacking community participation and transparency. This results in high tensions between community members, traditional authorities and mining companies regarding lack of accountability and transparency and charges of corruption and mismanagement (Claassens and Matlala 2014; Farrell, Hamann, and Mackres 2012, 197; Huizenga 2019; Manson and Mbenga 2003; Mnwana 2014a, 2015; Wicomb 2021; Yeni 2019).

Mining deals have also drawn attention from the media and civil society organizations (Action Aid 2016; Corruption Watch 2018), and have been the subject of investigations by the South African Human Rights Commission (2008, 2018), special Commissions of Inquiry,[21] the Parliament of South Africa (2017), the Public Protector[22] and private forensic auditors.[23] Combined, these organisations sketch an unnerving picture of powerful players – including transnational mining companies, traditional leaders and traditional councils, corrupt government officials and South African investors profiting from BEE deals – taking advantage of the vulnerabilities of rural people, resulting in "mining deals that enrich a select few while excluding the ordinary people whose land rights are at stake" (Parliament of South Africa 2017, 203). The large money flows generally bring few benefits to community members who are faced with the detrimental effects of mining on their land. They lose access to farmlands, sometimes need to relocate to new residential areas, and are confronted with pollution, noise and dust from blasting. The sources report extremely high tensions in areas where mining is taking place on communal land, resulting from widespread corruption, misappropriation of community funds and royalties, and a strong accountability deficit. The government is faulted for its "failure to monitor compliance, poor enforcement, and a severe lack of coordination." (South African Human Rights Commission 2018, 81) and for its "active role in enabling unlawful transactions to proceed and in shielding the perpetrators from efforts to hold them accountable" (Claassens 2019, 77). From this broad array of literature into various mining deals, we can draw insights regarding several aspects of governance and representation in the context of legal and governance pluralism.

Mining deals often involve the 'corporatization of traditional communities', including complex structures in terms of which part of the mining revenue is used to purchase shares, ostensibly on behalf of the community, in the mining company and to finance community investment companies.[24] While these investment or empowerment companies bear the name of the community, often the majority of community members is neither informed of its structure, ownership or possible connections with traditional leaders and royal family members, nor involved in the selection of its board of directors. In some cases, many community members only become aware of the existence of "their" investment company several years after its establishment. This was for instance the case with the Xolobeni Empowerment Company – Xolobeni is the community at the centre of the struggle in the Umgungundlovu area on which the *Baleni* case, discussed above, centres (Huizenga 2019, 218). Another example is the Bapo Ba Mogale community. In 2014, the acting senior traditional leader of this community, his son, and the CEO of Bapo Ba Mogale Investments (BBMI) concluded a swap deal with mining company Lonmin, in which entitlements to future royalties were largely transformed into Lonmin shares. Additionally, BBMI would receive preferential status to supply goods and services to Lonmin to a minimum value of ZAR200m, plus annual payments of ZAR20m for five years. To create a paper trail allegedly showing community consent with this deal, BBMI sent some people to the community to distribute notices on the transaction. Community members were, however, only given information after signing a "community consultation process form", which, unbeknownst to most community members, signalled their consent to the deal (Public Protector 2017/2018, section 5.1.31.3-5; see also Bloom 2016; Mogale 2017; Olalde 2017).[25]

Communities often have little knowledge of the mining deals and their legal, technical, and financial intricacies (Corruption Watch 2018; 2019, Baloyi Commission 2019, 20-21; Mnwana 2015, 505). When community interests are converted into equity stakes in mining companies, shares ultimately vest in connected individuals with very limited community oversight (Claassens and Matlala 2014, 125). The vast sums of money flowing into the accounts of traditional councils often bring very little benefit to the community. According to an internal audit report of the Bakgatla ba Kgafela Traditional Authority – which has crafted a "tribal" business empire of around ZAR 15 billion with revenues generated from mining and other sources (Mnwana and Capps 2015, 6) – only five per cent of its spending was on projects benefiting the community (Claassens and Matlala 2014, 125).

Community participation and accounting of traditional leaders for their administration are supposed to happen – and are often assumed to happen – at customary fora, including mass community meetings open to all community members. Such meetings in the Bakgatla ba-Kgafela community have been described as "a forum of public oversight: in the longstanding spirit of democracy" (Comaroff and Comaroff 2009, 106). Mnwana, however, shows that community members regarded these meetings, although indeed very inclusive, not conducive for actual input by community members on highly technical mining issues. The dominance of the meetings by experts reporting on highly technical reports allowed for few grassroots voices and made community participation largely tokenistic. When community members managed to voice their discontent, this resulted in arrests and suspension of further meetings. In addition, youth complained they were largely excluded from traditional councils and other key decision-making fora, while the largely uneducated elders failed to grasp the intellectually demanding mining decisions (Mnwana 2014a, 835–836).[26] Traditional leaders' uncontrolled access to mining wealth furthermore enables them to neutralize opposition and pay for allegiance (cf. Wicomb 2021, 190). Wicomb (2021, 186-189) moreover shows how the senior traditional leader of Bakgatla-Ba-Kgafela, kgosi Nyalale Pilane tried to manoeuvre the pluri-legal field to prevent scrutiny under statutory law. During hearings organised by a commission of enquiry into the maladministration and other issues relating to the Bakgatla-Ba-Kgafela's traditional leadership (the Baloyi Commission), kgosi Pilane argued that while the community's companies are run in accordance with the Companies Act and this Act requires a holding company to compile consolidated financial statements, the Act did not mention traditional councils or communities, and it could therefore not be expected of him and his traditional council to comply with these requirements. She concludes that Kgosi Nyalale attempted to blend traditional and corporate governance in a way that would allow him "to skirt the obligations of both" (ibid.).

Chiefs have sometimes successfully enlisted the formal legal system to sidestep local opposition. It is, for instance, quite common for the police to arrest critical community members, and this often occurs in a heavy-handed manner. Outright violence including killings has also been reported in many communities (Action Aid 2016, 30-46, 52; Boyle 2016; Huizenga 2019, 715; Kockott and Hattingh 2020; Leonard 2018, 290; Mnwana, Mtero, and Hay 2016, 33; South Africa Human Rights Commission 2020; Yeni 2019, 172-4).[27] State courts also play a role. Pickering and Motala (2021) describe several cases across the North West, Limpopo and Mpumalanga provinces where courts have been applied for and granted interdicts sought by traditional leaders against community members who tried to challenge their authority. The North West High Court, which has made several decisions regarding disputes in the Bakgatla ba-Kgafela Traditional Authority, serves as an example. The court not only repeatedly dismissed "complaints of community members, and their attempts to enforce the protective provisions of the law … on the basis of flawed *locus standi*", but has also granted interdicts sought by the chief to prevent activist leaders from actively participating in tribal meetings or calling their own meetings of the tribe or village (Claassens and Matlala 2014, 127–130; Pickering and Motala 2021, 123-9). In some cases, courts have sanctioned activists with punitive costs. While chiefs use tribal mining funds to fight their legal causes,[28] such punitive costs cause activists great personal suffering, with a clear chilling effect on community activism (Mnwana 2014a, 26-27). All in all, these judgments seriously undermine the accountability of traditional leaders and reinforce a rigid conception of customary law as 'empowering chiefs to be trustees of communal land' (Mnwana 2015, 505). In 2013, the Constitutional Court set aside similar interdicts obtained by the officially recognized senior traditional leader of the Bakgatla baKgafela, Nyalala Pilane, against community members. The Court held the interdict amounted to a negation of the constitutional rights to freedom of expression, assembly and association. Despite this seminal judgment, interdicts continue to be sought and granted by local courts in similar circumstances and on a fairly regular basis. Claassens (2019, endnote 11) believes that while higher courts have overturned several apartheid-era precedents, rural activists are often unable to pursue a case to the higher courts and their precedents take time to become known at the lower courts, which in the meantime mostly continue to default to apartheid-era precedents.

An alternative form of community representation - village-level not-for-profit companies

In the above-described context of increasing toxicity of the relationship between traditional authorities and community members, mining companies encountered growing levels of hostility from communities. One such community was Mapela traditional community, "host" of Amplats' Mogalakwena 'flagship'[29] platinum mine,[30] where anger about chief-led mining deals was high. Amplats has operated in the Mapela area on a massive scale for 30 years. From around mid to late 1990s, Amplats started to make plans to extend its operations, which would require the relocation of several villages in Mapela community. Considering the strained relationship with the senior traditional leader, this necessitated the selection and engagement of new community representatives. Amplats, the Provincial government and the then acting senior traditional leader of Mapela traditional community, *Kgoshigadi* (chieftainess) Atalia Langa, suggested that the affected villages formed Relocation Steering Committees, to start discussions on the relocations (cf. Mnwana, Mtero, and Hay 2016). These committees were later transformed into not-for-profit "section 21 companies"[31] (hereafter section 21s) and those institutions negotiated the relocation deals between Amplats and the affected villages.

Several insightful reports have been written about mining activities in Mapela traditional area.[32] To complement these studies and gain a deeper understanding of the formation and functioning of the not-for-profit companies in Mapela, field research was undertaken by the authors in Mapela's relocation villages. The case of Ga-Pila is exemplary. In this village, a Relocation Steering Committee was established around the year 2000 or 2001 during a *kgoro* (traditional council) meeting, with the stated aim of improving communication with Amplats. At a later *kgoro* meeting the villagers present were informed that the committee had been transformed into a section 21. There was no explanation of who had decided this, on which authority and when, nor of the functions and powers the section 21 would hold. The articles of association of the section 21 were not then, nor later, shared with community members, despite repeated requests to do so.

During its lifespan, the section 21 provided very little clarity on the negotiations with Amplats regarding the conditions for the move, including aspects of the future livelihoods and economic security of villagers – what the houses and fields in the new location would look like, how much compensation would be paid, how the new locations would be serviced. Various community members started asking increasingly critical questions and demanding clarity and openness, which resulted in the section 21's further withdrawal from the community. Instead of meeting locally, they now convened in fancy hotels in town, as far away as Johannesburg.[33] Pressure on community members resisting the move or its unclear conditions mounted, including intimidation and violence and a mysterious lethal car accident of a main activist. There were also attempts to neutralize protesters through job offers and offers of better houses and higher compensation to selected individuals. When the village headman (*ntona*) started to oppose the actions of the section 21 senior traditional leader *kgoshi* David Langa[34] appointed a different *ntona*. Similar types of interference were reported in other villages[35] – leading to numerous conflicts between the two different contenders for the position of *ntona* and their respective supporters. This underpins the widely shared conviction of Mapela residents that "(t)he section 21, *kgoshi* and the mine all work together".[36] When Ga Pila's section 21 finally concluded a relocation deal with Amplats, the section 21 directors refused to share the document with or explain its content to the community, on whose behalf they supposedly concluded the agreement.

As in the earlier described protests against mining decisions by traditional authorities, here also law enforcement was employed to further mining interests, in a role as "partisan stakeholders" (South African Human Rights Commission 2008, 55-57). The police played a key role in breaking up protests in the community, arresting dissenters just for being "on the list [of protesters]".[37] While these arrests did not lead to actual trials, bail was set very high,[38] which resulted in these activists being temporarily off the stage.

Besides paying the costs of the upmarket, remote meetings of the section 21s, Amplats paid stipends to the section 21 directors (cf. Curtis/Action Aid and M 2008; Farrell, Hamann, and Mackres 2012). Many community members felt this was impairing the directors' impartiality. "If they give you stipends, you cannot talk", is how a Ga-Pila resident expresses it. "Section 21s … represent the mine in the community. They don't represent the community. They're accountable to the mine, not the community."[39] There was a widely shared understanding in Ga-Pila that the section 21 directors have, moreover, profited handsomely from their positions, partly *via* stipends paid and skimming and theft of compensation and goods due to the community, but more importantly *via* tenders and development projects in the relocated areas (Ubink and Pickering 2021, 16).[40] Amplats also selected and paid the lawyers who were introduced to the villagers as their lawyers, representing their interests. These lawyers, Seth Nthai and Bhadrish Daya, both with long histories of acting as legal representatives for Amplats, assisted the Mapela communities with the establishment of section 21s and the negotiations of relocation agreements. Other sources (South African Human Rights Commission 2008, 21; Mnwana, Mtero, and Hay 2016, 25) similarly describe how in two earlier relocation villages (Ga-Puka and Ga-Sekhaolelo) the establishment of section 21s was done on the basis of specific advice given to the communities by these legal representatives.

Amplats mostly refused to meet and deal with community members or organizations not affiliated to the section 21s (cf. Curtis/Action Aid and M 2008, 14, 34). For example, in 2011, the "concerned group of Ga-Pila" marched to the Mogalakwena mine to present management a memorandum. In it they asked Amplats to stop negotiating with the section 21, which, they stated, had been established without knowledge or consent of most community members and which had not been mandated to conclude agreements without consulting the community. They demanded that any further negotiations be conducted between Amplats and the community. The company responded as follows: "The community is the beneficiary of the Section 21 company and if the beneficiaries are dissatisfied with the Section 21 company it is incumbent upon the beneficiaries to raise its dissatisfaction with the Section 21 company directly and not seek to have Anglo American Platinum Limited do so on behalf of the beneficiaries."[41] Amplats continued to liaise with Ga-Pila only *via* the section 21.

The story of Ga Pila clearly shows that while ostensibly based on statutory law to form a body representative of the community, the sections 21s were in fact hybrid institutions blending aspects of formal and customary justice systems. They were constituted by and operated under the influence of customary governance structures and the senior traditional leader was heavily invested in guaranteeing their cooperation with mine expansion and village relocation. In addition, both in Ga Pila and other Mapela villages, the operation of the section 21s was tightly orchestrated and controlled by Amplats. The section 21 meetings, the section 21 directors and the "community lawyers" were all paid by Amplats, and the company allowed only the section 21 as the representative of the community, despite clear messages that communities did not regard them as such. This supports Curtis/Action Aid and M (2008, 22–23; cf. Farrell, Hamann, and Mackres 2012, 198) scathing observation that "(i)t is hard to avoid the conclusion that the relocation agreement [was] in reality agreed between Anglo Platinum and itself". Section 21s served to facilitate relocation through a semblance of community participation and consent diverting attention away from corporate responsibility. The fact that in Mohlohlo Amplats made the section 21 responsible for instituting and prosecuting eviction proceedings at its cost against any community members who would refuse to vacate their land underwrites this point (Curtis/Action Aid and M 2008, 22). Claassens (2019, 85) concludes that "within a short space of time, the section 21 companies were discredited and became defunct.[42]

Discussion and analysis: representation in South Africa's traditional communities

Prior scholarship has highlighted that a narrow focus on either the firm or the community limits our understanding of the dynamic relationship between these entities and the role corporations play in processes of identification and acceptance of positions of community representation. The agency of mining companies and communities is shaped by actions and beliefs of each other as well as of other stakeholders, in our case foremost governmental actors. The identification of the person or persons who can legitimately represent the community and make decisions on behalf of it, is a complex issue. Mining companies are often involved in the selection of representatives and authority figures who can act as gatekeepers (Luning 2012). Crafting a fiction of unified traditional communities represented by legitimate leaders can strategically support mining companies to get access to extractive resources after nominal processes of consultation (cf. Kapelus 2002). In traditional communities, it is often traditional authorities that present themselves as just that authority. For mining companies, relying on traditional leaders as representatives of traditional communities constitutes a simple, tested way of claiming community involvement.

In South Africa, with its long history of colonial distortion of chiefly powers and checks and balances on their functioning, issues of representation and decision-making power in traditional communities are at the core of contestations over mining deals, which are fought out in various interconnected arenas: local communities, courts, and the legislature. Despite customary law's nested and layered nature (Delius 2008), senior traditional leaders and traditional councils make mining decisions in a top-down manner, lacking community participation and transparency. Mnwana argues that it is in fact due to the assumption of participation and inclusiveness within traditional governance structures that the traditional elite is able to "control decision-making processes in 'less obvious' ways". Chiefs' involvement in mining activities seriously disrupts traditional governance, as is evidenced by the high number of conflicts between communities and senior traditional leaders as well as between and among different levels of traditional authority and royal family members.

Mining companies are "complicit in entering into flawed and dubious deals with communities" (Corruption Watch 2018, 25; cf. Wicomb 2021, 187-8). They favor making deals with senior traditional leaders and traditional councils over negotiating with the directly affected landholders, as illustrated by the *Baleni* case. Despite increasing community unrest and resistance against mining deals concluded between chiefs and mining companies and increasing challenges of traditional authority taking such decisions without the consent of directly affected landholders, mining companies have long remained almost exclusively focused on senior traditional leaders as the only legitimate representative of the community - and claim that this is "in accordance with the law" (Land and Accountability Research Centre 2016, 7). When they did feel the need to deal with mine-affected communities in a different way than *via* traditional authorities only, they sought to designate another small group of beneficiaries as community representatives they could engage and make deals with.

In line with Luning (2012, 210) who writes that "[s]witches and combinations of strategies are a part and parcel of processes of company-community relations", we find that mining companies alternate and combine two main strategies towards communities. On the one hand they use the 'harmonious community with a legitimate representative' strategy and try to downplay critical voices as coming from or stirred up by a few unruly malcontents. On the other hand, mining companies frequently employ divide and rules tactics to exploit divisions within communities and then hide behind the community discord to avoid responsibility. Corruption Watch (2018, 25), for instance, ironically reports that mining companies on various occasions withheld payment of royalties to mining communities because the authority of the person(s) they concluded the deal with was contested in the community. We can also point here to the example described above of the Mapela 'concerned group' marching to the Mogalakwena mine to demand that Amplats deals directly with the wider community instead of the section 21 they claimed to be illegitimate, only to be told by Amplats that they needed to sort out their internal differences with their own representative organ. Similar statements, holding that the company did not want to meddle in internal affairs, were made in different villages of Mapela district, on different occasions, with Amplats deliberately ignoring that these internal divisions were fostered or even created by the company's own actions.

One can understand these corporate actions as a strategy of 'disentanglement' in the sense meant by Hannah Appel (2011). Appel, in a study of the oil industry in Equatorial Guinea, describes how corporate actors abdicate responsibility through a variety of disentanglements. The oil industry, she writes, separates itself from 'corrupt' practices by formatting those as happening outside – 'outside its walls, outside its corporate obligations … as *local and arbitrary* as opposed to standardized, compliant and global', and by juxtaposing its operations characterized by 'market rationality, corporate efficiency, and compliance' with the messy and corrupt reality 'outside' (ibid., 90). Also in South Africa, the physical environment of many mines and mining offices – closed off, guarded, accessible with special permission only – and the constant iterations of mining companies that they only deal with the legitimate leaders and that when leadership is disputed they cannot deal with anyone until the internal problems have been solved, can be recognized as forms of corporeal as well as more procedural disentanglement, employed to symbolically disassociate themselves from the sociopolitical problems that they themselves have created. The term 'mine-hosting community, if we understand it as a corporate oxymoron (Benson and Kirsch 2010) is also instrumental in establishing this juxtaposition, as such language allows the mining corporations "to claim to play a beneficial and indispensable role in making healthier communities, cleaner environments, and better functioning economies and societies" (ibid., 47).

Besides mining companies, government is similarly complicit in the continuation of mining decision-making in which affected landholders have limited voice. The South African Constitution and IPILRA guarantee tenure security to customary landholders and place decision-making powers over land-related decisions with the directly affected landholders, as confirmed by the superior courts in the recent cases of *Maledu* and *Baleni*. In violation of this, the executive continues to point mining companies to senior traditional leaders, and the legislature aims to place decision-making powers over communal land squarely in the hands of senior traditional leaders. Like mining companies, the lawmaker employs – and reinforces – the rhetoric of harmonious communities under undisputed senior traditional leadership. In an echo of the colonial policy of indirect rule, this institution ignores that there are diverse interest groups in traditional communities and "contested definitions of the customary and the ways in which social relations should be ordered and reformed" (Amanor 2008, 79). As such, they instrumentalize chiefs to absolve the state from blame for expropriating the rural poor, while profiting as a government, and some governmental actors also personally, from easy access to natural and extractive resources. Various investigative reports furthermore clearly show that government almost completely ignores its task of establishing financial oversight of accounts containing mining royalties (known as 'D-accounts'), and often refuses to depose traditional leaders implicated in financial mismanagement (Baloyi Commission 2019; Claassens 2019; Public Protector 2017/2018: Parliament of South Africa 2017; Wicomb 2021).

The alignment between senior traditional leaders, mining corporations and the South African government is intricately connected to South Africa's post-apartheid BEE measures. Shareholding mining companies all need BEE shareholders, and these include traditional leaders – who can swap community entitlements to future royalties for shares – and members of the Black business elite, which is closely aligned with (and often takes part in) provincial and national government. A wave of critical analyses has linked mining and traditional authority laws to alliances of senior ANC politicians, traditional leaders, and mining companies (Centre for Applied Legal Studies (CALS)) 2017; Claassens 2019; Parliament of South Africa 2017; Ubink and Pickering 2021; Von Holdt 2019). Media reports speak of "an unholy alliance" (Heywood 2019) and a "trilogy of corruption" (Olalde 2017) with a "state Capture ring to them" (Clarke 2019).[43] When governments instrumentalize chiefs or other local actors to absolve the state from blame for expropriating the rural poor, such business-government interactions may result in corporate social *ir*responsibility and actions that cause harm to stakeholders. Our analysis supports Hamann's (2019, 1209) argument that corporate social irresponsibility can be a systemic phenomenon, "in that the manifestation of [corporate social irresponsibility] involved more than company-specific motivations, characteristics and actions, but instead involved a broader range of role-players". When government interests align with those of mining corporations, and the legislature fails to protect land rights of customary rightsholders, there is ample leeway for mining companies to conclude mining deals with traditional leaders despite local protest, hiding behind a legal semblance of community involvement instead of actual representation and decision-making power of rural landholders.

Conclusion

In this article, we have shown that one cannot understand company-community relations and agency in traditional communities without understanding the composition and functioning of customary justice and traditional governance institutions. The country's configuration of legal and institutional pluralism both reflects and shapes struggles for authority and decision-making over land and mining deals (cf. Ubink and Pickering 2021). And these struggles are not only found in communities, but also play out in the courts and the legislature. References to the customary realm long served as a useful vehicle for disentanglement. Under customary law traditional authorities are the leaders of the community and mining companies have long almost exclusively engaged with communities *via* their senior traditional leaders.[44] When community members complain about issues such as lack of information and participation in mining-related decision-making, limited community benefit from mining revenues or accountability deficits, the company iterates that these are issues between the community members and their chief, regulated by customary law. References to the decidedly external realm of customary law strengthens the sought-after dichotomy between the rational, efficient, legal positivist world of mining companies, and the local messy reality of chiefs and 'subjects,' regulated by unwritten – and for outsiders largely unintelligible – customary norms. While overtly displaying their cultural sensitivity and acceptance of community notions of law and leadership, these strategies in fact serve as disentanglement strategy poignantly reminiscent of the "development along their own lines" rhetoric of British colonial administration (see Meredith 1975, 494).

Our case study of the section 21s in Mapela traditional community shows, however, that the customary nature of community representation is not essential and that the rhetoric of concluding mining deals with a so-called legitimate institution of community representation is not necessarily restricted to *traditional* institutions. Other forms of community representation, it seems, can be similarly manipulated and co-opted, particularly when the power inequality between mine-affected communities and mining companies is stark, which it often is (see Banerjee 2008, 2012; Haalboom 2012; Dolan and Rajak 2011). When analysing the functioning of chiefs and section 21s, we see that the form of community representation changed, but mining companies were equally involved in exclusionary processes of "identification, isolation and elevation of an elite group of beneficiaries" (cf. Rajak 2011, 206) and used comparable techniques to identify and co-opt the 'right' people as community representatives while at the same time neutralize opponents of mining activities, such as excessive secrecy, inaccessibility, intimidation, and financial rewarding of cooperative actors.[45]

When communities approach mining companies to ask them not to engage with the section 21s but with the wider community or a different representative structure instead, companies can still hide behind the representative structure – now enacted ostensibly on the basis of statutory law – and claim to follow the law in negotiating deals with these structures, and these structures only. Also outside the customary realm they can argue – as our case study of Amplats shows – that they cannot and will not interfere in internal squabbles about the functioning of community institutions and rules, ignoring the companies' own role in the forging of the representative structures as well as the discord at community level. In both cases, the mining corporations aim to disentangle themselves from what they portray as internally divided and badly organized mining communities, as if neither these local relations nor the circumstances of dispossession are of their making. Our study, however, clearly shows that 'effective disentanglements [are] built through deep entanglements' (cf. Appel 2011, 257) of mining corporations in institutions, environments, and people's lives.

According to Hamann et al. (2005, 66) "partnerships can only be formed fruitfully if the leadership of the different stakeholder groups is seen to be legitimate and accountable". The interactions of mining companies with representative structures in South Africa's former homeland areas displays not only these companies' (and the government's) lack of real interest in working with legitimate and accountable leaders but shows their deliberate interference to make leadership less accountable and legitimate. Resulting internal divisions in the community are of instrumental use for mining companies as they allow them to hide behind community discord and disentangle themselves from the local messy reality. While Jenkins (2004, 25) rightly warns that legitimizing one of various claims or groups within a community over others may cause divisions within that community, our case study of the Mapela community shows that these divisions may be deliberately caused by the company, which can subsequently use them to legitimise ineffective communication with the community.

While the above focusses on whether a representative structure is *officially* a customary or statutory institution, we do not mean to project a dualistic distinction between state law and non-state forms of ordering and rather follow legal pluralism scholarship in favouring a dialectic analysis of their interrelations.[46] This article shows that both models of traditional community representation and governance should be understood as customary-statutory hybrids. This hybridity, and the amalgam of statutory and customary laws and institutions that govern land and mining resources in South Africa, results in a new configuration of legal pluralism that has been employed to skirt obligations under either legal register. In the "corporatization model" of traditional communities, chiefs are often positioned as CEO and community members as shareholders. The Land and Accountability Research Centre (2016, 10) points out that this is a false analogy, as in this hybrid of corporate and traditional governance community members have almost no say in the governance of the corporations and only limited, indirect control over the use of dividends. The Comaroffs (2009, 110), writing about the Bafokeng, further describe that many community members are uneasy about the fact that a chief's responsibility for the "socio-moral needs of a nation" does not always align well with a CEO's "amoral imperatives of profit". At the same time, the Section 21s set up to negotiate relocation agreements similarly showcase hybridity. While formally based on statutory law, they (or at least their predecessors, the Relocation Steering Committees) were generally constituted by a community resolution taken at a traditional *kgoro* meeting - often by a minority of the villagers, without full knowledge and understanding of the legal vehicle they were creating and with many villagers unaware of this important decision – at the direction of the senior traditional leader and operated under the influence of customary governance structures.

Both hybrid forms – corporatized traditional communities and section 21s under influence of traditional governance structures – blend aspects of formal and customary justice systems. Our study shows that the increasing complexity of financial and legal constructions and the use of state legal forms hampers customary accountability. At the same time, remaining *assumptions* of participation and inclusiveness within traditional governance structures can be abused to skirt the obligations of the formal legal system – such as the obligation to present financial accounts of mining operations to community stakeholders or to share the articles of association of the section 21 with the community members it is supposed to represent. The interplay between statutory and customary law in the regulation of mining deals on traditional community land results in a form of legal pluralism that provides community representatives – whether in the form of traditional institutions or section 21s – and in their slipstream mining companies and government officials, with leeway to evade rules and responsibilities from each system by appealing to the other system. This underscores our point that one needs to understand the complex and constantly renegotiated configurations of legal and institutional pluralism to truly comprehend company-community relations in traditional communities.

Notes

1. See for instance the Sustainable Development Framework adopted by the International Council on Metals and Minerals.
2. The term host community can for instance be found in Platinum mining company Implats' ESG Report 2021, 'Mine Community Wellbeing", 100, 109, mine-communities.pdf (implats-ir.co.za), and throughout mining company Anglo American's Sustainable Mining Plan, Sustainability - Communities | Anglo American. The concept of host community also features in national laws, see for example the Nigerian Minerals and Mining Act, 2007, Nigeruian Minerals and Mining Act, 2007.pdf (theiguides.org) and South Africa's Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018, Mining Charter, 2018 (www.gov.za).
3. For references, see section "Situating Company-Community Relations in a Context of Legal Pluralism". The term traditional or customary communities refers to communities that are governed by both African customary law and state law, where traditional governance institutions play a role, often alongside decentralized local government institutions.
4. The concept "stakeholder" later also came to include more abstract notions such as the environment (Jamali 2008, 217). An instrumental stakeholder theory argues for including stakeholders from an efficiency motive, to 'achieve maximum overall cooperation between the entire system of stakeholder groups and the objectives of the corporation' (Garriga and Melé 2004, 59). Normative stakeholder theory departs instead from an ethical motive, emphasizing the fiduciary relationship of corporations to their stakeholders. In this theory, stakeholders are determined by their interests in the company's activities irrespective of the company's interests in them. These interests are of intrinsic value, regardless of whether they further the interests of other interest groups such as shareholders (Id.: 60). Luning (2012, 206) shows how the increased dominance of corporate capital led to growing scrutiny by international NGO's of transnational companies, holding them directly accountable for social, environmental and economic damages. The companies in turn responded by portraying themselves as 'corporate citizens … with rights, obligations and responsibilities' and the formulation of voluntary principles.
5. There is no generally accepted definition of indigenous peoples, but they can be identified on the basis of certain characteristics including self-identification, a historical link with those who inhabited these territories before invasion or colonization, cultural difference from other groups in a state, distinct social, economic or political systems, a special relationship with their traditional territory, and an experience of subjugation and discrimination under a dominant cultural model (see for instance Amnesty International (2023). "Indigenous Peoples". *Amnesty International*). In Africa, some peoples self-identify as indigenous and make use of indigenous peoples' rights frameworks, mainly on the basis of origins, current marginalisation or association with traditional cultures and economic practices. This includes for instance the San in South Africa and the Himba in northern Namibia (IPACC, Who are the traditional leaders of South Africa). The term traditional or customary communities refers to communities that are governed by both African customary law and state law, where traditional governance institutions play a role, often alongside decentralized local government institutions. Discrimination and marginalization are not necessarily characteristics of these communities.

6. This includes reports from the South African Human Rights Commission, the Public Protector's office and several Commissions of Inquiry.
7. Such as Action Aid, Corruption Watch and the Land and Accountability Research Centre of the University of cape Town.
8. See next section for references.
9. http://www.angloplatinum.com/sustainability/communities/our-communities.aspx.
10. See for instance Anglo American Platinum, "Our Communities" https://www.angloamericanplatinum.com/sustainability/communities/our-communities.
11. Particularly Curtis/Action Aid 2008; Action Aid 2016; Mnwana, Mtero, & Hay 2016.
12. MPRDA, s 3(1),(2).
13. Or comparable redress.
14. IPILRA, s.1 and s.2.
15. *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (CCT265/17) [2018] ZACC 41 (25 October 2018) at para 103.
16. *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).
17. TKLA s 24(2) reads: "Kingship or queenship councils, principal traditional councils, traditional councils, Khoi-San councils and traditional sub-councils may enter into partnerships and agreements with each other, and with—*(a)* municipalities; *(b)* government departments; and *(c)* any other person, body or institution." .
18. TKLA, s 24(3)(c). Prior versions of the Bill did not require the traditional leader to obtain the consent of, or even to consult, the people whose land rights and lives are the subject of such partnerships.
19. Dávid-Barrett (2023, 224) defines state capture as "a type of systematic corruption whereby narrow interest groups take control of the institutions and processes through which public policy is made, directing public policy away from the public interest and instead shaping it to serve their own interests."
20. Another instance where the tribe may not be the logical placeholder for land ownership and land decisions, is in case of historical acquisitions of land by a private group. For instance, in the colonial Transvaal, land purchased by African groups needed to be registered under the name of a recognised 'chief' (Capps 2016; Mnawa 2015, 503).
21. Such as the Mafereka commission on Traditional Leadership Disputes and Claims in the North West province (report submitted in 2015, but still not released by the North West Provincial Government); Baloyi Commission 2019.
22. The Public Protector has for instance investigated missing funds in Bakgatla Ba Kgafela (see Wicomb 2021, 184) as well as maladministration by the Bapo Ba Mogale administration (Public Protector 2017/2018).
23. Several authors refer to such internal audits, see for instance Claassens and Matlala 2014, 125; Corruption Watch 2018, 26; Mnwana and Capps 2015, 6.
24. The state has been encouraging mine-affected communities and mining companies to convert the royalties these communities received into equity stakes in the mining company, see Finance Minister Trevor Manuel, Introductory speech at the introduction of the Minerals and Petroleum Resources Royalty Bills, http://www.polity.org.za/article/sa-manuel-minerals-and-petroleum-resources-royalty-bills-24062008-2008-06-24.
25. See Yeni (2019, 167) for another illustrative story on a doubtful community resolution regarding mining.
26. See for accounts of financial management and accounting in other mining areas Baloyi Commission 2019; Claassens and Matlala 2014; Corruption Watch 2018; Public Protector 2017/2018.
27. See also documentary "This Land" picturing the struggle in Makhasaneni in KwaZulu-Natal (on file with author).
28. Claassens and Matlala (2014, 128) report that the Bakgatla ba-Kgafela tribe paid one attorney ZAR49 million between 2009 and 2011.

29. See Mining Platinum Group Metals in South Africa | Anglo American. Bowman (2016) explains the importance of this mine for Anglo, pointing to its profitability, expected long lifespan, and mechanized operations.
30. For a history of mining activities in this area, see Mnwana, Mtero and Hay 2016.
31. The Companies Act of 1973 provided for not-for-profit companies in Section 21. That Act has since been replaced by the Companies Act of 2008, but not-for-profit companies are still known in familiar terms as "Section 21 companies".
32. Particularly Curtis/Action Aid 2008; Action Aid 2016; Mnwana, Mtero and Hay 2016.
33. The distance between Ga-Pila and Johannesburg is almost 300 km.
34. In 2009, *Kgoshi* David Langa took over the position of senior traditional leader of Mapela traditional community from his mother *kgoshigadi* Atalia Langa. In April 2017, the Premier of Limpopo Province removed Kgabagare David Langa as Senior traditional leader and instead recognized Hans Langa as such, in line with the findings of two investigative commissions. In 2018, Hans Langa was inaugurated as the new senior traditional leader. The High Court dismissed an application by David Langa to set aside these decisions of the Premier, but the Constitutional Court in 2021 granted appeal and set the Premier's decisions aside. The court rules that the Premier had based its decision on the wrong section of the relevant act. This decision does not prevent the Premier making the same decisions based on the right provision, but it seems this has not happened yet.
35. This came to the fore in multiple of our interviews, and conforms with South African Human Rights Commission 2008, 57-9; Mnwana et al. 2016, chapter 4.
36. Interview community member M.F., Ga Pila, 1 September 2016.
37. Interview community member L.P., Ga Pila, 4 September 2016.
38. For instance, for people who created a road blockage to prevent the start of the relocation move, bail was initially set at ZAR3000. After involvement of a lawyer, this was reduced to ZAR500.
39. Interview community member L.P., Ga Pila, 4 September 2016.
40. "The section 21 directors in Ga-Pila include a magistrate and several civil servants, one of whom later became a member of the Executive Council for Mineral Resources. The section 21 directors negotiated the service level agreement for the new location. They could recommend service providers to the mine and proposed that the mine would pay the municipality for the provision of certain services, such as water and sewage. Because the section 21 directors occupy strategic positions in government, they benefitted from these tenders. They similarly profited from development projects, such as road improvement, the building of a community centre etc. These projects were undertaken without any transparency regarding the selection of the executing company or local ties to such company, and without any form of oversight regarding their financing, which proved hugely expensive" (Ubink and Pickering 2021, 16).
41. AngloAmerican, Response to the grievances and demands of the Ga-Pila/Sterkwater community, 23 November 2011.
42. In July 2022 social unrest and community protests are still rampant in this area, Fear, loathing and extortion on the eastern limb of SA's platinum belt (dailymaverick.co.za).
43. See for a discussion of the "symbiotic relationship" between the ANC and traditional leadership Skosana 2019. Wicomb (2021, 184, 188) describes how chief Kgosi Nyalala Pilane of Bakgatla-Ba-Kgafela – subject of several official enquiries into misappropriation and embezzlement of community funds – is also deputy chairperson of the African National Congress-aligned lobby group for traditional leaders CONTRALESA, and sits on the department of mineral resources' Mineral and Petroleum Board, listed as one of two community representatives. Claassens (2019, 82) narrates how Pilane has accompanied the deputy minister of the Department of Cooperative Governance and Traditional Affairs, Obed Apela, on occasions where he debated the traditional leadership bills on television. See Claassens (2019) for more insights into the traditional leader lobby, as well as several detailed stories of connections between prominent ANC politicians, tra-

ditional authorities and mining corporations. In addition, Seth Nthai, discussed above as serving as legal counsel for large mining companies, is also one of the main drafters of two laws regulating the position and powers of senior traditional leaders – the Traditional Leadership and Governance Framework Act and the Traditional Courts Bill. He has also served as Safety and Security Minister in the provincial government of Limpopo, highlighting once more the intimate connections between senior traditional leaders, business and political elite (Claassens 2019, 84).

44. Huizenga (2019, 716) for instance describes how in the dispute underlying the *Baleni* decision, Australian mining company TEM claimed that only the senior traditional leader and the Amadiba Traditional Council had the right to challenge a mining right.
45. Leonard (2019) describes similar techniques being used by a coalmining company operating in KwaZulu-Natal.
46. De Sousa Santos (2002, 437), for instance, 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." .

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