



Land, law and chiefs in rural South Africa: Contested histories and current struggles

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BOOK REVIEWS

Land, law and chiefs in rural South Africa: Contested histories and current struggles, edited by William Beinart, Rosalie Kingwill and Gavin Capps, Johannesburg, Wits University Press, 2021, 344 pp., ZAR 370, ISBN 978-1-77614-679-6.

Land, Law and Chiefs in Rural South Africa is an exciting update to the literature about land reform, associated legislation, the roles of traditional authorities in South Africa and how their subjects challenge these roles and disputes. The book exposes the often less-publicised debates and contestations around land, property and other rights in the areas that belonged to South Africa's former homelands. Chieftainship succession is contested, whilst history, identity and custom are disputed and reinterpreted. The 13 chapters, by old hands and some new ones to the land rights and customary ownership discourse in South Africa, add a rich interdisciplinary (historical, legal, anthropological and activist) perspective to this body of literature with Beinart setting the scene in the introductory chapter. The remaining 12 chapters adopt a novel case-study lens of what happens in the courts and the former homelands as different groups attempt to assert their rights around land and its resources.

The authors illustrate what is occurring when old and new struggles emerge in the former homelands as traditional leaders and others try to recreate and translate custom, identity and authority whilst manoeuvring themselves across the landscape of land rights, legislation and customary law. The ultimate purpose is to acquire and control mineral resources within these areas and decide who can benefit from them. The political economy of these areas is changing, but most people remain poor and have few rights, despite the constitution of 1996. This constitution recognises fundamental human rights, including the right to land and the place of customary law, both of which are crucial to traditional leaders in navigating their authority. Traditional leaders appear to have aligned themselves with the ruling African National Congress (ANC), an approach that resonates with the actions of their predecessors who aligned themselves with the apartheid homeland project for self-gain. Contemporary alignment is still about self-gain but is underscored by the ANC's need for the rural vote. Yet poverty persists, tenure insecurity remains, and conflict continues against a backdrop of increasing corruption. In these and other respects, the former homelands appear much the same or, if possible, worse off socially, politically and economically.

The courts are seemingly dealing with more cases, increasing complexity and contestation around land tenure and rights but also about tradition, customary law and the legitimacy of succession to chieftainship. The courts try to integrate and develop customary law as the jurisprudence of "living customary law." Whilst this milieu plays out in the courts and the homelands, ANC politicians and traditional leaders take as much advantage of the tenuous situation as possible by accumulating resources and support. As political brokers with new-found support, traditional leaders have shortened local democracy, affecting provincial and national politics. New struggles emerge over ownership of the resources and minerals on and under the land and who should benefit (or not) from their exploitation. Here I provide a brief synopsis of the chapters and an overall critique of the book.

In his introduction, Beinart notes that two political tensions are essential in what is transpiring in the former homelands. The first is the three-pronged land reform programme that attempts to effect the restitution of land to black people following the forcible dispossession through the 1913 Land Act; the redistribution of farmland from willing white sellers to willing

black buyers assisted through limited state subsidisation; and land tenure reform in the former homelands to refine and spell out the rights to use, occupation and ownership and to ensure the protection of customary and informal landholdings in these areas. Intertwined within these three objectives are the emergence of legally recognised communal property associations (CPAs) to establish institutions for collective ownership of redistributed, restituted and customary land. The second tension is the way the land reform programme's slow pace and limited visible success in the eyes of neoliberal viability have become more complicated in the former homelands through the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). This act made traditional leaders the exclusive custodians and brokers of communal resource allocation, legitimising their authority to negotiate with mineral-seeking corporations and redistribute benefits on behalf of communities. According to Beinart, the act has empowered continuities in pre-existing rural power relations and undermines popular rights per the democratic constitution.

The remaining chapters examine legal cases from different perspectives and positionalities. They focus on the post-1994 evolution of policy pathways and how they unfold in the former homelands as people negotiate their rights for land and resources.

Budlender provides a well-constructed summary of the emergence of *living customary law* in various Constitutional Court judgements and describes these as radical and innovative rulings. Fay recounts his experience as an expert ethnographic witness in the 2012 *Gongqose* criminal case, where three fishermen were arrested inside the protected Desa-Cwebe Nature Reserve in the Eastern Cape. The case was finally overturned on appeal in 2018, based mainly on the grounds of customary law. Fay carefully emphasises the resourceful and ingenious ways the lawyers and claimants forced the various courts to "(re)define the actual legal points that must be proven" (38). He draws on the rulings in other court cases to show that living customary law has probably always been around but not consistently recognised by the courts. Fay uses the *Gongqose* case to show how academics giving evidence in court must mediate and find their way as they are presented with claimants' evidence, relevant literature, legal principles and their own research.

The next five chapters emphasise how custom becomes the location of struggle and how the chiefs continue to exercise authority and power for their purposes and benefit. Mnwana reports that, whilst the Constitutional Court has made significant inroads concerning customary law, the lower courts, notably in North West province, translate it in ways that contradict this progress and these rulings. The lower courts go as far as interpreting precedence in favour of the chiefs, thus reinforcing chiefly authority over residents. The result is serious as people lose faith in the justice system. Mnwana notes the strong presence of corruption among the ruling elite and how local residents mobilise against it. Capps provides a similar example in the same province and explains the tension and conflict that have emerged over minerals in the platinum belt. Tensions arise between the Lonmin mine, affected residents in the area, the Bapo-ba-Mogale Traditional Community and different branches of chieftaincies. All actors are competing for a piece of the royalties from the mine. Residents again feel powerless as the courts have been favouring the chiefs, and resource entitlements continuously shift. Here Capps underscores the corruption and misappropriation of funds that prevails in these situations. He outlines Lonmin's attempt to obtain Cyril Ramaphosa as a political broad-based black economic empowerment partner and reports on the ZAR 600 million that disappeared from the so-called "D-account" intended to benefit 40 000 members of the Bapo-Ba-Mogale community. Importantly he notes how legal struggles for entitlements result in the creation of "new" identities and political divisions as chieftaincies and residents struggle for access to benefits.

In a thought-provoking shift away from the courts and the North West province, Skosana takes us to the coalfields of Witbank, Mpumalanga province, where she explores the importance and materiality of graves in the struggle for land rights. Graves have been relocated to enable increased coal mining by Glencore PLC. Rather than concentrating on chiefs and power brokers, she recounts the rich cultural significance of ancestral graves to family members. She shows

how this practice of cultural heritage enables them to express agency, for which the lives and identities of the deceased are essential. Noting that people feel Glencore has mistreated them and their ancestors, she concludes:

Families recognise that graves and oral memories are the only form of evidence they have ... to validate their claim of ownership, their history, belonging and identity. Some families have made land claims under the Restitution Act and make claims in a general sense that they have a connection with the sites of graves or the area that was their home. Recently, the precedence of the MPRDA [Mineral and Petroleum Resources Development Act 28 of 2002] was challenged in the *Maledu* court judgment, which gave the recognition of the informal land rights of communities who live in areas affected by mining. (119)

Pickering and Motala take us back to the manoeuvrings of the chieftains in North West province. Despite the Constitutional Court ruling in *Pilane* (2013) in the Bakgatla-ba-Kgafela area, local chiefs continue to use lower courts to issue interdicts that prevent local people from meeting and organising, making it impossible for them to make collective decisions over land use and benefits. Moreover, residents openly assert that the chiefs empower the courts to make decisions based on their interpretations of customary law, which undermines the constitution's commitment to human rights. Thus "there has been no effective transformation of these traditional structures" (123). The residents argue that the TLGFA has proved ineffective, and instead of leading to transformation, chiefs appointed during apartheid remain in authority and manipulate the courts in their favour.

Duda and Ulbink take us back to the Eastern Cape, specifically the Amahlathi Community in the former Ciskei. They show how the chiefly system continues to prevail in this province too, even as local people attempt to obtain land justice. The chapter highlights the local-level complexity of court rulings; and despite the outcomes of judicial struggles, there remains support for traditional leadership. Whilst the courts may impose rulings favourable to community applicants, the state is not always there to support these rulings. In some instances, chieftaincies may appear as the opposition to local residents. But in others they represent collective belonging through cultural identity and heritage and are much more accessible than the ineffective democratic local government in the area.

The following four chapters all look at property law in contemporary and historical situations from a bottom-up perspective. Moguerane stays in the North West and also looks at various parts of what was formerly known as Bechuanaland. He takes us back to the repealed Native Administration Act 38 of 1927, how this influenced the relationships between black tenants and landlords, and the idea of citizenship from below. In an insightful argument he shows that the notion of the "commons" is not communal property ownership as often supposed. Instead, it is more accurately understood as a *de facto* land holding. Whilst there is minimal investment in agriculture around Mafikeng, there is, however, as in other former homelands, considerable investment in homesteads, particularly fashionable houses. Other residents rent out their land to outsiders from other areas. Residents hold no obligations to pay rent or other duties to the chiefs; however, there are no title deeds to ensure *de jure* private property ownership. What nevertheless drives the building of new homes is that a "home of one's own remains a central requirement for personhood in these areas" (183).

Kingwill shows how family relationships in the Eastern Cape defy the communal–individual land ownership dichotomy. She argues that it is better to understand the prevalence of hybrid tenure models and that research has been overly focused on the law and collective ownership. The result has been the omission of "small-scale processes of property formation in and between families, and how these shape power and authority in their wider communities" (188). She concludes that legal frameworks are often at odds with existing social relations in these areas.

Weinberg provides a detailed history of the emergence of CPAs since 1995, as activists and officials looked at ways to bring about legal entities for communal land ownership. She correctly notes that whilst these were not enforced by the then Department of Land Affairs, CPAs resulted

in successful land reform beneficiaries being members of a legal institution without any ongoing state support. A common feature of much of the land reform process is that beneficiaries are often left without capital or other inputs to meet neoliberal capitalist expectations. In the former Transkei, Chaskalson tackles the lengthy Hloweni Land Claim (1983–2016). She distinguishes three interpretations of land rights that claimants used in this claim. She shows how complex the process can be and how fluid understandings of rights are within a juristic “community.” This illustration allows her to conclude, first, that various groups often interpret land right differently, sometimes even in opposing ways. Second, she finds that these understandings change over time due to ever-changing external economic, social and political forces. As such, this insight is crucial to the living customary law concept.

By way of conclusion, Beinart redirects us to his reflections as an expert witness for the Land Claims Court in three cases: *Hloweni*, *Mgungundlovu* and *Xolobeni* in the Eastern Cape. He also draws skilfully from experiences of other claims and their judgements, specifically from the many ways in which the courts have understood communal or customary land ownership organs and rights. In his analysis of the three cases cited above, Beinart examines the idea of “communal indigenous ownership” as derived from the Richtersveld case. However, Beinart feels this concept is unsuitable for clarifying claimant families’ land rights. He concludes that amplifying such rights is crucial to land reform and, specifically, to tenure reform in the former homelands. He stresses that the fundamental value of ownership is that it provides the most secure legal and arguably social rights to land. He notes that currently the situation is fluid, with no act sufficiently addressing or assuring these rights and related concepts.

Undoubtedly this is a well-researched and engaging book and a thoroughly enjoyable read. It rises above other works on customary law and traditional leadership because it highlights several court cases on land claims, controversies and portrayals of how the chieftains influence and mediate legislation in these areas. It includes several themes, such as the increasing recognition of customary law by the courts, case studies of disputes and conflict between traditional leaders and communities, the subtleties of the subsequent legal skirmishes, and the invocation of history, identity and their translation in these skirmishes. Yet, by emphasising the implications of the courts and legislation in the changing homeland political economy concerning land rights and access and benefits of the minerals demanded by the state and corporations, the book under-emphasises the field of law and society. This may result in readers missing the crucial contributions to law and legal pluralism in these rural social habitats that the contributors collectively imply. This is a significant implication and contribution of the book, but one that does not appear to be sufficiently emphasised at the beginning or in conclusion and is primarily overshadowed in some chapters by detailed court judgements. The backdrop of corruption could be more strongly emphasised, especially as it has been such a noteworthy theme for the past decades, culminating in state capture and the subsequent Zondo Commission.

Furthermore, the authors imply a linear process to improving the current situation — if we had the right laws, the problems would be addressed. However, development, whether legal, health, employment, land reform or any other improvement of people’s well-being, is far from linear (see Lewis and Mosse 2006; and, for the South African context Hebinck and Cousins 2013). Whilst justice and rights are crucial, these are not the only determining factors of the outcomes. Legal pluralism will remain, as will elite capture and opposition to this, especially as brokers emerge and retreat and people seek what they can from development interventions and change their minds over time. Clear land rights and concepts are necessary, but they are only a start to achieving social justice. As this work demonstrates, the existence of laws carries little weight if they are not reinforced and upheld by the courts, especially the lower courts. Furthermore, the book illustrates the challenges people face in accessing courts, as few can take their cases to the courts without external support and resources.

References

- Hebinck, P. and B. Cousins, eds. 2013. *In the Shadow of Policy: Everyday Practices in South African Land and Agrarian Reform*. Johannesburg: Wits University Press.
- Lewis, D. and D. Mosse, eds. 2006. *Development Brokers and Translators: The Ethnography of Aid and Agencies*. Bloomfield: Kumarian Press.

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Nationalism and territoriality in Barue and Mozambique: Independence, belonging, contradiction, by André van Dokkum, Leiden, Brill, 2020, xvi + 272 pp., €49 (paperback), ISBN 976-90-04-42841-6.

The book under review is Volume 39 of the Leiden-based Afrika-Studiecentrum series. The author, an adjunct assistant professor of sociology at the University of Macau, carried out extended intermittent fieldwork in the district of Barue in central Mozambique between 2009 and 2012, totalling 12 months. He also worked intensively in the archives and libraries of Mozambique, Portugal and the United States. Although the book is a reworked doctoral thesis, it makes the impression of an extensive, meticulously researched and synthesised work, the main aim of which is to contrast “precolonial Barue with postcolonial Mozambique” (6) as independent states. It is a difficult endeavour, but van Dokkum tackles it bravely. This is where the originality of his work rests.

André van Dokkum pays much attention to definitions, which he examines in Chapter 1, along with his argument. He is especially interested in the concept of *nationalism*, which he defines quite broadly, and the notion of the *nation state* is central to his theorising. Surprisingly, however, the author does not define *territoriality*, the second term in the book’s main title. Instead, van Dokkum argues in Chapter 2 that the precolonial kingdom of Barue, situated in the central part of present-day Mozambique and emerging from the Mutapa kingdom, was a regular nation state (though the term *kingdom* also remains undefined). Barue was an “oral” kingdom (192), leaving no written evidence. Most documents about it and its foreign relations with the Portuguese settlers along the Zambezi River are in Portuguese. Without these documents, we would hardly know about the existence of the kingdom. The emergence of Barue as an independent political entity ran parallel to the establishment of the Portuguese *prazos* [settlements] of Tete, Sena, Gorongosa and others. Although there were older polities in the vicinity, such as Great Zimbabwe, Rozvi, Mwene Mutapa (Monomotapa) and Manyika, as well as Nguni, they did not significantly disturb Barue’s independence.

Throughout its history (1608–1902), Barue sometimes had peaceful but often tense, if not hostile, relations with the local Portuguese. *Makombe*, translated as “king,” was the title of the leader who presided over several paramount chiefs. *Makombe* Gunguru, who reigned in the second half of the eighteenth century, was one Barue ruler who negotiated with the Portuguese over a controversial piece of land donated to the Portuguese by one of his predecessors. Barue’s independence lasted for three centuries in whole, but this period was interrupted at three points, such as occupation by Shoshangane’s Nguni (1838–1844) and the nearby Portuguese (1880–1892). By the nineteenth century, the colonial state of Mozambique began to show less and less tolerance for Barue’s separate existence. In 1902 it finally violently incorporated the “kingdom” into its