African Studies Quarterly | Volume 20, Issue 3|October 2021

At-Issue:

Chained Communities: A Critique of South Africa's Approach to Land Restitution

ANTHONY C. DIALA and SONYA R. COTTON

Abstract: In its quest to restore land to millions of its citizens dispossessed under colonial and apartheid regimes, South Africa adopted a Restitution of Land Rights Act and set up a Land Claims Court in 1994 and 1996, respectively. This article uses select judgments of the Land Claims Court to critique the interpretative mindset of judges and the ideological neutrality of certain definitions in the Restitution Act. It argues that the colonial legacy of legal positivism and 20th century anthropological imagery inhibits the access to justice of dispossessed Africans living on the periphery of land rights. It uses the word 'chained' to describe communities whose restitution of land rights depends on their ability to (re)imagine themselves through a judicial prism of fossilized colonial ideas of traditional structures, lineage, and unbroken practices. The article recommends measures for promoting a South African legal culture that is sensitive to legal pluralism, mindful of indigenous law's flexibility, and distrustful of undue standardization that stifles people's access to justice.

Keywords: Legal positivism, pluralism, land restitution, indigenous law, South Africa

Introduction

Land redistribution efforts in South Africa have been controversial since the promulgation of the Restitution of Land Rights Act of 1994.[1] At the heart of this controversy is the judicial

Anthony C. Diala is the director of the Centre for Legal Integration in Africa at the University of the Western Cape. His interests are legal pluralism, comparative law, and human rights. He recently published "Peacebuilding and the interface of state law and indigenous market laws in Southern Nigeria."

Sonya R. Cotton is a PhD candidate at University College Dublin within the ERC project, 'Property [In] Justice,' funded by the EU Horizon 2020 Research and Innovation Program. She recently published an article in *Global Journal of Comparative Law* on equality in polygamous African customary marriages.

http://www.africa.ufl.edu/asq/v20/v20i3a5.pdf

effectiveness of this Act and the 1996 Constitution as vehicles for social transformation. Here, we critique the ideological neutrality of the Act and the judicial mindset in land claims. We focus on the ways colonial legal culture and 20th century anthropological imagery inhibits the access to justice of dispossessed black communities.

Conceived broadly, the term 'access to justice' encompasses the institutions, procedural rules, and substantive laws that enable people to obtain remedies in and outside the courts. Our conceptualization is founded on the indivisibility, interconnectedness, and interdependence of human rights, which imply that litigants must have opportunities to present their complaints in line with their lived realities.[2] Access to justice may be violated in court, where technical rules sit uncomfortably with the process-oriented nature of indigenous dispute resolution.[3] We contend that access to justice is marginal in the formal justice system, thereby necessitating scholarly attention on the interaction of legal orders, also known as legal pluralism.

In South Africa, oral indigenous laws enjoyed normative monopoly until they were subjugated by European legal systems.[4] The laws and values of the colonizers, which bore the imperial stamps of Roman law, developed into what is known as the common law. Following South Africa's transition to democratic governance in 1994, indigenous law acquired equal legal status with the common law, subject only to the Constitution. However, its recognition raised challenges such as reconciling its orality and discriminatory features with legal certainty and gender equality. Two traits mark the judicial response to these challenges.

Firstly, South Africa's highest court, the Constitutional Court, acknowledges that indigenous law can adapt to constitutional values of gender equality.[5] Secondly, it has ruled that indigenous law should be engaged with independently rather than interpreted through a common law prism.[6] Nevertheless, we argue that adjudication occurs in the suffocating shadow of legal positivism because legislation and judicial behavior perpetuate hermetically sealed notions of community.[7]

Legal positivism is a rule-focused approach to law, which bases the validity of a given norm on its sources rather than its merits.[8] It is incompatible with the flexible nature of indigenous African laws, most of which emerged in agrarian settings. Significantly, colonialism was accompanied by radical socio-economic changes, "whose persistent patterns of power, philosophy and conduct" gave legal pluralism a rule-centric character.[9] This character neglects the value-driven ways in which people adapt agrarian norms to modern conditions.[10] We therefore re-assess indigenous law's interaction with statutory laws, emphasizing the ways in which the former is conditioned or 'disciplined' by legal positivism. We use the word 'chained' to describe communities whose restitution of land rights depends on their ability to (re)imagine themselves through fossilized colonial ideas of traditional structures, lineage, and unbroken practices. Through analysis of select judgments, we show how these ideas impede the access to justice of communities living on the periphery of land rights enjoyment.

Following this introduction, part two of this article discusses the creation of customary law from indigenous laws. Significantly, many indigenous laws are captured in codifications, restatements, and judicial precedents, thereby ossifying their forms and stifling their flexibility.[11] In part three, we probe the manifestations of legal positivism in South Africa's land restitution laws, with emphasis on the definition of community. These laws require that claimants for restitution must demonstrate their membership of a community based on 'shared rules.' We show how a positivist preoccupation with 'rules' impedes racial redress, whilst reinforcing Euro-centric notions of precolonial 'tribal' Africa. In part four, we offer an alternative model to legal positivism and 'shared rules' using the experience in rural Pakistan. We conclude in part five with three legislative and policy recommendations.

From Indigenous to Customary Law

Arguably, the definition of 'community' in land restitution cases reflects warped understandings of African customary law. Colonial rule was so coercive that normative interaction demands "a differentiation between pre-colonial norms and post-colonial norms."[12] We argue that poor understanding of the ways indigenous laws transformed into customary laws causes hardship in land claims due to fluidity in the meaning of communities and shared norms. To contextualize our arguments, we briefly historicize the interaction of indigenous laws and the mutated Western laws known as statutory laws.

Legal Transplants and Indigenous Laws

Legal transplant refers to the voluntary or imposed transfer of legal institutions, rules, and values from one social field onto another. The well-documented reasons for the imposition of European legal systems in Africa are mainly economic, imperialistic, and ideological.[13] Western settlers initially refused to recognize indigenous African laws as a legal system.[14] In the Colony of Natal, Basutoland (modern Lesotho), Transkei, and other territories beyond southern Africa, indigenous laws were recognized in the courts subject to Western legal standards. This is the origin of the infamous repugnancy clause, which required indigenous laws to be compatible with European standards of natural justice, equity, good conscience, and public policy. So, from the outset, indigenous African laws were subjected to a colonial project of construction into the image of European systems. Since these systems were/are characterized by social control, legal certainty, and rule-minded adjudication, they had a transformational effect on indigenous African laws.

The Creation of Customary Law

At the onset of the colonial transplant of laws into Africa, European societies were several decades into the First Industrial Revolution. Notable features of this significant development include standardization of judicial rules, dissociation of law from grassroots community

knowledge, and creation of adjudicatory principles of legal certainty.[15] The resultant legal order was eventually transplanted to Africa through colonization.

The justification for colonial annexation rested on a post-enlightenment philosophy of classification, standardization, and 'enumeration'—or the notion that (bounded) communities speaking objectively ascertainable languages could be more easily manipulated for colonial domination.[16] Using the vocabulary of nineteenth century Europe, the colonizers subordinated indigenous African laws to their transplanted laws, whilst affirming a Westphalian prism of tribes and cultural organization. Along with local collaborators and their successors, the Europeans codified, restated, and interpreted indigenous norms in ways that pigeon-holed them into Western legal parameters. In this process, some customs were misinterpreted, distorted, or recognized without their foundational values. Scholars have described this judicialization process as the "invention of tradition."[17] We call it the creation of customary law because it required 're-tribalization' or demand for Africans to (re)imagine themselves in hierarchical, inflexible, and centralized communities that conformed to European notions of tribes.[18] In short, colonization eroded the philosophy of interdependence and mutual responsibility known as Ubuntu, especially the family head's duty of care, which thrived on the best interest of the family principle.[19] We turn to how the definition of community impedes access to justice in the context of South Africa's land restitution laws.

Opposition to 'Shared Rules' in Land Restitution

The Restitution of Land Rights Act 22 of 1994 is one of the first laws enacted after the transition to democratic governance in South Africa. It seeks to restore the land rights of persons and communities dispossessed by the racially discriminatory Natives Land Act of 1913. It allows persons or communities to lodge claims for restoration of land until 1998 (later extended to 2019). Section 1 defines a 'community' as "any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group." Similarly, the Communal Property Association Act of 1996 defines a community as "a group of persons, which wishes to have its rights to or in particular property determined by shared rules under a written constitution." So far, there has been insignificant contestation over the ideological neutrality of 'shared rules.' Instead of deconstructing the legal positivist slant of 'shared rules,' the Constitutional Court merely lowered the threshold of 'community' to ensure that more people are granted land restitution. However, a critical exploration of recent land restitution cases suggests a structural flaw with the phrase 'shared rules.' Below, we discuss this flaw with reference to restitution cases.

Judicial Attitude to 'Community'

The claimants in the *Popela* case were a group of eleven former land tenants, who sought the restitution of land held by a commercial fruit farm.[20] The Land Claims Court in Limpopo rejected their claim, citing a lack of clear evidence on whether the claimants were involuntarily

dispossessed when white settlers occupied their land in the middle of the 19th century. However, the court's reasoning implies that the claimants could not show their qualification as a community based on 'shared rules.'[21] In other words, it considered them as labor tenants with private contractual relationships with the settlers and their successors. The decision was confirmed by the Supreme Court of Appeal.[22] In subsequently reversing this decision, the Constitutional Court advocated a 'low threshold' for determining the scope of community.[23] Its judgement observed that colonialism radically restructured African social settings, to the extent that communities could not have maintained their former livelihoods.[24]

The lower courts in *Popela* reveal a common argument used against claimants of African descent, namely that they do not qualify as a community on account of their inability to prove that they are governed by 'shared rules.' This argument is evident in the *Salem* case.[25] In the dissenting judgement at the Supreme Court of Appeal, Cachalia JA reasoned that the claimants did not live "independently as a community by their own shared rules" as contemplated in the Act, but were subject to the rules of commonage based on settler law.[26] This reasoning evokes a positivist system of self-contained 'rules' in the finest tradition of European imaginations of 'tribal' Africa. Similarly, in the Supreme Court of Appeal, witnesses against the claimants argued that the Africans residing on the commonage "did so as employees of the landowners, and not as an independent community, who determined their own rules for the allocation and use of land rights."[27] Fortunately, this argument was rejected at the Constitutional Court.[28] Despite the eventual favorable outcome for the claimants, we are concerned that sustained legal action against large, commercial farms or affluent corporations is economically unfeasible for many dispossessed communities. We illustrate this concern with the *Elambini* case.[29]

Here, the claimants failed because of their inability to prove 'shared rules.' As in the *Popela* and *Salem* cases, they are also Africans whose "indigenous ownership … was supplanted by white settler ownership," and whose relationship with their own land "degenerated to labour tenancy."[30] Rather than a community based on 'shared rules,' they were defined in relation to their subordinate position as laborers to the landowners, despite the absurdity of the land being occupied at the time the settlers arrived.[31] In her justification of this absurdity, Meer J stated: "The Plaintiff bore the onus of proving that they constituted a community with *shared rules determining access to land held in common by them*."[32] Curiously, both the judge and the defendants' expert witness, Dr. Whelan, admitted that some sort of African community existed on the appropriated lands. Meer J found that all evidence for the claimants "focused on their farming, social, cultural and religious interactions, as opposed to shared rules regulating access to land." In other words, it was immaterial that the claimants had "lived as a community, inter-married, performed rituals and visited family graves." What mattered was their inability to prove their 'shared rules.'[33] Instead of the colonial imagery of shared rules, the court should have adopted 'social community' to realize the transformative intent of the Constitution.

Colonial Imagery and Mixed Messages

The notion of 'shared rules' requires land restitution claimants to (re)imagine themselves in specific ways, a demand that often conflicts with lived experiences of identity, memory, and collectivity.[34] Fokane found two important themes that galvanized the Popela community's struggle for restitution.[35]

The first is a shared origin myth, whose validity lay in its psychological significance for community members, rather than in factual validity. The second is shared experiences of dispossession, loss, and betrayal.[36] In both instances, the claimants were obliged to co-create a narrative of communality based on defined 'rules' and exclusion of community members perceived as traitors to the restitution project. These individuals (*majela-thoko*) "did not share the same values as the rest of the claimant group," and in certain cases, returned to work for the defendants following the court case.[37]

The hardships caused by bounded definitions of community manifested in the *Mazizini* case, which involved three plaintiffs.[38] The Mazizini community, who referred to themselves as amaMfengu, and the Prudhoe community, who self-identified as amaGqunukhwebe, each claimed to be a 'community' to the exclusion of the other. However, there was evidence that both communities and their forebearers were victims of exploitation and forced removals.[39] Applying for land redistribution thus became a matter of invalidating the claims of membership to a community of another racially dispossessed group, a fact that sits uncomfortably with the restorative intent of the Restitution Act.

Normative Effect of 'Shared Rules'

Land restitution is an emotive issue because land is a site of ancestral worship, burials, residence, and livelihood.[40] Importantly, land dispossession dismantled social organization with profound psychological impacts.[41] As is well known, the Natives Land Act of 1913 prevented black people from acquiring land outside 'scheduled native areas,' effectively confining them to reservations on seven percent of South Africa's territory. Other laws such as the Group Areas Act of 1966 led to mass forced displacements with devastating consequences.[42] In the *Popela* case, Moseneke DCJ clarified that to qualify for land restitution, a community does not necessarily have to conform to a pre-established tribal structure.[43] This judgement—and others—draw attention to several issues.

Firstly, it uses language that emphasizes the traditional structure of a community, as guided minimally by an *induna*. Secondly, it emphasizes a community's unbroken lineage.[44] For example, Moseneke observes that the claimants "have the same ethnic lineage, and all bear the Maake surname barring one claimant. They originate from the same rural neighborhood..."[45] This statement suggests a judicial preoccupation with sameness, which is predicated on outwardly discernible 'rules' and imaginations of indigenous law.[46]

Thirdly, land restitution cases appear to construct communities as hermetically sealed and neutrally determinable entities. Meer J's reasoning in the *Elambini* case reveals judicial ideas of customary communities as self-contained, pre-modern entities.[47] These ideas preclude the possibility of dynamic, semi-permeable, and decentralized modes of sociality. Defendants' discomfort with non-fixed characterizations of communities is evident in how they emphasize lack of historical evidence of "a wider, effective overarching community structure."[48] Indeed, the *Elambini* defendants suggested that the claimants only recently started to identify as a community solely to benefit from the Restitution Act.[49] In contrast with the current statutory framework, a definition of community that is sensitive to the dynamic nature of indigenous law would accommodate simultaneous, overlapping community membership, as well as the layered ways in which shared experiences of dispossession construct group identity.

Fourthly, the phrase 'shared rules' fosters hierarchy and exclusion, and implies that communities governed by indigenous law should 'recognize' themselves as lying outside modernity. By so doing, it creates an unnatural eligibility for groups deserving of land restitution.[50] Furthermore, it may justify ambiguous awards of restitution, as evident in the *Salem* case. Here, Cameron J applied the 'acid test' of a community based on 'shared rules' to both the landowners and the dispossessed community, ultimately ruling that the land belonged to both parties. While we do not contest the good intentions of this judgement, we argue that harmonious coexistence between claimants and respondents is implausible without tackling its underlying socio-economic factors of systemic poverty and racism.[51] To facilitate spatial justice, therefore, it is imperative to move beyond the positivist framing of 'shared rules' and recognize the lived realities of communities claiming restitution.[52]

Beyond Positivism: Alternative Model to 'Shared Rules'

The current legal positivist definition of 'community' does not provide an effective framework for resolving tensions of identity in land restitution cases. Put differently, there is poor judicial recognition of the foundational values of indigenous law and land claimants' common experiences of dispossession. Instead, bounded perceptions of 'shared rules' evoke anachronistic notions of (pre)colonial African life that impede transformation.[53]

As a contrast with legal positivism, we use the experience in rural Pakistan to illustrate the political efficacy and legitimacy of new definitions of community, which emerged in response to social challenges. Rather than draw on mythologies of historical origin, the Anjuman Mazarin Punjab utilized a "moral ecology of land rights...forged through a specific form of spatial practices" to collectively defend their land rights against the Pakistani army.[54] We therefore advocate for a departure from legal positivist definitions of community, in favor of an approach based on a common history of land use, dispossession, and communal care.[55] This approach

better accommodates the dynamic character of indigenous law, and the need to accommodate grassroots, overlapping senses of belonging, identity, and citizenship in a post-colonial society.

Admittedly, legal positivism, along with its promises of moral neutrality, offers an easy solution to the challenge of integrating indigenous law with statutory laws.[56] However, legal positivism ignores the complex identities and common experience of dispossession by land claimants. Furthermore, it could increase the economic vulnerability of community members such as women and children, thereby violating their access to justice.[57] Moreover, the prominent position that judges accord to 'shared rules' in definitions of community membership negates the semi-porous structure of modern communities, thereby promoting standardization that impedes access to justice.

Furthermore, land restitution suffers under South Africa's neoliberal order. This is evident in the privileging of private property rights in land restitution.[58] Comaroff and Comaroff illustrate how ethnicities have become commodified 'products' governed by (neo)liberal market concepts such as intellectual property rights and discourses of entrepreneurship.[59] In shutting out alternative narratives of 'community,' the state is essentially 'disciplining' indigenous African law.

Conclusion and Way Forward

On the one hand, South Africa's Restitution Act does not fully accommodate the historical reality of forced dispossession of African lands by European settlers, whose descendants continue to control the majority of fertile land and attendant industrial power. On the other hand, its liberal Constitution commits to transformation but lacks an explicit clause for land appropriation without compensation. Caught between these two paradoxes are judges trained in Western legal traditions and enjoined to apply an individualistic Bill of Rights.[60] What could possibly go wrong when communities who feed off economic crumbs from their resource-rich ancestral lands bring cases of restitution to the courts?

As evident in restitution cases, the ability of claimants to benefit from the Restitution Act is dependent on their membership of a community governed by 'shared' rules. This requirement is a classic demonstration of adjudication based on rigid rules of legal certainty inherited from a colonial legal culture. It is an obstacle to transformative justice in South Africa, as argued by Dennis and Klare.[61] While they focused on judicial behavior, we stress the ways in which the framing of legislation fosters judicial embrace of legal positivist neoliberalism and formalism. Examples are replete in the bounded definitions of community in the Restitution Act, the Communal Property Association Act, the repealed Communal Land Rights Act, and the Traditional and Khoi-San Leadership Act. There is thus need for awareness of the Eurocentric origins of legislation and a transformative approach to the judicial interpretation of indigenous

norms. Since literature on the subject does not provide significant methodological guidance for curbing legal positivism, we conclude with practical and theoretical recommendations in this regard.

Recommendations

Firstly, the definition of community in the Restitution Act should be amended to mean any group or part of a group of persons whose rights in land are derived from a common history of land access and use by such group. For proper context of this proposal, we recommend a conceptual shift from policy perceptions of legal pluralism in South Africa. While scholars tend to approach legal pluralism from a conflict of laws perspective, we see it from a dialogic perspective. We draw support from objections to legal positivist perceptions of normative orders such as Moore's semi-autonomous fields theory, which emphasizes the porous nature of the multiple, co-existing normative orders that structure communal life.[62] We also draw on Mikhail Bakhtin's framework for literary analysis, which rails against the utopian notion of monologism, in which collective consciousness is artificially idealized, harmonized, and streamlined.[63] Like monologism, legal positivism is a reductive ideology since it sacrifices people's common history of dispossession on the altar of formal rules, thereby turning them "into a voiceless object of...deduction."[64] Instead, we adapt Bakhtin's 'dialogism' to reshape the meaning of community. Dialogism regards meaning as not just multiple but shaped by multiple, contextual voices. Since legal pluralism in Africa is essentially imitative in nature, judicial interpretation should draw on disciplines that privilege the operation of law in social contexts of exclusion.

Secondly, the statutory regulation of indigenous African laws needs reform in ways that frame customs in terms of their foundational values, rather than prescriptive regulations. In essence, legislative reforms should be driven by the awareness that South Africa's "colonial experience created contemporary customary law by forcing [African] people to adapt indigenous laws to socioeconomic changes."[65]

Finally, judicial rules and procedures should be amended to discourage a legal positivist philosophy and encourage reliance on evidence of the foundational values of indigenous laws. These values include *Ubuntu*, a concept that forefronts interconnectivity and emphasizes "humaneness, social justice and fairness."[66] Again, we urge for a re-assessment of the criterion of 'shared rules' in the judicial interpretation of community. We suggest that 'social' or 'moral' communities better accord with the project of transformative constitutionalism. Ultimately, unchaining the meaning of community in land restitution requires an epistemological shift to center legal experience on human actors rather than legal rules. Such movement is needed for the establishment of a legal culture shorn of undue standardization that stifles change and difference.

References

Cases

Alexkor Ltd and Another v Richtersveld Community and Others 2004 (5) SA 460 (Constitutional Court, 14 October 2003).
Bhe and Others v Magistrate Khayelitsha and Others 2005 (1) SA 580 (Constitutional Court, 15 October 2004).
Department of Land Affairs and Popela Community and others v Goedgelegen Tropical Fruits (PTY) 2007 (6) SA 199 (Constitutional Court, 6 June 2007)

District Six Committee and Others v Minister of Rural Development & Land Reform and Others 2019 (5) SA 164 (Land Claims Court, 20 March 2019).

Elambini Community and Others v Minister of Rural Development and Land Reform and Others 2018 ZALCC 11 (Land Claims Court, 30 May 2018).

Land Access Movement of South Africa v Chairperson of the National Council of Provinces and Others 2016 (10) BCLR 1277 (28 July 2016).
Mazizini Community v Minister of Rural Development and Land Reform and Others (2020) 3 All SA 318 (Supreme Court of Appeal, 2 June 2020).
Popela Community v Department of Land Affairs and Another LCC 52/00 (Land Claims Court, 3 June 2005).
Popela Community and Others v Goedgelegen Tropical Fruits ((Pty) Ltd 2007 (2) SA 21 (SCA) (Constitutional Court, 28 September 2006).
State v Makwanyane 1995 (3) SA 391 (Constitutional Court, 6 June 1995).

Salem Party Club and Others v Salem Community and Others 2017 1 All SA 712 (Supreme Court of Appeal, 13 December 2016).

Salem Party Club and Others v Salem Community and Others 2018 (3) SA 1 (Constitutional Court, 11 December 2017).

Legislation (South Africa)

1996. Communal Property Association Act 28.

1996. Constitution of the Republic of South Africa.

2004. The Communal Land Rights Act 11 (repealed).

1994. Restitution of Land Rights Act 22.

2019. Traditional and Khoi-San Leadership Act 3.

2003. The Traditional Leadership and Governance Framework Act 41.

Literature

Atuahene, B. 2014. *We Want What's Ours: Learning from South Africa's Land Restitution Program*. Oxford: Oxford University Press.

Berg, A. 2003. "Ancestor reverence and mental health in South Africa." *Transcultural Psychiatry* 40.2: 194-207.

Bakhtin, Mikhail (edited & translated Caryl Emerson). 1984. *Problems of Dostoevsky's Poetics*. Minneapolis: University of Minnesota Press.

Burman, S. 1979. "Use and Abuse of the" Modern" Versus" Traditional" Law Dichotomy in South Africa." *VRÜ Verfassung und Recht in Übersee* 12.2: 129-41.

Comaroff, John L. and Jean Comaroff. 2018. *The Politics of Custom: Chiefship, Capital, and the State in Contemporary Africa.* Chicago: University of Chicago Press.

_____ 2009. *Ethnicity, Inc.* Chicago: University of Chicago Press.

Cousins, Ben. 2009. "Potential and pitfalls of 'communal' land tenure reform: Experience in Africa and implications for South Africa." World Bank Conference on Land Governance in Support of the MDGs: Responding to New Challenges: 9-10.

Davis, Dennis M. and Karl Klare. 2010. "Transformative Constitutionalism and the Common and Customary Law." *SAJHR* 26: 403–509.

Diala A. C. 2017. "The Concept of Living Customary Law: A Critique." *The Journal of Legal Pluralism and Unofficial Law* 49.2: 143-65.

_____ 2014. "Reform of the customary law of inheritance in Nigeria: Lessons from South Africa." *African Human Rights Law Journal* 14.2: 633-54.

Diala, A.C. and Kangwa, B. 2019. "Rethinking the interface between customary law and constitutionalism in sub-Saharan Africa." *De Jure* 52.2: 189-206.

Fokane, Tshepo N. 2015. "(Re)constructed communities under land restitution: A case study of the Popela land claim." M.A. thesis. University of the Western Cape.

Gardner, J. 2001. "Legal Positivism: 5 ½ Myths." *American Journal of Jurisprudence* 46.1: 199-228.

Hamilton, Carolyn and Nessa Leibhammer. 2016. *Tribing and Untribing the Archive: Identity and the Material Record in Southern Kwazulu-Natal in the Late Independent and Colonial Periods*. Durban: University of KwaZulu-Natal Press.

Hobsbawm, E. and T. Ranger (eds.). 1983. *The Invention of Tradition*. Cambridge: Cambridge University Press.

Hochhuth, R. 1964. *The Deputy, a Christian tragedy*. New York: Grove Press.

Kepe, T. 1999. "The problem of defining 'community': Challenges for the land reform programme in rural South Africa." *Development Southern Africa* 16.3: 415-4

33.

Makoni, Sinfree and Alastair Pennycook. 2005. "Disinventing and (Re) Constituting Languages." *Critical Inquiry in Language Studies: An International Journal* 2.3: 137–56.

Maxeiner, J.R. 2008. "Some realism about legal certainty in globalization of the rule of law." *Houston Journal of International Law* 31: 27-46.

McDonald, David A. 2010. "Ubuntu Bashing: The Marketisation of 'African Values' in South Africa." *Review of African Political Economy* 37.124: 139–52.

Mnisi, Sindiso and Aninka Claassens. 2009. "Rural women redefining land rights in the context of living customary law." *South African Journal on Human Rights* 25.3: 491-51

Moore, Sally Falk. 1973. "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study." *Law and Society Review* 7.4: 719–46.

Ntsebeza, Lungisile. 2007. "Land redistribution in South Africa: the property clause revisited." In Lungisile Ntsebeza and Ruth Hall (eds.) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (Cape Town: HSRC Press): 107-31.

Pieterse, Marius. 2000. "Killing it softly: Customary Law in the New Constitutional Order." *De Jure* 33: 35–53.

Rodney, W. 1972. *How Europe underdeveloped Africa*. London: Bogle-L'Ouverture Publications.

Scott, James C. 1998. *Seeing Like a State.* New Haven: Yale University Press.

Thomas, P. and D. Tladi. 1999. "Legal pluralism or a new repugnancy clause." *Comparative and International Law Journal of South Africa* 32: 354-63.

United Nations General Assembly. 1993. *Vienna Declaration and Program of Action*. 12 July. A/CONF.157/23.

Notes

[1] Kepe 1999.
[2] Vienna Declaration 1993.

[3] Ntsebeza 2007, p. 124.
[4] Diala and Kangwa 2019; Thomas and Tladi 1999, p. 256.
[5] Bhe 2003.
[6] Alexkor 2003.
[7] Thomas and Tladi 1999, p. 256; Cousins 2009.
[8] Gardner 2001.
[9] Diala and Kangwa 2019, p. 189.
[10] Diala 2017.
[11] Diala 2017.
[12] Diala and Kangwa 2019, p. 197.
[13] Rodney 1971; Hochhuth 1964.
[14] Burman 1979, p. 129.
[15] Maxeiner 2008.
[16] Makoni and Pennycook 2005; Scott 1998.
[17] Hobsbawm and Ranger 1983.
[18] Hamilton and Leibhammer 2016.
[19] McDonald 2010; Diala 2014.
[20] *Popela Community v Department of Land Affairs* [2005] ZALCC 7 paras. 4, 61.
[21] Popela 2007, para. 26.
[22] Popela 2006, para. 17.
[23] Popela 2007, para. 41.
[24] Popela 2007, para. 26.
[25] *Salem Party Club v Salem Community* 2018 (3) SA 1 (CC).
[26] Salem, para. 368-369.
[27] Salem, para. 18.
[28] Salem, paras. 146-9.
[29] *Elambini Community v Minister of Rural Development* [2018] ZALCC 11.
[30] Elambini, para. 142.
[31] Elambini, paras. 82, 118-19, 133-34.
[32] Elambini, para. 146. Emphasis ours.
[33] Elambini 148.
[34] Kepe 1999, pp. 417, 421.
[35] Fokane 2015.
[36] Fokane, pp. 52-58.
[37] Fokane, p. 61.
[38] *Mazizini Community v Minister of Rural Development* [2020] 3 All SA 318 (SCA).
[39] Meer et al. 2018, paras. 107.6-107.7.
[40] Berg 2003.
[41] Atuahene 2014; *Land Access Movement* 2016.
[42] *District Six Committee* v *Minister of Rural Development* [2019] 4 All SA 89 (LCC).
[43] Popela, para. 40.

[44] Popela, paras. 36 and 44; Salem 2017, para 102-103.
[45] Popela, para. 2.
[46] A similar argument is applicable to para 58 of Salem.
[47] Elambini, para. 148.
[48] Elambini, para 31.
[49] Elambini, para. 79.
[50] Kepe 1999.
[51] Kepe 1999, p. 422.
[52] Soja 2010.
[53] Pepe 1999.
[54] Rizvi 2019, p. 4, 56.
[55] McDonald 2010.
[56] Pieterse 2000.
[57] Mnisi and Claassens 2009, pp. 515-16.
[58] Ntsebeza 2019, p. 126-129.
[59] Comaroff and Comaroff 2009.
[60] Diala 2019.
[61] Dennis and Klare 2010, p. 403.
[62] Moore 1973.
[63] Bakhtin 1984, p. 82.
[64] Bakhtin 1984, p. 83.
[65] Diala and Kangwa 2019, p. 205; Diala 2017, p. 154.
[66] *S v Makwanyane* 1995 (3) SA 391 (CC) para 237.