FREE, PRIOR AND INFORMED CONSENT IN THE EXTRACTIVE INDUSTRIES IN SOUTHERN AFRICA

An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia
ACKNOWLEDGEMENTS

This report was prepared by Legal Resources Centre and commissioned by Oxfam. We are very grateful to Oxfam in Mozambique and Oxfam America for the opportunity to work on this project and for their invaluable guidance in completing it. In particular, we wish to thank Titus Gwemende and Emily Greenspan for their support throughout, and Scott A. Sellwood for his tireless revisions. We would also like to thank peer reviewers for their thoughtful engagement with and feedback on earlier drafts of this research.

The authors want to thank in particular every person who gave of their time to be interviewed for this research.

Finally, we wish to honour the brave women and men who continue to fight for the recognition and realization of their human rights in difficult and sometimes dangerous circumstances. Their struggles remain the inspiration for every word written.

THE LEGAL RESOURCES CENTRE

The LRC is a human rights organisation established in South Africa since 1979. We use the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances. We seek creative and effective solutions by using a range of strategies. These include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the international level.
LIST OF CASES


Alexkor Ltd v The Richtersveld Community 2004 (5) SA 460 (CC)

Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC)


Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC), 2011 (3) BCLR 229 (CC)

Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC).

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya Comm. No. 276/03 ACHPR AAR Annex.

Gongqose and Others v S; Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others [2016] ZAECMHC 1

Kaunda and Others v President of the Republic of South Africa and Others 2005

MM v MN and another 2013 (4) SA 415 (CC).

Premier of the Eastern Cape and Others v Ntamo and Others (169/14) [2015] ZAECBHC 14; 2015 (6) SA 400 (ECB), [2015] 4 All SA 107 (ECB) (18 August 2015)

Richtersveld Community and Others v Alexkor Ltd and Another 2003 (6) BCLR 583 (SCA)

Shilubana and Others v Nwamitwa [2008] ZACC 9, 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC)2009 (2) SA 66 (CC)

Sigcau v President of the Republic of South Africa and Others (CCT 93/12) [2013] ZACC 18; 2013 (9) BCLR 1091 (CC)

Tongoane and Others v National Minister for Agriculture and Land Affairs and Others (CCT100/09) [2010] ZACC 10, 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC)
LIST OF LEGISLATION & POLICIES

INTERNATIONAL

International Covenant on Economic, Social and Cultural Rights (1966)
International Labor Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries (No.169) 1989

REGIONAL

Africa Mining Vision (2009)
African Union Guiding Principles on Large Scale Land Based Investments in Africa (2014)
Southern African Development Community Protocol on Mining (1997)

MALAWI

Constitution of Malawi (1964)
Customary Land Act (2016)
Environmental Management Act (1996)
Water Resources Act (2013)
Land Acquisitions Act (2016)
Land Act (1965)
Land Act (2017)
Registered Land Act (1967)

MOZAMBIQUE

Environmental Law (Law no. 20/97 of 1 October 1997)
Land Law (1997)
New Mining Law (2014)
Regulation on the Process of Resettlement Resulting from Economic Activities (Decree No. 31/2012, of 8 August)
Resolution 70/2008
SOUTH AFRICA

Interim Protection of Informal Land Rights Act (1996)
National Environmental Management Act (1998)
Native Land Act of (1913)
South African Constitution (1996)
State Land Lease and Disposal Policy (2013)

ZAMBIA

Constitution of Zambia (2016)
Environmental Management Act (2011)
Lands (Customary Tenure)(Conversion) Regulations (1996)
Ratification of International Agreements Act (2016)
Zambia Development Agency Act (2006)

ZIMBABWE

Access to Indigenous Genetic Resources and Genetic Resource-based Knowledge Regulations (2009)
Land Acquisition Act (1992)
Agricultural and Settlement Act (1970)
Communal Lands Act (1983)
Constitution of Zimbabwe (2013)
Environmental Management Act (2012)
Environmental Management Act Regulations (2007)
Indigenisation and Economic Empowerment (General) Regulations (2010)
Indigenisation and Economic Empowerment Act (2010)
Land Commission Bill (2016)
Mines and Minerals Act (1961)
Rural Land Act (1963)
# LIST OF ACRONYMS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACHPR</td>
<td>African Commission On Human and Peoples' Rights</td>
</tr>
<tr>
<td>AMV</td>
<td>Africa Mining Vision</td>
</tr>
<tr>
<td>CSOT</td>
<td>Community Share Ownership Trusts (Zimbabwe)</td>
</tr>
<tr>
<td>DTA</td>
<td>Department of Traditional Affairs (South Africa)</td>
</tr>
<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
</tr>
<tr>
<td>EIA</td>
<td>Environmental Impact Assessment</td>
</tr>
<tr>
<td>FPIC</td>
<td>Free, Prior and Informed Consent</td>
</tr>
<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights (1966)</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labor Organization</td>
</tr>
<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>IPILRA</td>
<td><em>Interim Protection of Informal Land Rights Act 1996 (South Africa)</em></td>
</tr>
<tr>
<td>MPRDA</td>
<td><em>Minerals and Petroleum Resources Development Act 2004 (South Africa)</em></td>
</tr>
<tr>
<td>RAP</td>
<td>Resettlement Action Plan</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern Africa Development Community</td>
</tr>
<tr>
<td>UNECA</td>
<td>United Nations Economic Commission for Africa</td>
</tr>
<tr>
<td>UNEP</td>
<td>United Nations Environment Program / UN Environment</td>
</tr>
<tr>
<td>ZDA</td>
<td>Zambia Development Agency</td>
</tr>
<tr>
<td>ZEMA</td>
<td>Zambian Environmental Management Agency</td>
</tr>
<tr>
<td>ZHRF</td>
<td>Zimbabwe Human Rights Forum</td>
</tr>
<tr>
<td>ZMDC</td>
<td>Zimbabwean Mining Development Corporation</td>
</tr>
</tbody>
</table>
Community members from Xolobeni in the Eastern Cape, South Africa, protest against mining in the area after an Australian mining company made an application to mine the sand dunes. This is the first case in South Africa to argue that a community has a right to say no to mining.
TABLE OF CONTENTS

EXECUTIVE SUMMARY .................................................................................................................. 9

INTRODUCTION ............................................................................................................................ 17
   Objectives and purpose of the study ......................................................................................... 17
   Methodology .............................................................................................................................. 19
   Outline .................................................................................................................................... 20
   Understanding FPIC in the African context ............................................................................. 20
   Status of UNDRIP in Africa ...................................................................................................... 21
   Regional laws and jurisprudence recognize FPIC ................................................................. 23
   Regional campaigns for FPIC .................................................................................................... 29
   Customary law as a basis for FPIC ......................................................................................... 31
   Challenges to realizing customary rights to FPIC ................................................................. 35

MALAWI ....................................................................................................................................... 40
   Background ............................................................................................................................... 40
   Legal Analysis ........................................................................................................................... 41
   Implementation .......................................................................................................................... 44
   Recommendations ................................................................................................................... 45

MOZAMBIQUE ............................................................................................................................ 46
   Background ............................................................................................................................... 46
   Legal analysis ............................................................................................................................ 47
   Implementation challenges ...................................................................................................... 51
   Recommendations ................................................................................................................... 53

SOUTH AFRICA ........................................................................................................................... 54
   Background ............................................................................................................................... 54
   Legal analysis ............................................................................................................................ 55
   Implementation challenges ...................................................................................................... 61
   Recommendations ................................................................................................................... 63

ZAMBIA ....................................................................................................................................... 64
   Background ............................................................................................................................... 64
   Legal analysis ............................................................................................................................ 65
   Implementation challenges ...................................................................................................... 70
   Recommendations ................................................................................................................... 73
EXECUTIVE SUMMARY

Africa is a continent of paradox. Arguably the richest continent in terms of natural resources, it continues to house many of the poorest people in the world. The current wave of legal and policy reforms emerging in Africa, both at a regional and domestic level, focus on increasing the state share of revenues from the wealth of natural resources, harmonisation of mining codes at sub regional and regional level1 and attempts to better integrate and manage mineral and hydrocarbon resources towards longer term economic development with the hope that this will have positive developmental impacts.2 Many argue, however, that this extractive-intensive model of economic development is actually driving widening inequality that, in effect, serves to erode potential development benefits and increase social strife and hardships for large sections of the economically marginalised population.3 None suffer more than the communities whose land and resource rights, often already tenuous, are affected or eroded directly as a result of such projects. These communities’ access and ownership of the land and resources has been neglected for decades through racially discriminatory regimes. The recognition of these rights today should mean that they can negotiate their own development outcomes in exchange for their valuable resources, thereby ensuring that they benefit in real terms.

The power to give or withhold consent to extractive industry projects is a key tool to help communities defend their right to participate in the development decisions that affect them. For Indigenous Peoples’ the right to free, prior and informed consent (“FPIC”) is recognized under international law, and requires that they be informed about projects that may affect their land, resource and other rights in a timely manner, free of coercion and manipulation, and have the opportunity to approve or reject a project prior to the commencement of all activities. In the African context, recognizing the unique histories of colonialism and post-colonialism across the continent, FPIC is increasingly interpreted as a standard for affected local communities who do not fit the international law definitions of rights holding indigenous entities. On the basis of the research conducted for this study, we argue that African regional human rights law, customary law and indeed various existing statutes and jurisprudence, elevate the standard of consent to a right to be claimed by customary land rights holders.

Power, consent, and choice are inextricably linked. If communities4 are to choose and give their consent openly, freely and in an informed sense, there has to be one or more alternatives for how people can choose to use their land, their water and other natural resources, and, ideally, there should be state support for these alternatives. Notwithstanding internal variance, the African continent is generally not yet characterized by equitable societies and therefore alternatives often appear not to exist. In addition, States sometimes deliberately limit choices, for example, by promoting the commercialization of agriculture and reducing supports for small-scale producers, both of which lead to peasant farmers being driven off their lands, as well as the privileging of certain forms of production (for example, for export or alternative energy). Therefore, the ability of rural communities to be able to protect their land rights from both the government and developers is crucial. The fact that many development projects target the land and resources of rural communities living in extreme poverty, outside the reach of government services and of access to information on their rights and mechanisms to enforce these rights, significantly worsens the situation.

Within this context, this research set out to identify major legal and policy gaps in the codification and implementation

---

1 See for example the African Mining Vision, the SADC Harmonisation Framework and the ECOWAS Mining Directive. These are reviewed in Chapter 2.
3 Africa Progress Panel 2013, n2 above
4 We use this term cautiously, fully acknowledging that, in the words of Ben Cousins, we are employing “strategic essentialism”. Communities are not homogenous entities and issues of power, coercion and manipulation exist at this level too. Women, men, youth and the aged represent just some subgroupings that often have both common and conflicting interests that make up what is referred to in this study as “community”.

---
of FPIC in the legal and policy frameworks of Malawi, Mozambique, South Africa, Zambia and Zimbabwe with particular reference to the mining industries in these countries. These five countries all suffer from high levels of poverty. The levels of inequality in income are equally startling. While all have histories of significant political instability – some very recently – there is relative stability in all five at the time of this study. A greater challenge is the capacity and quality of regulatory and other governance institutions, which appears to be deteriorating in Zambia, Zimbabwe and even South Africa. Access to information remains a significant challenge in all five countries, despite increasingly sophisticated legislative mechanisms that should enable citizens to access information that affects their rights.

In summary, none of the countries under review explicitly include the principle of FPIC in full in any of their legislative frameworks. Versions of consent and strong consultation are, however, recognized in most regulatory frameworks. In fact, we did find far stronger provisions in the land and minerals legislation, in customary law and in regional human rights law instruments that could be used to promote the right to consent than is widely appreciated. In Malawi, South Africa, Zambia and Zimbabwe, written consent of the lawful occupiers – which we argue include members of communities with customary tenure – is required. It is only in Mozambique, the country known for its progressive land legislation, where consent is not required – but the tenor of the legislation certainly leans towards significant community agency in decision-making.


6 South Africa, for example, is considered the most unequal country in the world measured in terms of the GINI coefficient (65.4), while Zambia (55.6) also makes the top ten. Oxford Poverty & Human Development Initiative Global Multidimensional Poverty Index Databank (2017) available at www.ophi.org.uk/multidimensional-poverty-index/mpi-country-briefings/.

7 An important tool for advocacy in this regard is the African Commission on Human and Peoples’ Rights Model Law on Access to Information available at http://www.achpr.org/instruments/access-information/.

8 Zambia’s new Draft Land Policy (2017) does make explicit reference to the requirement of free, prior and informed consent in relation to mining (see section 6.5.8). The draft policy recognizes weaknesses in current legislation and practice around land management, and acknowledges some of the legacy issues related to colonialism and gender discrimination which the new policy seeks to combat. However, there are weaknesses in how FPIC is framed that will make implementation challenging.
The table below reflects the existence of explicit provisions for consent or consultation with affected communities when a development decision that will directly affect that community is taken. It is important to emphasize that there is a significance difference between consultation (the right to be heard) and consent (the right to say no). This research focuses on the latter. We do identify where consultation requirements exist because the notions are often conflated and because existing consultation requirements may well be strengthened to the level of consent over time.

Table 1: Statutory basis for Consultation and Consent in five Southern African countries

<table>
<thead>
<tr>
<th></th>
<th>Malawi</th>
<th>Mozambique</th>
<th>South Africa</th>
<th>Zambia</th>
<th>Zimbabwe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Land: consultation with Chief</td>
<td>No (but Chiefs may make decisions)</td>
<td>No</td>
<td>No</td>
<td>Yes – consultation</td>
<td>Yes - consultation</td>
</tr>
<tr>
<td>Land: consultation with community</td>
<td>No</td>
<td>Yes - consultation</td>
<td>Yes - consent</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Land decisions in terms of customary law</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Mining: consultation with Chief</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Mining: consultation with community/occupiers</td>
<td>Yes – written consent of lawful occupier</td>
<td>Yes – consultation</td>
<td>Yes - consultation</td>
<td>Yes – written consent of lawful occupier</td>
<td>Yes – written consent of lawful occupier</td>
</tr>
<tr>
<td>Mining: consultation in terms of customary law</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Environmental: consultation in terms of customary law</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Environmental: consultation with the Chief</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

The analysis of the relevant legislation in these countries shows that – on paper at least – there are more provisions that provide for consent as a right than generally believed. While the serious lack of implementation of these provisions are indicative of the broader challenges to implementing human rights protections in general in all five countries, the consent requirements found in most customary land and mining related legal frameworks have become all but obsolete – with even communities and civil society no longer insisting on the implementation of these provisions.
Right to consent protected as an integral part of customary law

All five countries have fairly recently adopted Constitutions. None of these Constitutions require consultation or consent of affected parties for specific development decisions.\(^9\) Only the constitution of Malawi protects the right to development.\(^10\) Yet all of these countries, with the exception of Zambia, \(^11\) contain Constitutional provisions explicitly protecting the right to property (including customary property rights).

Furthermore, with the exception of Malawi, there is strong Constitutional recognition of the institution of traditional leadership. In South Africa and Mozambique, the Constitution does not define the roles and functions of traditional leaders, but leaves it to customary law and statute to do so. The constitutions of Zimbabwe and Zambia entrench far-reaching powers for traditional authorities in particular relevant to their power over land.\(^12\) The Zambian Constitution recognizes the right of chiefs to hold property in trust for their “subjects”, subject to regulation. Chiefs are also empowered to enjoy the “privileges and benefits” attached to this office in terms of customary law and otherwise prescribed. This confers on traditional leaders significant powers to make decisions over the land and resources of their “subjects,” including consenting to development projects on the land. The research shows the significant need of individual and household customary rights holders being able to assert their property rights also against their traditional leader.

In the four countries that have enacted legislation regulating communal tenure, it is only Mozambique – not a former British colony – that did not entrench the notion of the Chief as the custodian or owner of the communal land in his area. Statutory instruments in most of these countries include the requirement for Chiefs to make decisions “in terms of customary law.”\(^13\) However, this phrase, “in terms of customary law” often carries no meaning in practice. This study argues that this is one crucial opportunity of safeguarding the tenure rights – including the right to give or withhold consent – of the members of affected communities.

The 1997 Land Law of Mozambique has been hailed as one of the best of its kind. It recognises customary land rights as equal to any other statutory right to land and defers to customary principles of land management, allocation and use. However, certain principles in the Act override customary law rules that may run contrary to it: women are, for example, guaranteed equal right to hold, access and derive benefits from land independent of any male relative. The local community is allowed to choose what the nature of the administration of their land will be, whether customary or not. Most importantly, the Act attempts to empower communities to participate in negotiations around development on their land.

While South Africa has no statute regulating communal land or its administration, it does have an interim piece of legislation\(^14\) that provides for the consent of land rights holders in the event of their rights being threatened. It is perhaps the strongest expression of the consent requirement in legislation of the countries under review.

Notwithstanding these in-principle protections recognizing customary property rights the legal frameworks in these five countries all provide the State with some degree of power to expropriate lands for certain purposes.

---

\(^9\) The Zimbabwean Constitution at least requires the involvement of affected peoples in the “formulation and implementation of development plans” while also requiring the State to ensure that “local communities benefit from the resources in their areas”. Zambia’s Constitution includes similar principles, requiring land use plans to be done “in a consultative and participatory manner” and land investments to “also” benefit local communities. The Constitution of Mozambique calls for active participation of citizens and the involvement of local communities in the solving of local problems.

\(^10\) Section 30 of the Malawian Constitution.

\(^11\) The proposed Bill of Rights could not be passed by referendum in 2016 as the turnout did not reach the required 50% of the voting population.

\(^12\) The Zimbabwean Constitution provides: Except as provided in an Act of Parliament, traditional leaders have authority, jurisdiction and control over the Communal Land or other areas for which they have been appointed, and over persons within those Communal Lands or areas.

\(^13\) A community in the Eastern Cape province of South Africa successfully relied on this phrase to defeat the imposition of a headman on their village. They argued that the headman was not identified “in terms of [their] customary law” which provided for the election of headmen. Premier of the Eastern Cape and Others v Mntamo and Others (169/14) [2015] ZAECBHC 14, 2015 (6) SA 400 (ECB), [2015] 4 All SA 107 (ECB) (18 August 2015).

\(^14\) Interim Protection of Informal Land Rights Act 1997.
In South Africa, Zimbabwe and Mozambique, a law of general application is required to deprive someone of property. In South Africa, property may only be expropriated for a public purpose or in the public interest. In Zimbabwe, the framework for deprivation is at the same time narrower (citing specific public purpose objectives) and wider, including deprivation “in order to develop or use that or any other property for a purpose beneficial to the community”.

Mozambique allows expropriation for reasons of public necessity, utility, or interest. While this discretion is very wide, the ownership of land in Mozambique vests in the State in any event and grants it the right to determine the conditions under which land may be used and enjoyed.

In Zimbabwe, the Land Act provides for compensation to persons forcibly relocated, but the default position is for such compensation to be in the form of alternative land and no consultation is required prior to relocation. The Zambian Mines and Minerals Act includes compensation provisions very similar to that of Zimbabwe, while the Malawian Land Act, in section 28, guarantees “reasonable” compensation for any loss or damage to any interest in land.

In South Africa, section 25 of the Constitution sets out principles that a Court should take into account when calculating compensation for expropriation, including the history of acquisition of the property, current use and the purpose of the expropriation. However, expropriation is rarely triggered when communities face pressure given the weak implementation of consent rights of communities. In Mozambique, the Land Act requires compensation to be paid when the President decides to extinguish any customary rights in land in the public interest.

Gender equality and customary law

All five countries recognize the right to gender equality in their constitutions, but the applicable statutes regrettably do not go nearly far enough to realise this principle in the context of community decision-making.

- In South Africa, the legislation proposed to regulate communal and customary tenure did not mention women. Parliament has done no better with regards to the mining legislation. After first indicating that it would amend the mining law to specifically mention women as a previously disadvantaged group who should be afforded opportunities in the sector, the legislature inexplicably changed its mind and removed all references to women as a vulnerable group in the latest version before parliament. The attempts at formal equality in the traditional leadership legislation that require a third of the Chief’s council to be women, have not translated into substantive equality in decision making on the ground.

- The Land Law of Mozambique explicitly recognizes the equality of land rights of women independent of their connection to male relatives – regardless of what the applicable customary law provides. While the 2011 proposed amendments to the Constitution of Zambia would have included equal access of women to land, those amendments died in parliament. In Zambia, and following the failure of proposed amendments to its Constitution in 2011, there are no special protections for women in the face of development decisions; not in the Constitution, the land or the minerals legislation.

15 Section 7(3) of the Zimbabwean Constitution.
16 Section 82 of the Mozambican Constitution.
17 Section 109-110 of the Mozambican Constitution.
18 Unusually, Zimbabwe’s archaic Mines and Minerals Act attempts to outline an approach to calculating the quantum for compensation (probably because, at the time, it anticipated compensation to be paid almost exclusively to private land owners). While some argue that the provision for compensation in the Minerals Act excludes community members from benefitting, we believe that all occupiers and in particular directly affected communal land rights holders are covered by the scope of the statutory provision.
19 However, it does not provide for compensation in respect of customary land compulsorily acquired under the Lands Acquisition Act. Where compensation is granted in terms of the Land Act, it is limited to compensation for additions to the land rather than including the value of the land itself and the occupier’s attachment to it.
The Constitution of Zimbabwe elevates women as a special group for equal opportunities in development. That is largely where it ends, however. Neither the lands nor the mining legislation even mention women or gender inequality. That is also the situation in Malawi, although the new land legislation soon to come into force specifically protects women’s equal access to land.

Effective implementation of customary land protections remains the biggest obstacle to community consent

In all five countries, the level of implementation of the existing provisions that speak to the elements of FPIC fails dismally. We could find no clear example of a community that has effectively exercised its right to withhold consent, or negotiated with investors from an equal bargaining position based on its right to say no.20

The reasons for such weak implementation both overlap and differ from country to country. While the respect for applicable legislation lies on a spectrum in the five countries, it is safe to say that when it comes to facilitating investments that affect communities and their rights, the applicable legislation plays a far weaker role than one would expect.21 A persistent theme is the tendency to see any provisions that provide communities with mechanisms to assert local development decision-making power as an obstacle to a development path based on extractivism at all costs. Exacerbating this challenge is the lack of adequate human and other resources to properly monitor the implementation of the existing protection of customary and communal land rights. This limited role of the law is, in all countries, a symptom of a complexity of causes:

- The lack of capacity from government departments as implementing agents to understand and implement the applicable legislation. This includes a lack of human and financial resources to do proper cost-benefit analyses, access good information on which to base development decisions and properly patrol investors.
- A lack of coordination between government departments.
- The upward centralisation of decision-making relevant to extractive projects was identified in all countries as an obstacle to including local knowledge and information in the decision that inevitably allows the macro-benefits of the project to outweigh the micro-impacts.
- While customary law is generally recognized as a source of law, the colonial narrative of the Chief as the custodian of that law and of the land remains entrenched in most of the countries. Thus, the content of customary law, which includes consent as an element of individual and communal ownership, and consultation and consensus within the community, is entirely ignored in favour of the Chief as sole representative and decision-maker on behalf of the community he/she represents.
- Unsurprisingly, the members of affected communities are often not regarded as legal persons with individual rights (including property rights) as members of customary communities. That not only makes it more difficult for community members most affected by projects to voice an opinion different from the rest of the community (in particular, the Chief), but appears to be one of the reasons why the consent provisions in Zimbabwean and Zambian legislation applicable to individual land rights holders are not applied to community members.
- While there are examples of women gaining strength as decision makers and land rights holders within communities, these examples are rare and not the result of legislative interventions.

20 This is changing. Members of the Xolobeni community in the Eastern Cape, South Africa who stand to lose their land and livelihood rights on account of a titanium mine planned for the area have been able to use litigation, direct action, solidarity and media campaigns to say no to the project for more than a decade. The struggle continues.

21 In Zimbabwe, a mining executive told us bluntly that the (domestic) law is simply not a central factor in their dealings with government and affected communities. In South Africa, a researcher recounted how the Minister of Rural Development and Land Reform told him, when confronted with the Department’s unwillingness to protect community’s land rights, “You will win in the courts, we will win on the ground.”
Looking ahead: defending community consent in Southern Africa

While the focus of civil society supporting affected local communities to assert their rights to participate in development decisions generally focus on opportunities provided by environmental legislation, this study shows that stronger provisions requiring actual written consent lurk in the mining and communal land legislation of the countries concerned. These provisions should be looked at afresh and in particular through the lens of recognizing the members of local communities with customary or communal tenure as individual tenure rights holders and, thus, individual lawful occupiers for purposes of many of the relevant legislation. In Zimbabwe and possibly Zambia and Malawi, strategic litigation may be required to gain certainty on the issue.

The more recent recognition of customary law by the constitutions of all five countries provide an important opportunity to ground both procedural (consent) and substantive (property) rights of local communities who are governed in terms of customary law. This means the recognition of customary law as a system of law, rather than as the will of the chief or the unchanging traditions of the community.

The proper recognition and implementation of customary law must be treated with caution and particular attention to the following:

- Customary law must be rid of its colonial distortions, notably the notion of the Chief as autocratic leader and custodian of the law and of the land. Respecting and adhering to the customary law of the community concerned can never legitimately be reduced to negotiating with a single representative of the community, or taking the leader’s word for compliance with internal processes. Members of customary communities, men, women and children, all have individual (and often overlapping) rights based on their membership to a household and to the community and outsiders (whether the State or investors) should legally be required to recognise and respect those individual rights.

- In all jurisdictions under review, customary law is subject to the Constitution in any event. That means that, even if the Chief insists on a version of custom that denies the rights of individual members (to participation or compensation for example), the constitutional protection of the tenure rights of individual community members overrides that.

- Equally important is that customary law is subject to the gender equality provisions in the constitutions of four of the five countries. Customary law cannot be used as an excuse for denying women’s equal rights to tenure and, in particular, to participation in any consultation or consent processes.

The struggle for the meaningful participation of local affected communities should also be a struggle towards including good and thorough information in the decision-making processes. This study shows the lack of capacity of government departments to get good information upon which to base their decisions. The only available information often comes from the investor who wants the decision to be in their favour. Including local communities in a meaningful way and treating their local knowledge with the respect it deserves, will make for better decisions. In addition, taking customary law serious can empower communities as the experts of their own law when confronted with the might of a well-resourced legal team representing a developer. They can be sure that they know more about their own law that the most well-paid legal team.

Communities and the organisations that support them must share the tools – existing and envisioned – that increase their bargaining power in the context of development decisions that will affect them. This research aims to provide civil society groups and local communities with a tool to inform their advocacy on FPIC and related issues directed and the extractive industries.

---

22 Individual rights under customary law should not be confused with individual common law property right that attaches one owner to one piece of land. In customary law, individuals have rights but these largely overlap with rights of other persons over the same piece of land, mostly within the household structure, but also some rights shared with other members of the community (to communal spaces).
INTRODUCTION

The continent of Africa has been described as central to a “global land grab.” Some estimate that 70% of land transacted in large-scale transnational deals since 2007 has been in Africa. In a study for the FAO, Rachael Knight writes that:

[...] the issue of how best to increase the land tenure security of the poor and protect the land holdings of rural communities has been brought to the fore in Africa due to increasing land scarcity [...]. This scarcity is being exacerbated by wealthy nations and private investors who are increasingly seeking to acquire large tracts of land in Africa for agro-industrial enterprises and forestry and mineral exploitation, among other uses. Some nations have received (informal) requests for up to half of their cultivable land areas, and others are granting hundreds of thousands of hectares to private investors and sovereign nations.

These thousands of hectares are largely held in terms of customary law by rural communities. These communities struggle to assert their customary tenure rights against their governments or other external entities because customary law has not yet properly recovered its status as a source of law and of property rights since being relegated to second-class status by decades of colonial imposition.

Ben Cousins has argued that while idealizing customary tenure systems is dangerous, the problems inherent to the system appear to arise specifically when development planners and investors arrive on the scene. In the absence of outside pressure, tenure security operates relatively well in customary communal systems (with the important caveat that women’s tenure rights are often prejudiced as we will discuss). This is a very useful insight, as it means that the focus on securing tenure should specifically deal with decisions on land disposal for development and other projects.

OBJECTIVES AND PURPOSE OF THE STUDY

The purpose of this study is to identify opportunities for local communities of five countries in Southern Africa to advocate for FPIC as both a right and a principle to inform decision making pertaining to community land. FPIC is a tool that helps communities to defend their right to participate in development decisions around oil, gas and mining projects. The countries under review are Malawi, Mozambique, South Africa, Zambia and Zimbabwe. For each country under review, we highlight the existing protections for communities directly affected by extractive industry projects in these countries, while at the same time seeking new avenues for promoting and fulfilling the rights of those communities to determine their own development paths – both inside and outside the law. We use the language of self-determination because it is a right recognized in Article 20 of the African Charter on Human and Peoples’ Rights (“the African Charter”). Article 20 provides that “[all peoples] shall...
pursue their economic and social development according to the policy they have freely chosen”. The African Commission on Human and Peoples’ Rights (“the African Commission”) has, in its jurisprudence, confirmed that the term ‘people’ includes nations, but also localised groupings such as indigenous peoples and local communities “who are most immediately affected by extractive industries” 28 That provides the rationale for this study which analyses, in relation to the elements of FPIC:

- the applicable legal frameworks of the five countries (specifically the extent to which their Constitutions, land laws, mining laws, environmental laws, and other pertinent laws and policies provide a legal basis for the right to consent or not), and

- the implementation of these frameworks, with an emphasis on the main implementation challenges;

On the basis of this analysis, we attempt to provide recommendations to relevant stakeholders, including communities, civil society, government and companies, to recommend ways in which existing legal frameworks may be more effectively implemented; new or amended frameworks may strengthen the rights of communities and what opportunities exist outside the law for promoting the proper implementation of FPIC.

Extractive industries are by no means the only external threat to the rights of rural African communities: large scale agribusiness is possibly an even greater threat to customary land rights. However, we have chosen to focus on the extractive industries, in particular mining, specifically for the following reasons:

- The focus of the countries under review, and most of the continent, is on using extractivism as a vehicle for economic growth and development;
- Extractivism, and in particular mining, is a well-regulated field in all five countries and therefore analyses of applicable legislation and policy is feasible; and
- The principles of balancing the rights of communities, in particular to their land and resources, with the interests of foreign investors and the interest of the country in attracting investment can usefully be extrapolated from the extractive sector to other instances of large-scale development such as large-scale infrastructure, agribusiness or forestry. 29

We did not include the regulation of oil and gas in the five countries, because such separate regulation does not exist in South Africa and Zimbabwe (although it is on the cards in both countries), while the regulation of petroleum in Malawi, Zambia and Mozambique specifically relating to communal land rights and FPIC are identical to that contained in their mining legislation.

While the study used FPIC as its starting point, the focus of the research was mainly on the right to consent (or the lesser rights to consultation). Addressing the crucial other aspects, such as what ‘free’ means and how information can and should be accessed to ensure the decision is ‘informed’, fell outside the scope of the study beyond references to the most notable mechanisms to access information.

Finally, we note the importance of carefully distinguishing between ‘consent’ and ‘consultation’. We see the former as the right to give or withhold permission, thus providing a choice in the true sense of the word. Consultation, on the other hand, we regard as the right to be heard and should entail the right to meaningful participation. It does not include the right to have ones views accommodated, however. This research aims specifically to look for examples of consent requirements and ways in which existing consultation requirements may be strengthened to reach consent status.


29 In this study, we focused on the legislation regulating the mining sector in particular. We did not include the regulation of oil and gas in the five countries, because such separate regulation does not exist in South Africa and Zimbabwe (although it is on the cards in both countries), while the regulation of petroleum in Malawi, Zambia and Mozambique specifically relating to communal land rights and FPIC are identical to that contained in their mining legislation.
INTRODUCTION

Box 1: Defining FPIC in Africa

For Indigenous Peoples' the right to free, prior and informed consent (“FPIC”) is recognized under international law, and requires that they be informed about projects that may affect their land, resource and other rights in a timely manner, free of coercion and manipulation, and have the opportunity to approve or reject a project prior to the commencement of all activities. In the African context, recognizing the unique histories of colonialism and post-colonialism across the continent, the applicability of this international law right of indigenous communities to many local, affected communities in Africa remains contested.

In this research FPIC is interpreted as both a substantive principle under international law as well as a process designed to ensure satisfactory development outcomes. In the African context, it can refer to a right arising from customary and statute law. The right places the development decision in the hands of the community. To realise FPIC, the community's decision should be made free from any obligation, duty, force or coercion. Ideally, alternative development options should also be available to the community to ensure that the decision is based on real choice. Secondly, the community is entitled to make the development choice prior to any similar decisions made by government, finance institutions or investors. In other words, FPIC is not realised if the community is presented with a project as a fait accompli. Thirdly, the community must be able to make an informed decision. That means that they should be provided sufficient information to understand the nature and scope of the project, including its projected environmental, social, cultural and economic impacts. Such information should be objective and based on a principle of full disclosure. The community should be afforded enough time to digest and debate the information. Finally, consent means that the community’s decision may be to reject the proposed development. They can say no.

FPIC is then also described as a process precisely because the right to say no places the community in a position to negotiate. In other words, FPIC is not designed only to stop undesirable projects, but also to provide communities with better bargaining positions when they do consider allowing proposed developments on their land or resources.

METHODOLOGY

This research adopted a comparative policy analysis approach. The Legal Resources Centre led a team of four researchers who analysed the legislation and policies relevant to the protection of the land rights of affected communities of the five countries under review, the implementation thereof and the challenges and opportunities that exist in furthering the protection of affected communities’ rights. In preparing the report, the team did desktop research for contextual analyses in each country before embarking on a series of interviews in each of the five countries. Respondents were identified in each country from the government, corporate and civil society sectors. The team developed a questionnaire as guideline which was shared with potential respondents beforehand. The interviews were very loosely based on the questionnaires.

A few respondents answered the questions in writing. The team visited Lusaka, Zambia from 28 February until 2 March 2017; Harare, Zimbabwe from 20 until 24 March 2017; Maputo, Mozambique from 18-21 April 2017 and Lilongwe, Malawi from 19-21 February 2017. The team interviewed respondents in South Africa at different times throughout the process given their proximity. More than 50 respondents were interviewed in person and in most countries at least one respondent from each

30 In this study, we use the term “community rights” to refer to the rights that are regarded as collective in domestic and African regional legislation and/or indigenous customary law. For example, communal or customary tenure (in domestic legislation), community rights to freely dispose of natural resources (defined as peoples’ rights in the African Charter on Human and Peoples’ Rights).
sector was reached. A number of respondents, notably from government and the corporate sector, granted interviews on the basis of anonymity. As a precautionary measure, it was decided not to include the names of any of the respondents, but where their responses are specifically mentioned, the sector from which they emanate is cited.

OUTLINE

This report is structured as follows.

In the next chapter we discuss the legal and political history of FPIC in the African context, looking specifically at how regional laws, policies and relevant jurisprudence treat the right to FPIC. Our analysis seeks to identify mechanisms to broaden the scope of protections for affected communities at the domestic level. In doing so we highlight some key contextual issues that cut across all or most of the countries under review and often echo across the continent. These issues are relevant, in our assessment, to the implementation of the existing elements of FPIC and will likely continue to influence any attempts at strengthening community participation in development decisions. These are by no means the only cross-cutting issues – the chosen African development path based on extractivism being a notable other – but these issues are in one or more ways unique to the African or Southern African context and therefore require some more unpacking upfront.

In the subsequent five chapters we present the findings from each of the five country investigations. For each country we provide a brief background on the socio-political context relevant to extractive industries as well as identify the extent to which domestic laws codify elements of FPIC. For each country we consider the constitutional and statutory recognition of customary law, as well as the legislative frameworks relevant to land, mining, and environmental protection. Where other statutes or policies were relevant – for example, resettlement, these are discussed. In each case we seek to identify explicit provisions regarding the right to consent and rights to consultation. We focus in particular on the evidence of implementation – or lack thereof – found.

In Chapter Eight we discuss a number of cross-cutting issues that the country investigations identify. We conclude with advocacy opportunities for addressing these issues and ensuring the protection and promotion of the elements of FPIC in Malawi, Mozambique, South Africa, Zambia and Zimbabwe.

UNDERSTANDING FPIC IN THE AFRICAN CONTEXT

For Indigenous Peoples’ the right to free, prior and informed consent (“FPIC”) is recognized under international law, and requires that they be informed about projects that may affect their land, resource and other rights in a timely manner, free of coercion and manipulation, and have the opportunity to approve or reject a project prior to the commencement of all activities. In the African context, recognizing the unique histories of colonialism and post-colonialism across the continent, the applicability of this international law right of indigenous communities to many local, affected communities in Africa remains contested. In this context, then, we look at the possibility of finding the legal grounding for the right to FPIC for affected communities in customary law systems. After discussing these efforts, we conclude this section by identifying a number of limitations or obstacles to the effective implementation of FPIC as customary law in the region. The purpose behind doing so is to provide a comparative lens through which we assess the progressive implementation of FPIC in each of the five countries under review.

31 In Zambia we were unable to get a response from any company or the Chamber of Mines despite multiple attempts at setting up interviews.

32 It was notable from interviews conducted with stakeholders in all five countries that a similar pattern prevailed: government representatives insisted that the legislation was properly being implemented, in particular provisions requiring consent (although they were never able to mention examples of communities who had withheld their consent); company representatives in all the countries seemed unfamiliar with in particular land legislation and any consent provisions; while civil society without fail described a complete failure of implementation due to a number of factors set out in more detail below.
STATUS OF UNDRIP IN AFRICA

A critical contextual issue for this study is the use of the term “Indigenous Peoples” in Africa broadly and in the countries under review specifically. It is important because the legal history of the right to FPIC is so closely aligned to the protection of Indigenous Peoples’ rights, specifically their right to self-determination. In 2005, the United Nations embarked on negotiations in finalising the Declaration on the Rights of Indigenous Peoples (“UNDRIP”) to be adopted by the UN General Assembly. A number of African states were deeply concerned about the impact of the Declaration on the continent, given that the term ‘indigenous peoples’ had at the time been seen as incongruous in the African context.\textsuperscript{33} The fear was that, in

a context where the large majority of groupings may claim to be indigenous, providing for special rights for these groups would seriously undermine African state sovereignty. In May of 2007, the African Commission requested its Working Group on Indigenous peoples to draft an Advisory Opinion on the concerns expressed by the African Union. The opinion made the following crucial points:

1. “In Africa, the term indigenous populations does not mean “first inhabitants” in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from the other Continents [...]”

2. “In Africa, the term indigenous populations or communities is not aimed at protecting the rights of a certain category of citizens over and above others. This notion does not also create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups which have been historically marginalized.”

3. In the African context, the notion of self-determination refers to cultural and socio-economic rights and their equal enjoyment. As a political right, it only guarantees internal group rights.

4. The African Commission On Human and Peoples’ Rights (“ACHPR”) rejected the concerns raised by the African States to the UN declaration’s reference to ‘the control by the indigenous peoples of [...] their lands, their culture, territory and resources’.

On the basis of this Opinion, the majority of African states withdrew their opposition and the UNDRIP was adopted in December 2007. They appeared to have done so based on what they understood to be a guarantee that indigenous peoples’ rights would have minimal impact on development decisions taken at national level, regardless of their potential impact on the property and other rights of Indigenous Peoples. The manner in which States have continued to disregard these rights appear indicative of that understanding. Since then, both the ACHPR and the African Court on Human and Peoples’ Rights (“the African Court”) have established that the African States erred in that assumption, strongly coming out in favour of the rights as defined in the UNDRIP and other international instruments.

The African regional and sub-regional human rights institutions have consistently shown significant sensitivity for their particular context and for the vulnerability of all local African communities threatened by large-scale development projects. Therein lie some of the greatest protections for African communities under threat. The African Commission, the institution tasked with giving content to the African Charter, has not only understood the vulnerability of local African communities faced by the extractive industries, but has explicitly linked their protection to the right of FPIC (as defined in UNDRIP) and to the recognition of their customary ownership to their land and resources.

All five countries under review have ratified the African Charter, and are thus, in terms of Article 1 of the Charter, bound to adopting legislation that will give effect to the rights contained in it. In addition, while the decisions of the African Commission and the African Court strictly speaking bind the states party to the matters only, the Charter itself recognises in particular the African Commission as the authoritative interpreter of the provisions of the Charter and it is argued,
therefore, that their decisions must at the very least be taken into account by domestic courts. In the following subsections we examine how regional laws, policies, and jurisprudence, as well as and evolution of customary laws both provide strong legal basis for the domestic recognition of FPIC across the continent.

REGIONAL LAWS AND JURISPRUDENCE RECOGNIZE FPIC

The African Charter, adopted by and binding upon all the countries featured in this study, guarantees the protection of the right to property in Article 14. The Commission’s guidelines and principles on the implementation of the socio-economic rights contained in the Charter clarifies that this right includes:

\[ \text{Rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership. This places an obligation on State Parties to ensure security of tenure to rural communities, and their members.} \]

In 2012, the African Commission adopted a Resolution on a Human Rights-Based Approach to Natural Resource Governance that:

\[ \text{Mindful of the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights to access and control of various resources, including land, minerals, forestry and fishing...calls upon State Parties to [... ] confirm that all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision-making related to natural resource governance; [...] and ] to promote natural resources legislation that respect human rights of all and require transparent, maximum and effective community participation in a) decision-making about, b) prioritisation and scale of, and c) benefits from any development on their land or other resources, or that affects them in any substantial way.} \]

This followed an earlier Resolution on Climate Change adopted in 2009, in which the Commission expressed concern:

\[ \text{That the negotiations on climate change leading to the Copenhagen Conference in December 2009, make no clear reference to human rights principles, such as the rights to traditional knowledge and intellectual property of local and indigenous communities, as well as the principle of free, prior and informed consent by communities, as enshrined in the Maputo Convention and other relevant African human rights instruments;"} \]

And further urged:

\[ \text{The Assembly of Heads of State and Government of the African Union to ensure that human rights standards safeguards, such as the principle of free, prior and informed consent, be included into any adopted legal text on climate change as preventive measures against forced relocation, unfair dispossession of properties, loss of livelihoods and similar human rights violations.} \]

Most pertinent to this study, the African Commission has specifically called upon Mozambique, in its concluding observations to its period country report in terms of the Charter submitted in 2015, to “ensure consultation with local communities


42 ACHPR/Res.224 (LI) 2012.

to provide the opportunity for free, prior and informed consent in advance of any mining or development project.” The Commission expressed its concern regarding the “lack of free, prior and informed consent of Mozambican populations resettled as a result of mining and development projects.”

Article 60 and 61 of the African Charter also specifically empowers the African Commission, when deciding communications or cases before them, to ‘draw inspiration from international law on human rights’, but in particular from ‘the provisions of various African instruments on human and peoples’ rights’. While the instruments referred to are not specified, the principle of resorting to African instruments in preference of international human rights instruments is clear. Article 61 relating to subsidiary means of interpretation, reflects the emphasis on the African context even stronger. It reads:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or specialised international conventions laying down rules expressly recognised by member states of the (then) Organisation of African unity, African practices consistent with international norms on human and peoples’ rights, customs generally accepted as law, general principles of law recognised by African states, as well as legal precedents and doctrine [own emphasis].

This article includes both local customary law systems and African domestic jurisprudence as sources to be considered by the Commission. This should be the case where uniquely African issues are at stake.

**The Endoris and Ogiek decisions**

In its jurisprudence over the last decade, the African Commission has accepted that distinct local communities qualify as “peoples” and thus attract the right to development. What is crucial about this interpretation is that it turns on its head the standard interpretation of the right to development as simply confirming the State’s sovereignty in dealing with its natural resources as it chooses. The implication of the African Commission’s jurisprudence is that distinct locally affected communities must also have a say in how they develop. The development decision cannot be taken at the highest level only; it must be confirmed – and can be rejected – at the local level of impact.

In giving content to the right to development, the African Commission held that the right to development included the requirement that the Free, Prior and Informed Consent be sought from a community in terms of its customary law. An affected community’s right to development under the Charter includes procedural and substantive elements, it held, and in particular:

[R]equires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development. […] Freedom of choice must be present as a part of the right to development.

In the landmark Endorois case against Kenya in 2003, the Commission held that community’s right to development was violated because:

[C]ommunity members were informed of the impending project as a fait accompli, and not given an
opportunity to shape the policies or their role. Furthermore, the community representatives were in an unequal bargaining position, [...] being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. The African Commission agrees that it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community.47

The Endorois is a community of around 60,000 people who have lived in the Lake Bogoria area of Kenya for centuries. They claimed that they were dispossessed of their land in 1973 by the government and, through not being able to access their land ever since, their rights to property, and religion and their peoples’ rights to development and to freely dispose of their natural resources were infringed. The community had customary ownership of the land and framed their claim to ownership in terms of the common law principle of ‘aboriginal title’.

In May 2017, the African Court delivered its judgment in African Commission on Human and Peoples’ Rights v Republic of Kenya.48 The case concerned the Ogiek community living in the Mau Forest in Kenya who was served with an eviction notice in 2009 by the Kenya Forestry Service. The Court accepted that the Ogiek community constituted an indigenous people. The Commission argued, on behalf of the Ogiek, that the Kenya Constitution strips communities of their land rights and vests it in government institutions, while failing to give effect to land rights of communities. They contended that the Ogiek had exclusive property rights to the Mau Forest. They also denied that the eviction of the Ogiek followed regular consultations and the offer of alternative land, as the Kenyan government contended. Significantly, the Court confirmed that the Charter’s reference to “people” includes indigenous communities. That means that the right to development and the right to freely dispose of one’s wealth and natural resources may be claimed by communities in relevant circumstances.49 While the Applicants explicitly argued that the Ogiek’s right to FPIC was violated, the Court did not go further than finding violations of the Ogiek’s rights to property, development and the free disposal of their natural resources in the absence of prior consultation. However, given that this is the very first judgment of the Court dealing with a community’s right to property, there is a lot to build on.

Decision interpreting regional human rights instruments such as the European Convention on Human Rights and the American Convention on Human Rights are widely accepted as forming part of the growing international human rights law jurisprudence.50 Whether the decision of the African Commission in the Endorois case would be regarded as authoritatively interpreting the relevant provisions of the African Charter in domestic courts in Southern Africa is less clear.

The African Commission itself has stated that its decisions constitute authoritative interpretations of the African Charter that must be, “respected” and “implemented.”51 However, the decisions of the African Commission are framed as recommendations and as Dugard notes, the extent to which these recommendations are binding, “depends largely on the good will of states.”52 Decisions of the African Court are, in contrast, clearly binding on member states. We propose that although the domestic

47 Ibid at paras 281-282. In its Resolution 197: Follow up to the Endorois Case, the Commission repeated that “the inscription of Lake Bogoria on the World Heritage List without involving the Endorois in the decision-making process and without obtaining their free, prior and informed consent contravenes the African Commission’s Endorois Decision and constitutes a violation of the Endorois’ right to development under Article 22 of the African Charter”. Available at: http://www.achpr.org/sessions/50th/resolutions/197/ [accessed 20 April 2018].


49 Ibid at para 199.

50 For example in Kaunda and Others v President of the Republic of South Africa and Others, Chaskalson CJ referred to the African Charter and the ICCPR as “international human rights treaties to which South Africa is a party” 2006(6) SA235 (CC) [34].


courts in Southern Africa courts will not necessarily consider the decision of the African Commission in the Endorois case to be binding on them, the findings would have persuasive force and domestic Courts should be careful to depart from an interpretation given to a right in the African Charter by the African Commission. At least two cases are currently before courts in Southern Africa that will test how the Endorois principles are applied domestically. 53

Sub-regional legal frameworks supporting FPIC

The different regional economic communities on the continent have begun developing protocols relating to mining regimes. Over time, these instruments have improved dramatically in terms of focus on the importance of proper relations at a local community level. The ECOWAS Council of Ministers adopted a Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector in 2009. 54 The mining directive provides explicit recognition for the continuous system of FPIC throughout the mining cycle 55 and benefit sharing 56 with a broader localization or empowerment perspective. 57 It draws no distinction between indigenous and local communities. 58 It envisions providing capacity for communities engaged in negotiations, 59 and couches obligations in terms of respect for human rights, 60 and the Directives provide for relief via the ECOWAS Court of Justice, which can be approached by a state, an individual or a stakeholder. 61 ECOWAS provides for strong recognition for customary land rights governing ownership. Notably, the Directives envision FPIC not as a moment, but a process. Article 16 holds:

(3) Companies shall obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations.

(4) Companies shall maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle.

The Directive is based in particular on Article 31 of the ECOWAS Treaty on Natural Resources, which articulated the need to harmonise and coordinate Member States’ policies and programmes in order to “improve the economic and social justice of communities with respect to the decision-making process on the exploitation of natural resources” and promote and protect human rights, the environment, and to safeguard the rights of local communities. The countries under review are not members of ECOWAS and therefore the Treaty and Directive is not binding on any of them, but could have persuasive comparative value.

By contrast, the Southern African Development Community (SADC) Protocol on Mining, which is binding on the five states under review, is much older (1997) and, according to its Preamble, is intended to promote “the accelerated development and growth of the mining sector in the region” in order to alleviate poverty and improve the standard and quality of life through

53 The Hai//om class aboriginal title claim in Namibia (a monist country) before the Namibian High Court (case nr A206/15) and the Xolobeni community’s application to have their rights to consent on their land confirmed before the South African High Court in case nr 73768/2016 (a dualist country).
55 Ibid at Article 16.
56 Ibid at Article 8.
57 Ibid at Article 11.
58 Ibid at Articles 4 and 16.
59 Ibid at Article 18.
60 Ibid at Article 15.
61 Ibid at Article 18.
the region. It does not refer to affected communities at all, but does intend to “promote economic empowerment of the historically disadvantaged in the mining sector”, defined as disabled people, women and indigenous people. Presumably, the idea is to increase the participation in the mining sector of these groups. With regards to the potential impact of mining, the document refers to environmental impacts only. The SADC Tribunal was disbanded for political reasons in 2010 and currently no sub-regional grievance mechanism exists where SADC treaties may be enforced.

The policy direction both at the regional and sub-regional level supports the drive towards free mining economies in all five countries. At a continental level, the African Mining Vision (‘AMV’) was conceived in preparation for the First African Union Conference of Ministers Responsible for Mineral Resources Development. It was drafted by a technical taskforce of the International Study Group (‘ISG’) on Africa’s mineral regimes, a project of the United Nations Economic Commission for Africa. This initiative ultimately seeks to harmonise standards and increase the developmental impact of mining in Africa. The ISG process has specifically noted the neglect of local communities.

Unfortunately, while the African mining vision does refer to local communities, their protection is by no means a central theme in the document. The AMV calls for “transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development” through, inter alia, “mutually beneficial partnerships between the state, the private sector, civil society, local communities and other stakeholders”, and “a sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible and appreciated by surrounding communities.”

The final report that served as the basis for the African Mining Vision is 230 pages long – yet only mentions FPIC once, in an appendix, on page 201 and only to point out those countries that do not require it. The sections of the document that deal with public participation suggest nothing more than lukewarm consultation provisions largely as a risk management process. It is acknowledged, however, that “the danger exists that participation processes can be little more than rituals that do not affect policy outcomes.”

Even though the World Bank safeguards are discussed and the African Charter is mentioned, neither of these instruments are interpreted to include a consent right. In fact, directly after citing Article 21.1 of the African Charter the report concludes “Respect for human rights by companies is an important part of their social license to operate, but the scope of the obligations imposed on them by international human rights law is limited and contentious.”

The African Mining Vision itself does refer to FPIC at all and carries the language associated with consultation and the social license to operate. The action plan to the AMV carries similar statements.

---

62 SADC Protocol on Mining at Article 2(1).
63 Ibid at Article 8.
66 ISG n 64 above.
67 Ibid at p 55.
68 Article 21.1 of the African Charter on Human and Peoples’ Rights states that the right of people to freely dispose of their wealth and natural resources shall be exercised in the exclusive interest of people, and in no cases should they be deprived of it. Furthermore, the Charter makes provisions regarding the spoliation of wealth and natural resources and advocates for the right to adequate compensation.
69 ISG n 64 above p59.
70 ISG n 64 above p 39.
71 See for example the Africa Mining Vision n 65 above at p 29.
Most recently an AMV compact between government and private companies based on the action plan was launched at the 2016 Africa Mining Indaba in Cape Town.\(^72\) It has stakeholder engagement as part of the compact principles but there is no consideration of consent. Principle 6 of the compact requires companies to be “cognisant of the need to uphold public participation to obtain a social licence to operate and will work towards building long term relations with communities in which they operate.”\(^73\)

The African Commission, the African Development Bank and UNECA produced a Framework and Guidelines on Land Policy in Africa in 2010.\(^74\) The objective was to guide African states in designing their legal and institutional frameworks to govern land in a manner that would secure the land rights for customary owners. The policy expressly calls on states to recognize the legitimacy of indigenous and customary land rights systems and to thus treat customary tenure and private title on equal terms. The policy was given further practical contents through the AU Guiding Principles on Large Scale Land Based Investments in Africa of 2014.\(^75\) The Guiding Principles provides for six fundamental principles constituting a framework for legal and policy reform. The principles are:\(^76\)

1. Respect human rights of communities, contribute to the responsible governance of land and land-based resources, including respecting customary land rights and are conducted in compliance with the rule of law.

2. Decisions are guided by a national strategy for sustainable agricultural development which recognizes the strategic importance of African agricultural land and the role of smallholder farmers in achieving food security, poverty reduction and economic growth.

3. Decisions and their implementation are based on good governance, including transparency, subsidiarity, inclusiveness, prior informed participation and social acceptance of affected communities.

4. Respect of the land rights of women, recognise their voice, generate meaningful opportunities for women alongside men, and do not exacerbate the marginalisation of women.

5. Decisions on the desirability and feasibility of investments are made based on independent, holistic assessment of the economic, financial, social and environmental costs and benefits associated with the proposed investment, through the life-time of the investment.

6. Member states uphold high standards of cooperation, collaboration and mutual accountability to ensure that investments are beneficial to African economies and their people.

Key to this study is the third principle on decision-making. While the principle steers clear from requiring consent, it does require prior and informed “participation” and “social” acceptance of affected communities. In the elaboration, the


\(^{76}\) Ibid at p 5-6.
supporting document emphasizes the need to develop the capacity of communities, in particular women, to “negotiate”.77 Arguably, however, negotiation could only seriously happen if the community has the right to consent.

The SADC Regional Indicative Strategy Development Plan for the first two decades of the twentieth century, adopted in 2003, notes that land tenure reform remain a major issue in all member states, but that “there is no regional framework to guide national politics and strategies in this area”.78 While the document identifies food security as a priority area and spends much time on it, access to land gets very little attention. The document suggests that the threat of land grabbing was not on the agenda of member states at the start of this century. We would argue that the difficulties in implementing the FPIC-related provisions have much to do with these provisions being seen as obstacles to the policy direction chosen at regional, sub-regional and domestic level. The challenge, then, lies in demonstrating how properly considered development decisions that include those directly affected make for better, tangible development outcomes.

In as far as the provisions of regional and sub-regional instruments provide higher standards than the domestic frameworks, they should arguably be adhered to. They also provide important advocacy tools for lawyers and community rights defenders. Reliance on regional and sub-regional legal instruments are often more palatable to African lawmakers and courts than international instruments developed in very different contexts.

REGIONAL CAMPAIGNS FOR FPIC

In 2009 and in response to the massive commodities boom that had communities in South Africa experiencing the largest mass relocations of people since the height of the apartheid regime, affected communities, community organisations, and NGOs from that country met with the South African Human Rights Commission to discuss a collective response to the burgeoning crisis. While the group acknowledged that there might be differences in the particular circumstances of communities and what communities may want from interactions with mines, everyone agreed “free, prior and informed consent in a fair process and sharing benefits where there is agreement should be a fundamental principle to all.” The most important implication of that call was that it originated at a local level in a country that scarcely engaged with the discourse of indigenous peoples and from communities who, through a history of strife and forced displacement, could not claim any identification of indigenous peoples status in the narrow sense.79

In subsequent interactions with other affected communities on the rest of the continent, it became increasingly apparent that such experiences were not unique, but wide spread, endemic and becoming the norm. As networks within African civil society evolved around these issues there has been a convergence in the expression by local peoples for the need to have some means to determine their own development trajectory.

A number of progressive and democratic civil society organisations in Southern Africa have joined forces on campaigns to promote FPIC and the formal recognition of the development rights of communities. All of them work closely with  

---

77 Ibid at p 15.
SAHRC Report on Limpopo Community Discussion Forums 2-4 December 2008: Mining-Related Observations and Recommendations: Anglo Platinum, Affected Communities and Other Stakeholders In and Around the PPL Mine, Limpopo. 2009. Available at: https://www.sahrc.org.za/home23/files/Reports/Report%20on%20Site%20Visit%202008%20Mokopane%20%20%20December%202008%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%2
communities. The Southern African Campaign for the Dismantling of Corporate Power has five objectives under the mobilising banner, aptly called, “law from below and the right to say no!”:  
- Building the understanding of communities of how transnational corporations, globalisation and extractivism operate and exploit, and how extractivist companies and their private sector partners including local elites, often engage in corrupt practices;  
- Corporate capture, state capture in Africa and capital flight out of Africa  
- Community agency and pressure negotiate on their own terms regarding their natural resources relying on property law, including customary land rights and FPIC;  
- Sharing experiences and knowledge about communities choosing their own development paths and building counter narratives...and challenging orthodox development from above and statist approaches to development;  
- Making inputs into the Global Campaign for Dismantling Corporate Power and supporting the establishment  

The SAC DCP has supported the struggles of the peoples of Marange, Xolobeni, Marikana and numerous others. It is currently engaged in a three year project aptly named “Southern African Peoples’ Tribunal” which is associated with the Global Permanent Peoples’ Tribunal which has its roots in the Algiers Declaration of 1976. The Jurors’ Report on the community hearings held in Manzini in 2016 and Johannesburg 2017, gives much attention to the consent principle and FPIC.  

The International Alliance on Natural Resources in Africa (IANRA) development and promotion of a set of principles and a model procedural “model law” [from a community perspective] for the subcontinent. The model is an “inclusive dialogue on good governance” in the minerals sector in sub-Saharan Africa, setting at least 17 principles to be adhered to when formulating new mining laws for African countries. The document is a product of case studies on human rights impacts as per the African Charter on Human and Peoples’ Rights. The studies were carried out in communities in five countries namely Angola, DRC, South Africa, Zimbabwe, Mozambique and Kenya. The document decisively promotes community agency and FPIC. It does not compromise on the importance of:  
- Full disclosure and accountability of parties in negotiations;  
- Support for communities to participate in negotiations on an equal footing;  
- Independent facilitation of negotiations;  
- The state not being player and referee in the licensing and regulation process.  

The project remains work in progress but is already proving to be of interest to governments and civil society stakeholders to evaluate domestic law reform projects. The Pan African Parliament and the African Commission have been briefed on the intention and content of the exercise.  

The African Coalition on Corporate Accountability (“ACCA”), a loose network of almost 100 organisations on the continent working on issues relating to corporate accountability and extractives, identified FPIC as one of their two main areas of focus in 2016. The Coalition is engaging in ongoing research on the topic.  

Finally, the African Commission’s Working Group on Extractive Industries and Working Group on Indigenous Peoples have both showed great interest in developing the concept of FPIC within the African context.

---

80 Algiers Charter. On July 4, 1976, the Universal Declaration of the Rights of Peoples was adopted in Algiers. A similar institution the “Russell Tribunal II on Latin America”, was active from March 1974 to January 1976.  
81 IANRA is based in Johannesburg and have about 40 member organisations from 14 countries, including all the countries under review.
INTRODUCTION

CUSTOMARY LAW AS A BASIS FOR FPIC

Today there are debates raging across the continent in favour of broadening the application of the protection of indigenous peoples’ rights in the African context, in particular as it includes FPIC as a right or a principle. We argue, however, that the parallel legal and political developments outlined above have steered the conversation in a different direction. It affords local affected communities who have customary rights to their land and resources with other avenues to advocate for FPIC as a right when threatened with external interests. Indeed, the South African Constitutional Court has confirmed the right to consent to be integral the customary property rights (see Box 2 below).

BOX 2: What is customary law?

Customary law, in this context, refers to the system of shared local “rules” of communities, with the caveat that, in customary systems, rules follow a rather different logic than in what Western lawyers are accustomed to. Rather than applying pre-existing rules mathematically, customary communities emphasize processes and negotiated outcomes, with rules applied flexibly to fit desired outcomes. This is precisely why decision-making processes based on negotiation and consensus is so important to communities governed by customary law. Customary tenure then refers to the rights of members of communities to land and resources that are based on the shared rules of access to the land and resources in question. These rights may include access, control, use or occupation rights and are typically ‘nested’, so that rights overlap. Cousins explains:

“These ‘communal’ or ‘customary’ land tenure regimes are not static and tradition-bound, as sometimes perceived by unsympathetic outsiders, but dynamic and evolving. However, a number of important commonalities can also be observed over time and space, which derive from the underlying principles of pre-colonial land relations”. He lists the following principles:

1. Customary land rights are embedded in a range of social relationships, often overlapping and therefore ‘nested’ of layered;
2. Land rights are inclusive rather than exclusive in character, being shared and relative;
3. The rights are derived from accepted membership of a social unit (whether community, clan etc);
4. Access to land is distinct from control over land;


Richtersveld Community and Others v Alexkor Ltd and Another 2001 (3) SA 1293 (LCC) para 65: “The circumstances that the Richtersveld people, prior to being excluded from the subject land, occupied it and regarded it as their own, is evidenced by the fact that outsiders required permission before they could use the land [ ...]”


5. Social, political and resource boundaries are generally relatively stable, but are inherently flexible and negotiable.

6. The majority of the African continent is covered by rural communities who live and work on communal land and whose access to these resources is governed by customary law. Customary law operates at two levels: it provides for the internal “rules” of communities which regulate relationships between the members of the community and provides for the rights of individual members of the community. For example, customary law will provide that a woman has access to and the right to use a particular piece of community land to the exclusion of other members of the community. Her husband may typically have the right to control the same piece of land. In practice in all five countries under review, customary law continues to govern the lives of the majority of communities.

Secondly, customary law provides for the rights of the community and its members against the outside world. Most of the instances of gender discrimination in customary law cited by respondents in this study, occur internally to the communities, when, for example, women are not granted the same land or decision making rights within the community as men.

In colonial times, governments often allowed communities to continue to exercise their customary rights and apply customary law at this level; that is within the community boundaries. However, the second level at which customary law operates—where it is a source of rights that can be defended against the outside world—it becomes relevant when the community is threatened by outsiders interested in its land or other resources. Then the community, and its members as individual and household rights holders, need to assert their rights to these resources through customary law in order to ensure that they are not simply dispossessed of their rights.

When these “outsiders” are neighbouring communities, the problem is simply one of a conflict of customary law and can be resolved in terms of the local arrangements. But when the “outsider” is the government or a corporation, then these more powerful players will generally ensure that their interaction with the community is regulated in terms of state law and not customary law. In fact, they will argue that customary law either does not exist, is trumped by state law or is applicable only within the boundaries of the community. As a result, they tend to deny communities the rights that they have under custom and take land or resources without the community’s consent required in terms of customary law and without proper compensation or reparation.

State law often “allows” this to happen—by providing for weak recognition of customary tenure rights or assuming that state law will simply override it. In the case of Zimbabwe, Zambia and Malawi, the non-recognition of customary tenure and ownership is expressed in the fact that the reference in the applicable statute law to “lawful occupiers” whose consent is required is not applied to community members with customary occupational rights. This is a typical example of the non-recognition of customary tenure and ownership.

Upon independence, most African countries adopted the colonial legal framework wholesale; especially, as renowned Kenyan scholar Okoth-Ogendo pointed out, in view of the development frameworks’ “general ambivalence as regards the applicability

---

89 This is evident in the way protections of communal land are implemented in all five countries studied. We were unable to find a single example of a government representative in any of the five countries that confirmed that, in their understanding of the applicable legal framework, customary property rights had to be identified, understood and protected whenever a project threatens customary land rights. For example, a case study in Zambia was reported where a Canadian mining company operating in the North-West province refused to compensate people who were removed from their land as they “did not hold title to the land”.
90 We were presented with multiple examples of this occurring in all five countries.
91 Recognition is often weak because it conflates rights in terms of customary law with traditional leadership. Consulting the traditional leader is regarded as a complete fulfilment with recognizing customary law.
of indigenous law”. Indigenous law and customary legal systems were regarded as inferior, were never extended to areas covered by colonial laws and, when applied, it was done only to the extent that it was not repugnant to Western justice and morality or inconsistent with any written law. Four of the five countries under review are former British colonies.

The colonial settler mining and agricultural economies shaped the spatial and legal dimensions of development and underdevelopment of these colonies. The legislative impact of that history runs through much of this research. The post-colonial era also relegated customary law to a separate and unequal system of law that rarely found its way into the formal, “Western” courts. The impact on customary law systems went further. Under colonial rule, those in power realised that they could utilise customary institutions of governance to achieve the subjugation of the local communities. Traditional leaders were turned into local administrators and agents of government in many instances, achieving the model of indirect rule. The legislation created during this era was based on a distorted colonial understanding of custom skewed to benefit colonial interests.

When the legislative frameworks were entrenched in post-independent states, the colonial distortions of customs were also entrenched. Customary law systems thus developed in spheres invisible to the dominant legal system, but these informal systems remained central to the lives of most of the community members who live it. Towards the end of the twentieth century, many African countries adopted constitutions which recognise customary law as an equal source of law as an equal source of law to be applied by the courts “where appropriate”—including the countries under review. However, the application of customary law in the formal courts remains almost exclusively limited to issues of personal law, and rights claimed by individuals.

One of the reasons why communities are not protected, we contend, has to do with the parallel nature of African legal systems and the inability of domestic courts to engage with customary forms of tenure. It is worthwhile to look at the strides made in this regard by the South African Constitutional Court. When the Court recognized for the first time the customary ownership of the Richtersveld community to their land and minerals in 2003, it held:

The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law which governed its land rights. Those rights cannot be determined by reference to common law…While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution

The Constitutional Court recognised that customary law: “[I]t is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of live…it is a system of law that was known to the community […] It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution”

---

94 For example, in South African the Bantu Authorities Act of 1951 entrenched ‘tribal’ boundaries and gave statutory powers to certain chiefs. See also Delius, Peter 2008 “The changing nature of chiefly power and land rights” in A Claassens & B Cousins (eds) Land, Power, Custom.
97 The Endorois case described in Chapter 2, for example, reached the African Commission on Human and Peoples’ Rights because Kenyan courts found that collective property rights could not be asserted in their domestic courts.
98 Alexkor Ltd and Another v Richtersveld Community and Others at para 50.
99 Ibid at para 51.
They coined the term “living customary law” as opposed to “official customary law” such as colonial codifications (and distortions) of custom. This is living customary law, rather than official, static versions that is recognized by the South African Constitution.

In Shilubana, the Court identified four factors that must be taken into account when determining the content of living customary law (and as later summarized by the same Court in Mayelane):

a) Consideration of the traditions of the community concerned;
b) The right of communities that observe systems of customary law to develop their law;
c) The need for flexibility and development must be balanced against the value of legal certainty, respect for vested rights and the protection of constitutional rights; and
d) While development of customary law by the courts is distinct from its development by a customary community, the courts, when engaged with the adjudication of a customary-law matter, must remain mindful of their obligations under section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights.

The Court found that customary law is not equal to old traditions or rules that exist since time immemorial. Those are colonial conceptions. Rather, customary law is living, evolving and its content should be found in the practices of the community today, taking into their history, but also the need to develop and to align with the Constitution. The unpacking of how courts should deal with customary law as law, finding and applying its contents, is crucial to the development of an emancipatory customary law jurisprudence in Southern Africa that may provide the strongest mechanisms yet to protect communities land rights.

CHALLENGES TO REALIZING CUSTOMARY RIGHTS TO FPIC

Like all legal systems, customary law has problematic and discriminatory values inherent to it, notably with regards to an attitude towards women. What makes this phenomenon more problematic in customary law systems is the reliance on tradition to resist change and history, to justify unconstitutional practices. We roundly reject any attempts to insulate customary law systems from developing in line with constitutional, regional and international law principles. Indeed, this is why it is so important to understand customary law as a system lived in the present, rather than a relic from the past. At the same time, if customary law systems are to be recognized as equal sources of law and of property rights, it must equally be subjected to the scrutiny of the courts and a changing society.

100 Bhe and others v Magistrate, Khayelitsha, and others (Commission for Gender Equality as amicus curiae); Shibi v Sithole and others; South African Human Rights Commission and another v President of the Republic of South Africa and another 2005 (1) SA 580 (CC) at para 87.

101 Shilubana and Others v Ntironga [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC). In 2008, Ms Shilubana approached the Constitutional Court. She claimed that, whereas the customs of her community in earlier times would not allow a woman to succeed as chief, the law of her community had developed to indeed allow for such an appointment. As proof, she provided a resolution of the elders of the community supporting her appointment. The Court was thus again challenged to find the content of the customary law of Ms Shilubana’s community. In considering how the content of customary rules may be found, the Court says: The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted.

102 MM v MN and another 2013 (4) SA 415 (CC) at para 45.

103 A practice has developed for communities seeking to prove the contents of their customary law by calling a combination of expert academic witnesses and community experts, whether elders or other persons with a specific interest in the customary law of the community. Indeed, in the Mayelane case of 2013 (102 above) concerning the right of a first wife of a polygamous husband to consent to his husband’s second wife, the Constitutional Court directed the parties to bring evidence of the contents of Xitsonga customary law. The Court received evidence from people in polygamous marriages, elders, traditional leaders and academic experts. In many instances, the evidence was contradictory. This was not a problem the Court found. The further evidence has shown that there are nuances and perspectives that are often missed or ignored when viewed from a common-law perspective. Nevertheless, while we must treat customary law with respect and dignity, it remains the court’s task to bring customary law, as with the common law, in line with the values of the Constitution. The Court interprets the customary law, in line with the Constitutional principles, to indeed require the consent of the first wife.
In the following section we discuss the main challenges inherent to customary law systems in the context of the protection of land rights and promotion of consent. The purpose behind doing so is to provide a comparative lens through which we assess the progressive implementation of FPIC in each of the five countries under review.

Unchecked power of traditional chiefs

To understand the pattern of extraordinary chiefly control over communal land in all five countries under review, one must understand how the existing statutory frameworks built on their colonial predecessors. Colonial administrations preferred a certain version of customary law, and of the role of the chief. In these distorted versions, chiefs were generally elevated to a position akin to that of a common law owner of the land under his jurisdiction. As historian Peter Delius has explained:

> This rendition of all-powerful chiefs had considerable appeal to officials and policy makers who saw themselves as the heirs of chiefly power and thus welcomed inflated versions of their authority. Especially attractive was the idea that chiefs held ultimate authority over land, and that with the coming of colonial control, this control had been assumed by the colonial state.

The description and interpretation of rights in land within African communities was also influenced by a powerful strand of social Darwinism in British nineteenth century official and legal thinking, which saw indigenous communities as being at a lower level of social evolution. According to this view private property was the mark of civilisation, while less evolved societies were believed to have weak, communal rights. The presumed absence of more ‘advanced’ individual rights of ownership within African societies also provided a convenient justification for seizing the land of colonised peoples. Both anthropologists and contemporary observers tended to interpret what they saw in terms of the western legal constructs of property and ownership that they were familiar with. These perspectives – especially in combination – tended to lead towards an exaggeration of chiefly power – especially over land and to an understatement and misconceptualisation of the rights of their subjects and the occupants and users of the land.

These misconceptions were the bases for colonial codifications of customary governance and land tenure systems. The result was “the decentralisation [...] of despotic power centralised to individual chiefs within sometimes manufactured indigenous communities for purposes of achieving state control over the members of that community.”

Women’s equal participation in decision-making is not guaranteed

Development that deprives communities of their land rights has a disproportionately negative impact on women. Women often outnumber men in the rural areas as men go to the cities to look for work, leaving the women to secure the land and the day-to-day needs of the family. In addition, women in rural Southern Africa are typically the primary users of the land, thus the loss of access to land to grow food can have a devastating effect on the ability of women to sustain themselves. Even worse, the use rights of women are often connected to their relationships to men – husbands, fathers and brothers – who are seen by outsiders as the ‘owners’ of that land. As a result, women are often not included in conversations about the deprivation of their land and resource use rights.

---

104 Expert Affidavit filed in the matter of Tongoane and Others v National Minister for Agriculture and Land Affairs and Others 2010 (8) BCLR 838 (GNP) at para 11.


In her commentary on the AMV, Valiani\(^{108}\) highlights “the reality of historical structures of patriarchy in Africa and their impact on the shaping of 21st century mineral development” in a case study of two South African rural communities. While these women feel the impact of expanding anthracite coal mines in their villages, their numerous attempts to raise the negative socio-environmental effects of the mine go unanswered.

---

**In Somkhele,** due to their sex and the lack of political participation accorded to women in Zulu culture, women have met with the deaf ears of the tribal authority, which favours the mine and carries primary decision making power around land use. At the municipal level of government, the outcome has been the same for Somkhele women given the dominance of the ruling clan in all major political parties in municipal politics.

**In Fuleni,** women have incurred numerous fines issued by the tribal chief upon their repeated attempts to object to the expansion of the mine. Across the continent and persisting in post-colonial Africa is the intertwining of traditional and formal power structures, both of which are built on patriarchal traditions.\(^{109}\)

This lack of voice means that, despite women feeling the impact of development decisions more acutely, their inputs in the decision go unrecognized.

An important contribution to the consent discourse came most recently from the feminist collective of mining-affected women—WoMin. Using the experience of Nonhle Mbuthuma, a defender of the rights of the Xolobeni people in South Africa, the article unpacks what it calls,\(^{110}\)

> [T]wo interrelated dimensions of power and what we call ‘counter-power’ around consent. These are women’s power to counter patriarchal exclusion from discussions and decisions about resources extraction; and the power of excluded rural and peasant communities to counter a capitalist extractivist development agenda that is seeking to push them off their lands and open up their territories to exploitation.

WoMin argue that the dominant power interests involved in development decisions (“corporates, states, ruling party elites, local councillors and traditional leaders) are all predominantly male and work to undermine the rights of women within communities, also in participation in decision-making.\(^{111}\) Thus, consent should be seen and promoted as a process, a political struggle, “won through local organizing, combined with clear ideas about local development, and political solidarity from outside of the community” and not be reduced “to a legal tool for communities to claim.”\(^{112}\)

There is little evidence that the legislative protection of women’s rights’ to resources has translated to more secure tenure. Implementation remains a problem not only because of the lack of knowledge of these frameworks, but perhaps most significantly, because the legislation is drafted in a top-down manner that excludes the women and the men who are expected to change entrenched power relations at the local level. There may well be an important lesson to learn in this regard, namely the value of allowing the space for progressive change to happen in a bottom-up manner.

A very interesting example of such bottom-up, organic emergence of stronger women’s rights was documented in rural communities in South Africa. A survey in 3 former homeland areas by the Community Agency for Social Enquiry, released in February 2011, indicated that the unmarried women in these communal areas were gaining increasing access to land

---


\(^{109}\) Ibid.


\(^{111}\) Ibid at p 5.

\(^{112}\) Ibid at p 11.
under democratic rule despite any empowering legislation being in place. These women were negotiating better deals for themselves even within the context of patriarchy and tradition which militated against it. Asked how they did it, they described employing the words of the “new” South Africa such as “democracy” and “women’s rights”. They did not have paper rights as trump cards. They could not assert a law that stated that single women had a right in land. However, they felt empowered through the discourse of democracy, of freedom and of gender equality and, in turn and over time, changed the relations between themselves and others in the community. The result was the emergence of new customary rules and new rights favouring them.

Sindiso Mnisi-Weeks, writing on women’s struggles for land rights in South Africa, argues that:

[R]ights are not about protecting individuals or enabling their autonomy from one another, but instead facilitate an autonomy enabled and supported by the relationships on which individuals depend, through their connectedness and mutual reliance. Thus the process by which rights come into being is as important to rights protection as the substance of such rights. Processes which determine rights are integral to their defence. So when women take part in rights struggles in their communities, it is important to pay attention to the terms in which struggles are conducted, the language of culture they employ, and the lens through which rights are mobilised.

Lack of capacity and resources for implementing agencies

As is evident from the nuanced approach of the South African Constitutional Court to establishing the content of customary law on a case by case basis and then applying, generous human and financial resources are necessary to give effect to customary law systems. When the case in question may affect the land or resource rights of the community, a rights enquiry into the overlapping, communal and individual rights of community members is necessary in addition to establishing the customary law of decision making. Such an enquiry requires skilled persons with a deep understanding of customary law tenure systems, and the time to do the enquiry properly. The same can be said of ensuring that customary law decision making processes, including to consent, are respected.

A key challenge in all five countries is the serious lack of such resources, in South Africa, where the legal system has been most outspoken about the nature and content of customary law, the knowledge and skills of government officials who are required to implement the decisions leave much to be desired.

Lack of access to justice

The desired development of customary law to a constitutionally compliant system of law that protects rather than negates the rights of community members, depends on the at least some development of the law in the courts. Equally, many communities will continue to require legal support to enforce their rights, customary or otherwise, against developers, the state and their own leaders. With the possible exception of South Africa, access to adequate legal representation and thus to justice through the courts remains a serious challenge in the countries reviewed. While lawyers in all countries expressed a great desire to participate in building progressive jurisprudence towards the protection of communities, the reality is that legal services in these countries are very expensive and as such, simply not attainable. The model of donor-funded public


114 Budlender et al (n 113 above) p 141.

interest litigation that thrives in South Africa exists at least in Zimbabwe, albeit on a smaller scale, but is largely absent in the other countries. This remains a serious challenge.

In the light of these serious difficulties, it is easy to conclude that the proper recognition of the complex African indigenous property rights and legal systems in the face of a wave of extractivism is simply too difficult, too time consuming and too expensive to contemplate. But that is in reality not an option if we are serious about resisting the full-scale deprivation of community land on the continent. We must do better.

In the following chapters, we discuss challenges and opportunities emerging in each of the five countries.
MALAWI

In this Chapter we review the main Malawian legislation relevant to the impact of the extractive industries and in the mining industry in particular, on affected communities and the opportunities for asserting the principle of Free, Prior and Informed Consent. The relevant legislative framework in Malawi is at present undergoing significant developments with a series of new pieces of legislation promulgated (but not yet in force) in 2018. Our analysis focusses mainly on the pieces of legislation still in force, but we do refer to the changes that will accompany the new legislative framework. We discuss the Malawian Constitution, the statutory regulation of customary land and the regulatory framework for mining/extractives and the environment. We then provide a brief assessment of the implementation of these frameworks, before attempting some specific recommendations.

BACKGROUND

Malawi remains one of the poorest countries in the world. Women make up 67% of the populace living below the poverty line, disproportionately bearing the brunt of the lack of development.116 Approximately 25% of households are headed by women, and 63% of rural women-headed households live below the poverty line.117

Relative to the other countries under review, the extractive industry in Malawi is both the youngest and the smallest. While the extractives industry is increasing partly due to industries like tobacco in decline, most activity around mining in Malawi is in the prospecting and exploration stages.118 As a result there was limited exposure and in-depth knowledge on extractives and its impacts from NGOs working with communities. The extractives sector in Malawi can be divided into mining, oil and gas and forestry.119 The government froze all prospecting operations for oil and gas in 2014 in order to review whether the licences were granted and the agreements executed in accordance with all the relevant legislation. Activities resumed in 2016 but not much has been documented yet.

Since independence, Malawi’s mining sector has been characterized mainly by artisanal and small scale rock aggregate and limestone quarrying, coal mining and gemstone prospecting in all the three regions of the country. Recently, however, coal became an export product to Tanzania and Zambia and lime to Mozambique. In 2008, the first modern and relatively major mining operation, Kayelekera Paladin Uranium Mining Company was opened in Karonga district in the northern part of the country and was until recently, the most known active extractive venture.120 Although the company’s mining activities were eventually suspended in 2014 due to persistent low Uranium prices and being placed on “care and maintenance”, it

119 Forestry remains an important industry in Malawi. Forests and woodlands account for 21% of the total surface area with forest coverage at approximately 20.4% making it the third largest land-use category behind agriculture which occupied 70% of the country.
established Malawi as a mining country and considerably increased the contribution of the sector to the GDP.\(^{121}\) In 2015, the mining sector accounted for about 1% of the average GDP. It is one of the priority sectors for national development and the target is that by 2020 it would contribute 20% of GDP.\(^{122}\)

In 2009, six blocks for oil and gas exploration were demarcated in Malawi for the purposes of granting exploration licences.\(^{123}\) The licenses were granted between 2011 and 2013 for a period of four years, with the option of two additional three-year extension periods. In May 2014 eight days before the elections the former Minister of Natural Resources, Energy and Mining signed two petroleum contracts with RakGas LLC and another petroleum contract with Pacific Oil.\(^{124}\) Following revelations that the deals were made without the approvals required in law, the Government suspended all prospecting operations for oil and gas while the Attorney General took the existing agreements on review to ascertain whether the licences were granted and the agreements executed in accordance with all the relevant legislation. The companies resumed exploration in February 2016 when the suspension was lifted.\(^{125}\) Civil society organisations are not satisfied, however, and have continued to push for investigations into these deals and for the suspension of oil and gas exploration pending clarification of the regulatory framework.\(^{126}\)

**LEGAL ANALYSIS**

Malawi is a constitutional democracy, adopting its first constitution that included a Bill of Rights at independence in 1964. After abolishing the Bill of Rights in 1993, a new Constitution was provisionally adopted in 1994. The Constitution includes non-judiciable fundamental rights, called principles of national policy and described as directory in nature. The courts are, however, entitled to have recourse to these principles when interpreting any provision of the Constitution or any law.\(^{127}\) Malawi’s Constitution requires international law to be enacted through an Act of Parliament which has caused major obstacles for the implementation of the country’s international obligations. Constitutionally, all citizens have the right to obtain property and to engage in economic activity. Land and mining laws are the two main statutory frameworks that are relevant to assessing the extent to which the right to consent is provided for in Malawi.

**Land laws**

Around eighty five percent of land in Malawi is customary and/or communal land.\(^{128}\) Before colonisation, land was owned or controlled by the chiefs. In 1891, the land within this “Protectorate” of Britain belonged to the Crown, with the chiefs retaining administrative powers only. Upon independence in 1965, authority over the land was transferred to the President. The 1965 Land Act recognised three categories of land: public, private and customary land. Between 15% and 20% of land is

---

121 See Malawi EITI Report n 118 at p 15.
122 See https://eti.org/malawi
124 Ibid at p 2.
125 See Malawi EITI Report n 115 above at p 26.
126 amaBhungane: Malawi oil contracts under probe. Available at: https://www.dailymaverick.co.za/article/2017-05-14-amabhungane-malawi-oil-contracts-under-probe/#WjYcPy-QIVq
categorised as public and is occupied, used, acquired, or held by the government in the public interest. Private land accounts for 10% to 15% of land in Malawi. In 2017, a new Land law was adopted. It vests land in the Republic instead of the President in line with Section 207 of the Malawi Constitution. 

Since the legislation was enacted very recently, it is difficult to make any real assessments of their implementation and our analysis and description will focus on the legislation still in force at the time of the study.

Customary land is land held, occupied, or used by community members under customary law and was vested in the President in trust for the people while under the jurisdiction of customary traditional authorities. However, state law renders customary law rights very weak, ensuring that customary land is in practice held by chiefs. “Customary land administered by chiefs does not belong to the people, but offers them only user rights”, writes Gausi and Mlaka, “however, there is a widespread view among rural dwellers that the land is their own property inherited from their forefathers”. 

Customary law governs land allocation, land use, land transfers, inheritance, and land-dispute resolution— but only within the boundaries of the community. The authority of customary law and traditional authorities is recognized in the Land Policy (2002), but the Policy appears somewhat ambiguous about the role of the Chief. While it states in terms that “holding land in trust for citizens does not make a Headperson, Chief or any public official the owner of the land”, it also state that “customary law restricts customary allocations to usufructuary rights because, in principle, title is vested in traditional leaders on behalf of the people”. And while it recognises that customary landholders include entire communities, families or individuals, it requires approval and signature of the Chief and a member of an elected customary land committee only to dispose of customary land.

The Land Policy provides that customary land, when acquired for national development purposes or in the public interest, “will be valued and compensation based on the open market value paid to the owner for both the land and improvements”. 

Rural Malawians access land mainly through inheritance (52%) and marriage (18%). While this is a common African trend, Malawi is somewhat unique in that rights of access to land are governed by one of two customary systems, namely a matrilineal system which is prevalent in the central and southern regions of the country where land is handed down through the female line, and the patrilineal system prevalent in the northern region where land is transferred from fathers to sons.

The new Land Act (2017) provides for two categories of land only, namely public and private land. So-called “unallocated” customary land used for the benefit of the community as a whole (elsewhere called communal land with use rights) is public.
land while allocated customary land (called “customary estate”) is private land. The Customary Land Act (2016) provides for the complementary registration of customary land that is owned, held or occupied by a household or individual as customary estate. The administration and management of customary land is codified through the formalisation of the role of chiefs, land committees and tribunals. This is a big concern for local NGOs, as chiefs are perceived as having administered land in a very corrupt manner in the past, mainly contributing to NGOs opting for individualised or registered titles. The most prevailing accusation is that they easily succumb to being bribed by private investors. Data from researchers at the London School of Economics recently revealed that, while the sale of customary land is illegal, the vast majority of land transactions and distribution of land indeed happens via the traditional authorities and under the Customary Land Act.

While these two Land Acts are silent on community consent in the face of developments on their land, the Land Acquisitions Amendment Act (2016) may extend the Land Policy’s provisions for compensation for land owners (including of customary estate) for land acquisitions. The Act distinguishes between acquisition of land by agreement’ and ‘compulsory purchases’. The latter suggests that land owners may refuse the acquisition of their land. However, the Act allows for land in those cases to be forcibly acquired if it would be in the public interest, which is a standard expropriation requirement. The test for these provisions will surely lie in their implementation.

Mining laws

Exploration and exploitation of the mineral resources in Malawi is currently regulated in terms of the Mines and Minerals Act (1981), its regulations and the Minerals Policy (2013). A new bill is expected to be tabled before Parliament before the end of 2017. One of the main reasons for the amendment is to introduce Community Development Agreements ("CDAs") into the regulation of the large-scale mining sector.

A mining license allows the holder to enter any public or customary land, subject to a limited number of exclusions, and mine prescribed minerals. In terms of the Environmental Management Act (1996), a mining licence can only be granted after a socio-economic and environmental impact assessment ("EIA") is approved. The EIA must include all significant impacts that are anticipated as a result of the project. The analysis must be conducted by a project team, including the developer and a multidisciplinary team of experts.

While the legislation does not specifically require public consultation from the developer in preparing the EIA, the Guidelines since published by the Department of Environmental Management sets out the value of such consultation for a proper EIA process. This process does not envision affected land rights holders to have any greater stake in these consultations than any other stakeholder. The Guidelines describe ‘stakeholders’ as people who “can have a ‘stake’ in a project. For example, a project may provide opportunities for employment and sales of goods and services, it may displace them from their homes, or it may create noise and pollution which can affect their health”. It is thus clear that, while the importance of these consultations for the success of the EIA process and the project is stressed, it is in no way designed to ensure the protection

References:
139 Men or women can be registered as the owners of the land and can secure a loan from a bank with the registration lease and sub-lease the land.
141 Mining in Forest Reserves, National Parks, Game Reserves, any protected Monuments or Relics are prohibited. Underground mining operations, use of explosives and any powered machinery for the purposes of mining are also prohibited under this license.
142 Required in terms of section 24.A screening is done as a first step to ascertain whether the project indeed requires an EIA in terms of listed categories of projects.
144 Ibid.
of affected land rights of provide such land rights holders with any bargaining power. These consultations are focussed on mitigating potential negative impacts only, with no provisions made whatsoever for the affected community to say no.

Where resettlement is proposed as a mitigating measure, the assessment must include a resettlement plan. The resettlement plan needs to be approved by the Minister of Lands, who in turn must have regard to the applicable legal framework including the World Bank Resettlement Policies, the Environment Management Act (1996), the Water Resources Act, the Land Act, and Land Acquisition Act. This is the moment where community consent would arise – and the applicable legislation would be the Land Acquisition Act discussed above.

Given how young the extractive industries in Malawi is, it is difficult to assess whether and how communities have been able to assert their right to say no to the acquisition of their land. But since a mining license allows entry onto any land in order to mine, the license holder does not need to acquire the land in order to mine on it – giving yet another loophole for companies faced with resistant communities. Compensation remains the prerogative of the President under existing legislation, and then only where it is expressly provided for (which is not the case for compulsory acquisition of customary land). Newly introduced legislation aims to change this (as noted above), and a Resettlement Bill is currently being discussed in parliament.

**IMPLEMENTATION**

The provisions on paper are only as good as their implementation. Through our assessment mainly of interviews with actors from different relevant sectors in Malawi, the following key issues were identified as being systemic challenges to proper implementation of the protections for community decision-making over their land that do exist.

1. **Consultation/Consent**

In practice, there appears to be little consultation with the community during the assessment, approval and operation of extractive industry projects. At most, companies consult communities where serious disturbances occur. It was reported that oftentimes, the chiefs would sign a form that he understood to be an acknowledgment that the community knows of the impending ‘development’. In reality, however, they were signing consent letters relinquishing land. Communities would then be informed of the impact of the development on their land by the chief after the fact. Communities are informed of the advantages and disadvantages when mining is about to commence as a political courtesy as opposed to complying with any requirement for consent or consultation. When consultation happens, it is in the context of acquiring a social license—a goodwill agreement with community. In the new Mines and Minerals Bill, this is codified in the form of a community development agreement. It is binding and can lead to a licence being withdrawn if companies don’t comply.

2. **Women**

While Malawi has adopted legislation that gives effect to the gender non-discrimination clause in the Constitution, respondents indicated that it is hard to sensitize chiefs in this regard. Responding to criticism that the land-related legislation does not sufficiently protect women, government officials insisted that it is simply because the objective of the legislation is to deal with land in general. Read in conjunction with marriage and divorce as well as wills and inheritance legislation, they argue, women are adequately protected. While in theory this may be true, there is not enough evidence that communities who regulate their lives in terms of customary law know and resort to the aforementioned legislation.

With regard to participation and representation, women’s rights NGOs further lamented that despite the requirement for there to be 50% representation of women on land committees, there aren’t any women participating yet. Getting woman to

---

145 Organisations such as WOLRC recount areas where chiefs take land from widows, and resell it, abusing the liberties afforded under the National Policy which provides that traditional leaders may reclaim and reallocate land if it is abandoned.
participate meaningfully even when present is a huge challenge, solved by some NGOs by facilitating group discussions of separate gender or age groups. When raising these concerns with government, it was proffered that women are protected indirectly through the ability to choose a chief, indicating that in Malawi a man cannot be chief if women have not endorsed him. None of the NGO respondents thought that this protection was sufficient and it is easy to see how power imbalances will play a role in the selection of candidates for chiefs.

3. Intra-departmental dispute and lack of resources

It was reported that strained relationships between relevant government departments competing for revenues streams create challenges for implementation. The Ministry of Mines reportedly used to have significant power because it received the fees flowing from the extractives industry. Currently, however, this power resides with the Ministry of Finance. There have allegedly also been contracts which have been championed by Malawi Revenue registration and the Minister of Resources without the Ministry of Finance, even though policy dictates that the Ministry of Finance should be involved in all such projects.

Government departments responsible for regulating the extractive sector and ensuring compliance and implementation of relevant law and policy are also undoubtedly under-resourced.

4. Access to justice

Access to justice for communities affected by mining in Malawi is illusive, with lawyers starting from as much as 250,000 kwacha’s (almost $350) for representation and little funding for extractives and land related cases. The NGOs interviewed exhibited very little appetite for public interest litigation opting more for opportunities to collaborate with government. The fact that the majority of the population is rural and illiterate is a contributing factor as well. It was reported that the courts have a bad reputation for setting court dates and processing cases. Furthermore NGOs that do litigate and attempt to use international/regional instruments experience difficulty in domestic courts as these instruments are not domesticated. As a result, enforcement and access to remedy remains a huge challenge as courts and police are underfunded and don’t do any follow-ups.

RECOMMENDATIONS

Malawi has a relatively young extractive industry and is on the cusp of the implementation of a new legal regime for mining and customary land. Both these factors mean that there is significant opportunity in Malawi to shape the way that communities will be granted agency in development decision that will impact upon them. It is important for civil society and communities to work towards a relatively unified view as to how the new legislation can and should be interpreted in the best interest of the community members. A number of key issues stand out:

- The challenge of powerful chiefs was raised in multiple contexts, including as easy targets for bribery, obstacles to the implementation of gender equality provisions and usurping the voice of the community. Given that this problem is acknowledged across the board, it is recommended that civil society and government embark on a dialogue to find ways of curbing or effectively regulating the powers of chiefs to ensure greater internal community accountability, mechanisms available to community members to hold abusive chiefs to account.

- Government should work towards eliminating factors that contribute to inter-ministerial tensions such as competition over budgets and power imbalances.

- Government and companies should jointly contribute (and, where possible, with donor funding) to a legal aid fund for communities that would enable both reactive and strategic litigation to strengthen the applicable legislative frameworks.
MOZAMBIQUE

In this Chapter we review the main Mozambican legislation relevant to the impact of extractive projects, in the mining industry in particular, on affected communities and the opportunities for asserting the principle of Free, Prior and Informed Consent. After a brief overview of the history of extractives in this country, we look mainly at the Mozambican Constitution, the Land and New Mining Law, environmental regulation, compensation and resettlement. We then provide a brief assessment of the implementation of these frameworks, before attempting some specific recommendations.

BACKGROUND

Mozambique has had one of the world’s fastest growing economies for some years. However, the global commodity price slow down and the hidden debt crisis has now pushed Mozambique into the position of one of the most indebted countries in the world whilst leaving the number of poor nominally the same and with widening inequality.146 This is partly because the economy started from such a low base after years of civil war following the struggle for independence and more recently fuelled by the discovery of large coal, oil and natural gas deposits. Yet in terms of human development indicators, Mozambique is amongst the lowest ranked countries in the world. Poverty is concentrated in the rural areas and in the central and northern provinces147 where much of the recent coal based extractive projects are located. The value of the extractives sector is considerable. In the period between 2010 and 2015, over $10-billion was invested in these sectors, with a further $34 billion set to be invested by 2020.148 Coal has recently overtaken aluminium for the first time as the leading export. Pressure on land is increasing significantly from both the agricultural and extractive sectors.

Mozambique is important case study for testing the efficacy of the principle of consent for protecting community land and development rights. This is so for several reasons:

- Mozambique is known for having amongst the most progressive land legislation systems in Africa. It explicitly recognises customary law as a source of land and governance rights. It formalises these rights, whilst maintaining a balance with other and often competing economic interests over land in the form of investment capital. Mozambique’s approach to these competing interests envisaged a negotiated form of development between local communities and investors which was arguably intended to be based on consent.

- The country’s burgeoning extractives sector is a recent phenomenon, emerging after the development of the land legislation.

- The state is central to the contestation over land use as owner of both the land and the minerals (surface and subsurface resources).

- Mozambique has a monist approach to the incorporation of international law into the domestic legal system. This is significant, because the development of the principle and rights to free prior informed consent has progressed most in international law.


148 Major Mining Companies operating in Mozambique include: Vale; Rio Tinto; Jindal; Minas de Revuboe; Ncondezi Coal; Minas Moatize; Kenmare Moma; and Syrah Resources Limited. Major Gas Companies operating in Mozambique include: SASOL; ENI; and Anadarko.
Mozambique has an active civil society which has played a central role in the development of land policy and legislation. However, very little is done in terms of litigation in securing socio-economic rights and promoting the interests of the poor.

LEGAL ANALYSIS

The Constitution of the Republic of Mozambique ("the Mozambique Constitution") is the supreme law of the land and legislation must be consistent with it. The law is mostly codified in the form of legislation emanating from parliament, but the Council of Ministers also has the power to perform legislative acts, referred to as decrees.

The civil-political and socio-economic rights first introduced in the 1990 Constitution were entrenched in the 2004 Constitution. While most rights are individual rights, the Constitution does contemplate collective rights to a healthy and unpolluted environment and the right to engage in economic activities. The 2004 Constitution recognises legal pluralism and is monist in nature. International norms would not prevail above the Constitution, which remains the supreme law. In addition, as Mozambique is what is described as a 'moderate' monist system, there is a requirement of publication of international law for it to have full effect in the domestic courts.

The civil law system tends to be far less litigious than other systems by nature. Because court precedent is not a source of law in Mozambique, the strategic benefit of litigation is limited in this regard. Even in such instances the benefits are often limited to the complainant group as there must be a specific statutory violation demonstrable in proceedings. There were only a handful of cases referred to during the discussions with respondents. In the absence of direct access to the Constitutional Court, the other possibility of relief and the securing of internationally recognised, so called second and third generation human rights through domestic interpretation and litigation is through the avenue of ‘popular actions’. There has been only one case using popular action which indeed revolved around the relocation of 750 families by Vale.

149 There is some debate as to whether socioeconomic rights are directly justiciable in Mozambique. Some argue that terms such as "within the terms of the law" as stated in reference to the right to health militates against an interpretation of justiciability. The counter argument is that this is an enjoiner to specifically enact legislation to realise such rights and many other rights, such as the right to property, have no such clause. The Constitution also appears to make such right justiciable at Article 56(1) by confirming these rights as binding and directly applicable to both public and private entities. Mandlate, C. N. 2016 'Direct Constitutional Protection of Economic Social and Cultural Rights in Lusophone Legal Systems: Angola and Mozambique' in The Protection of Economic, Social and Cultural Rights in Africa Cambridge: Cambridge University Press.

150 Ibid.

151 The first chapter of the Constitution reads, "The State recognises the different normative and dispute resolution systems that co-exist in Mozambican society, insofar as they are not contrary to the fundamental principles and values of the Constitution".

152 Fernandes, JMBP 2005 Enforcement of International Human Rights Law in Domestic Courts in Mozambique and Ghana Univ. of Ghana Faculty of Law LLM Dissertation p 21 available at https://repository.up.ac.za/handle/2263/1143. See also Killander, M (ed) 2010 International Law and Domestic Human Rights Litigation in Africa p 10-11: "African civil law countries have a monist constitutional framework but their judicial cultures create dualism in practice. Admittedly, the fact that these countries have extensive bills of rights makes it likely that the question of direct application rarely arises. However, an increased use of the findings of international human rights monitoring bodies in interpreting constitutional provisions would enrich the jurisprudence on human rights recognised in the constitutions. The first measure must, however, be to address constraints on the access to justice to remedy violations of nationally recognised human rights." The Supreme Court of Mozambique has directly drawn on international treaties in its judgments. In President of the Republic of Mozambique v Bernardo Sacarolla Alegoncha, for example, the Court held that traditional authorities must consider the constitution and international human rights law in making their decisions.

153 The majority of respondents confirmed this aspect.

154 In Cateme Community v State of Mozambique, The Mozambican Human Rights League (an NGO) lodged a complaint against the government using the provision of Article 81. The case was originally referred to the Administrative Court of Mozambique in Maputo. Two years later that court felt it was a matter for the Administrative Court of the Tete Province on the basis that events had transpired in Tete.

Following the granting of a coal concession to the company Vale many people needed to be relocated in the process. The complaint revolved around the relocation of 750 families to Cateme, which was inter alia far removed from the nearest urban settlement, the land was not conducive to agriculture and the housing provided inadequate. The applicants therefore argued, "that the government had failed to ensure the protection of their rights to adequate housing, access to land, to water and human dignity" (Mandlate n 149 above at p 389) Government argued that there was not yet the correct procedures for this form of court challenge promulgated and secondly that the mining company Vale was in fact the right respondent to answer in the matter. The decision of the Administrative court of appeal does however confirm the justicability of economic social and cultural rights which can therefore be enforced by ordinary courts. The substantive merits of the case are yet to be decided.
Land laws

The 1990 Constitution adopted a socialist orientation to land governance by vesting all land in the state and prohibiting the sale or encumbrance thereof. In practice, land governance was almost entirely achieved through customary practice at the time. The Land Policy approved in September 1995 took an explicit rights-based approach to guaranteeing land to the poor and attempting to balance redistribution and tenure security with economic development uses.

The landmark 1997 Land Law, which provides the legal foundation for current policy, emerged out of a process widely described as one of the most participatory and democratic in recent Mozambican history. The legislation purposefully uses broad, self-defining notions of community and does not attempt to codify customary law. It establishes the community as the base unit from which other rights and rights holder flow or are grouped, such as the individual or family. The land law also leaves each community free to determine how it will administer its land. Whilst the act contemplates the registration of land title, it is not a requirement for the existence of rights.

155 Lei de Terras 19/97.

“2. The absence of registration does not prejudice the right of land use and benefit acquired through occupancy in terms of sub-paragraphs a) and b) of article 12, provided that it has been duly proved in terms of this Law” (GOM, 1997, Article 14(2))

A collection of donor groups established the Community Land Initiative (Iniciativa para Terras Comunitárias, or iTC) in 2007, a program to register community parcels in the government cadastre and empower communities to negotiate with potential investors. By mid-2016, the program had registered 655 communities in the government cadaster – nearly four times the estimated 171 community registrations carried out before the iTC was established. The registrations covered 6.9 million hectares and 10% of the country’s rural population.

Nagonha is a tiny fishing village nestled among sand dunes in Nampula, northern Mozambique. The village and its traditional lifestyle is threatened by a Chinese company mining titanium sands next to it, encroaching on communal land and leaving a biological desert where it mines.
Tanner argues that the law envisaged that by negotiating with investors, local people could trade land for new or other resources needed for their development path, whatever they defined this to be. Using their legally recognised customary rights and community consultations, they can realise at least some of the capital value locked up in their land. This approach has not been successfully implemented. As a result, and in the absence of firmly established and easily articulated tenure rights, the negotiating power of the local community is severely constrained and the outcome substantially negative.

Commentators and most of the interview respondents felt that the principle ideas behind the policy and legislation were sound and progressive. But the law has proven not to be robust enough to guard against the power realities and imbalances inherent in exchanges between under-resourced communities and large capital and governing elite interests. These tendencies were heightened significantly in the wake of the minerals discoveries in recent times.

The new Constitution vests all land in the State and cannot be disposed of by any means. Article 111 enjoins the State to recognise and protect the rights to land achieved via inheritance or occupation, effectively recognising land rights sourced from custom. The Constitution also explicitly identifies the State as decision-maker around land use. While the 1990 Constitution regarded the social purpose of land as the primary concern informing land use decisions, the 2004 Constitution adds economic considerations.

On the face of it, land occupiers thus have no say in the decisions taken over their land. The explicit recognition of customary law in the Constitution stands in tension with this override by the State, however. In addition, in 2008, the government passed Resolution 70/2008 which requires all investors wanting more than 10,000 hectares to include in their proposals, ‘the terms of the partnership between them and the holders of the rights acquired by occupation’ over the land in question. A minimum of two consultation meetings with local communities are now required for land acquisition applications. The first meeting is to inform the community of the application for the DUAT acquisition, while the second meeting should seek the views of the local community as to the availability of the area for the implementation of the proposed use plan. The second meeting must be held within 30 days of the first. Where there is additional information to be provided to the community, other meetings may be scheduled.

It is difficult to see how two meetings would suffice, particularly where large and complex projects are envisioned. Given the original intent of the legislation for communities to negotiate a share in the development process, communities clearly require more time to become familiar with the information and understand the consequences of a proposed project, and to build a collective view of a preferred development path. Some interview respondents referred to the thirty days deadline for the community view to be formed as creating an imperative to accept a project and thus falling short even of the World Bank concept of meaningful consultation. The provision in the Land Act on consent does not explicitly state that communities can decline a project, but experts opine that the right is implied.

**Mining laws**

Mozambique has a comprehensive legal framework regulating the extractives sector with a separate focus on mining on the one hand, and oil and gas extraction on the other. Of particular importance is the new regulations relating to relocation of communities.
Mozambique’s New Mining Law (“NML”)\(^{163}\), as did its predecessor,\(^{164}\) essentially creates a free or open mining regime, subject only to certain local ownership or partnership criteria.\(^{165}\) Article 12 of the NML provides that “pre-existing rights of use and enjoyment of land are considered extinct after the payment of a fair compensation to land users”. This provision effectively removes any power communities may have gain under the land law. In the case of mining, the land-related legislation appears to become obsolete. Article 18 also contemplates the proactive reservation of land for minerals extraction where it is considered to be in the national economic interests or the future development of the region in which the mineral deposits occur. This creates a very broad discretion clearly aimed at fast-tracking development. While the 2002 Act still provided for a nominal cost-benefit analysis underpinning development decisions, the NML removes even that requirement.

The NML does require that communities “must be previously consulted” before the granting of an authorisation and be provided with information.\(^{166}\) The logic of separating the mining application and the application for a land use right (called the Direito de Uso e Aproveitamento da Terra, or ‘DUAT’) sets up competing consultation requirements. Under the mining law, mining takes precedence over all other land use and, where necessary, the state must expropriate property on this basis. The actual land DUAT process is where communities were supposed to have significant customary law based power to negotiate development for the value of the land given up. Yet at this point in the process the mining decision has already been taken with regards to mining, rendering the consent right of communities meaningless.

The holder of the Mining Concession, before commencement of extraction activities, is required to obtain: (i) the environmental licence; (ii) right of use and development of land; and (iii) the approval of the resettlement and compensation plan. It was common practice under the previous law for mining to commence prior to completion of such elements. It is now likely that such practices will begin to decline after court orders have more recently found this to be administratively incorrect.

The State is legislatively responsible for ensuring communities are adequately protected. Article 13 (g) of the NML, for example, requires the State to “protect the communities where mining activities are authorized and promote socio-economic development” and elsewhere “for assuring the best terms and conditions in favour of the community, including the payment of fair compensation”.

A lesson that emerges from the Mozambican experience of a free mining regime is that there seems to be a fundamental incompatibility between empowering organised local decision making through consent rights and a free mining development paradigm. It is apparent that not all investment is equal and that a community confronted with the potential of displacement by agricultural investment is potentially in a much different (and potentially stronger) position than a community confronted by mining or natural gas exploitation.

**Environmental Laws**

In Mozambique the EIA process is a legal requirement governed by the Environmental Law (Law no. 20/97 of 1 October). This Law applies for any activity which could have direct or indirect impacts on the environment. The mining legislation specifically caters for environmental impact assessment which also takes socio-cultural aspects into account. The law provides for different levels of environmental impact assessment and management for different categories of mining activity.\(^{167}\)

---

\(^{163}\) 20/2014.

\(^{164}\) Law 14/2002 of 26 June (2002 Mining Law).

\(^{165}\) Pursuant to article 98 of the Constitution, the ownership of minerals as in the case of land is vested in the state.

\(^{166}\) NML at Article 32.

\(^{167}\) Article 69 (Environmental classification of mining activities): 1. Mining activities are classified into Category A, Category B and Category C. 2. Category A covers mining activities carried out under a mining concession; 3. Category B covers mining activities in quarries, prospecting and research activities for pilot experiment purposes and activities undertaken under a mining certificate; 4. Category C covers mining activities carried out under a mining pass and non-mechanized prospecting and research activities.
The environmental law provides for a right to halt activities. No interview respondents knew of any civil society campaign or strategy emerging from this right; however it is not inconceivable that it could be employed by a community wishing to make a point about a project and community engagement therein.

Resettlement laws

Early agricultural attempts at resettlement where communities ‘agreed’ to land use changes (be it in a largely manipulated or virtually forced manner) were not particularly successful. The mining resettlements in the wake of the Vale and then Jindal operations were by most accounts catastrophic. Partly as a result of the very negative press and community anger and protests at a number of large projects, the government attempted to institute a more comprehensive regulatory framework that should have been in place prior to the development of mega-projects and resettlements. On August 8, 2012, Mozambique’s Council of Ministers adopted a new decree regulating resettlements due to economic projects.

The decree and attached regulations do establish a rights basis for resettled communities which should be interpreted as going beyond the payment of compensation. Article 10 of the regulations lay out the rights of the directly affected population as:

a) To have their income level re-established, equal to or above the previous level;

b) To have their standard of living re-established, equal to or above the previous level;

c) To be transported with their goods to the new place of residence;

d) To live in a physical space with infrastructures and social facilities;

e) To have space to perform their subsistence activities;

f) To give their opinion about the entire resettlement process.

In addition Article 14 gives a specific right to information.

The resettlement plan is subject to four consultations. This is two more than contemplated in land regulations related to DUAT acquisition. Again, this is a positive step. It is however somewhat vexing that the resettlement plan that grants no real discretion to affected persons would be benchmarked at four consultations and land use change where presumably communities have more powerful rights and should be negotiating envisages this as needing fewer engagements.

The implementation of plans is subject to inspection and penalties (articles 24-28). However, these penalties are limited to fines without reference to other processes upon which resettlement might be dependent such as an EIA, or a mining right. After approval from the district government, the resettlement plan is integrated with the environmental and planning frameworks. It is good practice that this precedes the environmental management plan and EIA processes as these are often lumped together and the social component given scant attention.

The resettlement regulation predates the NML by two years and can be used in conjunction with the mining law to establish better practices. It should be viewed as a safeguard after the community has negotiated with the company (and the government who are to ensure their best interests) and come to a decision to give up rights for a particular quantum of compensation. This would be through processes envisaged in land legislation and regulation and the NML.

168 This enabling clause has been used in some extractive related cases such as the Jindal matter in the Tete province. Article 22 states “Injunctions: Those who believe that their right to an ecologically balanced environment has been violated may, through the use of procedures to obtain administrative injunctions and other appropriate procedures, demand the immediate suspension of the activity which is causing the violation.” And then goes on to create a duty to complain at article 23, “Any person who has knowledge of any infraction of the provisions of this law or any other environmental legislation or who has a reasonable belief that such an infraction may imminently occur shall have the duty to inform the nearest police or other administrative authorities of the fact.” (GOM, 1997)

IMPLEMENTATION CHALLENGES

Based on the extensive available literature and interviews conducted in Maputo in 2017, the following systemic challenges to proper implementation of the protections to community decision-making were identified.

1. The lack of “free” consultations

Respondents indicated that government officials are often perceived to be under pressure to secure investment leading to community engagements frequently characterised by government officials and the investors “speaking with one voice” on a project and the community feeling intimidated by this stance. It was noted by two respondents that communities did not feel that there was any option to say “no” to the proposal and as such would simply ask questions as to how the process would affect them – accepting that it would happen regardless of their views. None of the respondents interviewed could think of a community who had tried to exercise their right to withhold consent to giving up their land for development.

Some respondents indicated that consultations sometimes extended to meetings beyond the legislative requirements, held “behind the scenes,” but generally this would only happen where civil society support escalates the issue. None of the respondents characterised any of these consultations as “negotiations.” Communities simply do not perceive themselves to have the right to say no and as such have no power in the context of a consultation— which makes negotiation very challenging. One respondent noted that in the absence of a community understanding its right to consent to a project, community resistance usually only surfaces down the line when the impacts of a project become apparent.

2. Women

Both the literature and interviews conducted for this research suggest that whilst communities are generally marginalised, women are particularly marginalised in consultation processes. This, despite the fact that the enabling legislation specifically provides for women to play an active and meaningful role in such deliberations as equal land rights holders. While customary law systems recognise women’s rights to land, patriarchal systems do still predominate and serve to make women’s rights secondary with limited to no control of land. The processes and procedures for land demarcation, for example, whilst intended to bolster women’s positions, have rather achieved the reverse of this challenge. 170

An interview respondent working on feminist critiques of land legislation and administrative practice pointed to the problems in the 2012 Presidential Decree on Resettlement. The Decree fails to mention and protect women specifically despite the fact that it is in the process of resettlement that women often face their greatest difficulties. The Resettlement Regulations mention women only once, and then in the context of women-headed households.

It is critical for the gendered perspective to also inform Mozambique’s relocation policy. Relocation makes communities more susceptible to risk, breaks down community support networks and divides kin groups. In all these impacts, women are made most vulnerable. One respondent explained that in the example of Moatzie, where she conducts fieldwork, households were to be given two plots of land as compensation for losing their community land to a development project. One of the plots was often paid out in compensation. The respondent indicated that this practice frequently led to men to access this additional money by taking further wives or girlfriends – and sometimes simply by means of force.

Another respondent made the point that while women have rights on paper, they are actively excluded within the community and by external parties. Whilst people are generally ignorant of their rights, women in particular have very little opportunity given limited financial resources and a lack of free movement to approach lawyers and paralegals for help.

The NGO Centro Terra Viva conducted a study into the impacts of large-scale developments on women in 15 communities in 2014. They found that:

Many communities practice a top-down approach, where decisions are made predominantly by male community leaders, often in men-only meetings. Some communities allow wider participation, but while women are present in meetings and sometimes even outnumber men, they remain on the sidelines. 171


171 Ibid.
Any FPIC right conferring process or regulatory procedure should specifically and explicitly balance women’s participation in procedures and analysis and be subject to paralegal support as a minimum.

3. Inadequate resources

As in the other countries under review, the lack of adequate resources to ensure proper implementation of provisions protecting communities is a problem in Mozambique. An interview respondent explained that the duty of the State to protect the interests of communities, also in consultations, often fall to ill trained cadastral service officials to deal with and those local administrators were often under significant pressure to get the investment on track.

4. Legislative alignment

The scattering of consultation requirements across different pieces of legislation and different processes appears to confuse the process. The time frames involved are short and these processes are often collapsed into one another. In addition, different standards apply to the different processes, for example with regards to compensation. In practice, this allows the state and investors to fall back on the lowest available standard.

The other confounding factor is that while there is theoretically no market for land, the process of discussing benefits and creating community agreements effectively creates an informal land market often described in terms of compensation. There are also contradictions in the legislation and regulations: whereas the land law sees a potential for organised communities to negotiate a development path and outcome and implies a consent process, the minerals legislation makes extraction a land use priority above all else, automating consultation into a formality and people are simply to be compensated. There exist different development conceptions in different law.

RECOMMENDATIONS

- FPIC processes or regulatory procedure should specifically and explicitly balance women’s participation in procedures and analysis and be subject to paralegal support as a minimum.

- Consultation about what is effectively one project must be consolidated into one process that commences at the exploration phase. To implement this effectively, communities must be capacitated to organise themselves, digest and discuss the initial information provided, and NGOs allowed to support them especially in terms of paralegal development and building development consensus. Full consultation towards consensus (consent) then occurs on the actual decision to mine which incorporates elements of the delineation process and development planning for the community.

- Full cost accounting on the benefits and costs of a project must be completed as part of the EIA process. The costs should include less tangible elements of, for example, cultural attachment and social interdependence. Communities should then have access to independent expertise paid for from a fund for minerals extraction. NGO based training for the community is also part of this preparation. Community processes must specifically cater for marginalised groups. Benefit sharing, resettlement and a decision to move must all be dealt with in one process of multiple engagements preferably mediated by a third party outside of government and the project proponent.

- Liability and responsibility for every aspect of the process needs to be clearly indicated. Currently the state is responsible for social and development infrastructure, but legislation now also calls for investors to consult on the social and infrastructure development alongside the 2.75% revenue stream that will be allocated to the local area.

- The entire process needs take place within realistic and unhurried time frames dictated by the needs of a community to internally process and make decisions paying attention to customary processes and supplementing these with vulnerable group support. Compensation and the establishment of the social alternatives, livelihoods replacement and redevelopment of social infrastructure, and access to markets must precede a decision to go ahead and certainly before any relocation takes place. Monitoring and evaluation must be ongoing.
In this Chapter we review the main South Africa legislative and policy measures relevant to the impact of extractive projects, in the mining industry in particular, on affected communities and the opportunities for asserting the right to consent. After a brief overview of the history of extractives in this, an old mining country, we look mainly at the South African Constitution and in particular its recognition of ‘living’ customary law, the interim legislation designed to protect customary land rights holders, the statutory regulation of mining and the environment and a state land lease policy. We also consider the issue of compensation. We then provide a brief assessment of the implementation of these frameworks, before attempting some specific recommendations.

BACKGROUND

South Africa’s history of colonial segregation and legislated apartheid is well documented. Perhaps the most devastating impact on the majority black population was felt on account of the legislated dispossession of black people’s land and resources. Through the Native Land Act of 1913, separate territories for black and white ownership and occupation of land were first delineated. Only 7% of the land was set-aside for the black majority. From 1946, with the architects of apartheid in power, the rural reserves created through the 1936 legislation was used as a basis for creating ten ethnically defined “homelands.” The division was based on different African languages. Some of the homelands became “independent states.” In 1994 and with the transition to democracy, these homelands were incorporated back into a unitary South Africa. The homelands, or Bantustans as they were called, relied heavily on a state supported system of chiefly rule. 172

The Final South African Constitution, adopted in 1996, created a system of elected local government throughout the country to replace traditional leaders as local government agents. However, traditional leaders have been aggrieved by this loss of power and governmental status. Their political rise over the last decade in South Africa has brought them to the point of seriously agitating for a constitutional amendment that would again recognize the governmental powers that the colonial and apartheid governments bestowed upon them.

The post-1994 regulation of water, minerals and marine resources all abolished the old common law regimes that provided for private property rights to these resources linked to land ownership. As such, the privileged position implied by landownership to water and mineral rights fall away in a significant step towards equal access to the resource. 173 Under the new regulatory regime, the State becomes the custodian or national trustee of the resource and has the responsibility to ensure sustainable resource management and equitable access to the resource.

An important consequence of the abolishment of ownership rights in favour of the State as the sole custodian of the resource is that decision-making power is centralised upwards in the hands of the Minister. We will highlight the implications of this result in our discussion of the specific pieces of legislation below. The significance of these developments for mining-affected communities in South Africa is enormous. As we point out below, the majority of valuable mineral deposits in South Africa are located within the former Bantustans. The two former Bantustans of Bophuthatswana and Lebowa, for example, accounts for almost 80% of the world’s platinum production. Control over the resources in these areas–albeit now incorporated into a unitary South Africa–thus remains highly contested.

172 A discussion document emanating from the then Department of Cooperation and Development in 2000 on the role of traditional leaders in a democratic South Africa described the system thus: Essentially, these [apartheid] laws established a system of local government that placed the traditional leaders at the centre of the bureaucratic system of traditional authorities. Chieftainship came to be reduced to a very different institution. As one commentator noted, "It was a public office created by statute. That is the reversal of the position of the chief in traditional society in which the role of the chief was to represent his people according to the dictates of customary practice. This reversal, effected by the Act, has plainly made the appointment, suspension and deposition of chiefs subject to political manipulation”.

The founding values of the South African Constitution permeate throughout the text. These values, contained in section 1, are human dignity, the achievement of equality and the advancement of the rights and freedoms contained in the Bill of Rights. In order to achieve equality, the state must take legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. Section 25(8) emphasises that the property clause should not be construed to impede the state from “taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination” as long as such measures are otherwise constitutional. The Constitution requires that legislation be interpreted consistent with international law where it is reasonably possible to do so. Section 39(1) requires all courts, when interpreting the Bill of Rights, to apply international law. Arguably one of the most radical—but least recognised—transformations affected by the Constitution was the recognition of customary or indigenous law as a source of law equal in status to the common law and statute law. This represented a significant break from the past when, based on racially discriminatory views of indigenous legal systems, the recognition and application of customary law was limited to intra-community regulation and disputes. In particular, customary property rights had not been recognised.

The Constitution changed that. The Constitutional Court has laid down far-reaching principles to give content to what the constitutional recognition of customary law entails. Moreover, the validity of customary law is determined with reference to the Constitution and not to common law. In other words, a rule or provision of customary law cannot be trumped merely by being in conflict with the common law. The Constitution does provide for the statutory regulation of customary law, but such regulation will only amount to the extinguishment of the customary law right if done explicitly and in line with the Constitution’s limitation clause.

A South African High Court recently found that the Act regulating rights of access to the marine resource in South Africa does not extinguish communities’ customary rights to access the resource despite providing for the Minister as the custodian of all resources and requiring access rights to be granted by the Minister. Similar to the finding of the Constitutional Court in Tongoane, the High Court thus envisions customary law as a system of law that gives rise to rights parallel to the statutory framework and that should be considered, incorporated and regulated by the legislature when designing resource governance systems.

174 S211(3) of the Constitution provides that customary law is subject to “law that specifically deals with customary law”.


176 In Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17, 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 42: “[A]n approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation, such as the Intestate Succession Act, would be incorrect. At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution.” In Alekxor Ltd v The Richtersveld Community 2004 (6) SA 460 (CC) at para 51, the Constitutional Court held as follows: “While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.”

177 Whether statute can change any aspect of customary law remains an open question. Some scholars argue that statute law cannot change aspects fundamental to customary law unless constitutional required doing so. See Affidavit filed by Dr Aninka Claassens on behalf of the Centre for Law and Society in the matter of Sigcaw v President of the Republic of South Africa and Others (CCT 93/12) [2013] ZACC 18, 2013 (9) BCLR 1091 (CC) Available at https://collections.concourt.org.za/bitstream/handle/20.500.12144/3691/Founding%20Affidavit%20Application%20for%20Admission%20as%20Amicus%20Curiae-20511.pdf?sequence=1&isAllowed=y

178 Richtersveld Community and Others v Alekxor Ltd and Another 2003 (6) BCLR 583 (SCA) at para 40: ‘Termination requires appropriate legislative authority showing a clear and unequivocal intention to extinguish or at least an action making the land over to others.’

179 Gongqose and Others v S; Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others [2016] ZAECMHC 1.

The South African Constitutional Court has developed a number of principles key to establishing the content of customary law in the context of colonial, apartheid and present-day distortions (see chapter 1). With regards to the recognition of customary law in the context of a Western legal tradition, the Court found, in Alexkor:

While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution...It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system.

On the question of what the Constitution recognises when it refers to ‘customary law’, the Court has developed a strong line of jurisprudence around the notion of ‘living customary law’ as opposed to ‘official customary law’. In Alexkor, the Court argued:

Bennett points out that, although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term “customary law” emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice), the law used by academics for teaching purposes; and the law actually lived by the people. [our emphasis]

It is the latter, the Court held, which is recognised by our Constitution. Following the establishment of this principle, in Shilubana the Court went further to establish principles for “finding” the content of living customary law. In considering evidence of the content of customary law, regards should be had to:

- The historical practice of the community (with the appropriate caution as to Western notions and historical interpretations)
- The community’s current practice;
- The need to be flexible to the specific contextual needs of the community; and
- The possibility to develop customary law to be brought in line with the Bill of Rights.

Regrettably, this approach has been entirely lacking from the legislature and policy makers in South Africa. Rural communities—and their land and resource rights—have increasingly become invisible, as the powers of their “representatives”, notably traditional leaders and their councils, have soared since 1994.

**Interim Protection of Informal Land Rights Act 1996**

As a result of the failure of Parliament to enact legislation that provides security of tenure to people who ownership and other land rights in land were never recognized because of racial discrimination, a placeholder law was introduced in 1996. The *Interim Protection of Informal Land Rights Act 1996* ("IPILRA") continues in force today. The policy document that accompanied its inception reads (our emphasis):

> Because the land is still nominally owned by the state, various decisions in respect of the land have legal status only if they are taken by the Minister [Minister of Rural Development and Land Reform as he is now...

---

181 Alexkor n 176 above.
182 Ibid at para 52, emphasis added.
183 Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC) at para 44-48, emphases added.
184 Section 25(6) of the Constitution provides that “a person or community whose land tenure is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress”. This refers specifically to customary tenure, in the past not regarded as forms of ownership.
185 Act 31 of 1996.
known as trustee or nominee. Decisions pertaining to ownership rights in communally owned land are most appropriately made by the majority of the members of such communal systems. If the decisions have been properly taken and it can be shown that they reflect the view of the majority of the rights holders and particularly of the people who will be affected by the decision, then the Minister’s role should simply be to ratify such decisions.

The Minister of Rural Development and Land Reform does not have any decision-making role, but a fiduciary duty to ensure that community processes run properly. This responsibility to ensure that decision making happens at the level of the affected community is crucial in ensuring tenure security in the face of other claims on the relevant land, whether for infrastructure, mining or commercial development.

Section 2 of IPILRA provides that for a deprivation of customary and other informal land rights, the following is required:

1. The living customary law of the community must be complied with.
2. The customary law is deemed to include, at minimum the following:
   2.1. a decision taken by a majority of land rights holders;
   2.2. taken at a meeting where there has been sufficient notice; and
   2.3. where land rights holders have been afforded a reasonable opportunity to participate.

Procedures were adopted by the Minister for capturing the customary law decision or, at least, the majority view of a community and ensuring that this forms the basis for any decisions impacting on the rights of the community affected.

Drafted around the time of the adoption of the final Constitution, IPILRA clearly illustrates the shift since then towards centralising power in the hands of the traditional leaders in the two decades since. IPILRA does not mention traditional leadership; does not align the definition of a community with the jurisdiction of a traditional leader and, certainly does not assume the senior traditional leader of a community as its representative. Rather, it insists on customary law decision making by the community and in particular the affected rights holders. All legislation drafted from 2003 onwards, placed traditional leaders firmly at the centre of the definition of traditional communities and the decisions taken on their behalf.

Despite the very good intentions of IPILRA, it has never been implemented properly. There are many reasons for this. Firstly, because it was anticipated that this piece of legislation would simply fill a temporary gap while the legislature completes the legislation to regulate communal property, IPILRA is a very short piece of legislation and regulations were never promulgated. Secondly, very few departmental officials were ever educated about its existence or how to implement it. In the absence of these officials making communities aware of their rights in terms of the Act, they simply did not know.

Minerals and Petroleum Resources Development Act 2004 (MPRDA)

The MPRDA was specifically adopted to end the white monopoly on access to minerals, and also to combat anti-competitive and anti-democratic hoarding of mineral rights, by converting the system of privately held mineral rights into rights over which the State exercises custodianship in the public interest. Ironically, now that all South Africans are finally able to own land and have their ownership rights recognised, the MPRDA put a definitive end to the consent right of land rights holders, as we discuss further below.

The transformation measures of the MPRDA are two-pronged: it seeks to transform the ownership of the industry and it seeks to ensure the positive impact of the industry on socio-economic advancement. In order to achieve socio-economic advancement, the Mining Charter provides for mining companies “co-operate in the formulation of integrated development plans” for host and labour-sending communities.

186 Originally on 20 November 1997. It was later amended on 14 January 1998.
There is no express provision that the consent of any owner or land rights holder is required in the MPRDA. The MPRDA does, however, require the Regional Manager\textsuperscript{187} and the applicant\textsuperscript{188} to “consult”\textsuperscript{189} with interested and affected parties as part of the application process. In practice any interested and affected party can make a written submission and the submission should theoretically be considered in the decision-making process of the Regional Mining and Development Committee [RMDEC]. The RMDEC makes a recommendation to the Minister to award a mining right. The “consultation” in effect amounts to a notice and comment procedure. RMDEC meetings are rarely open to the respondents and no reasons are provided for the recommendations or decisions made.\textsuperscript{190}

It could be argued that the transformative schema of the MPRDA inadvertently entrenches the historical discrimination against indigenous or customary forms of ownership. The argument is this: only people with recognised ownership in the pre-MPRDA era had old order rights which could be converted to new order rights under the MPRA. In practice, old order rights holders were thus almost exclusively white landowners with common law title. While the constitutional provisions for restitution and security of tenure aimed to ensure the systematic overturning of such a racially discriminatory property regime, it came too late in most cases for communities to allow them equal opportunity to convert their rights in terms of the MPRDA (the conversion from old order to new order rights came to an end on 1 May 2005). As such, the MPRDA discriminated against the very black communities that historically suffered discrimination against their customary tenure by the mining industry. The MPRDA, by ostensibly treating all landowners equally by granting no landowner the right to refuse mining on their land, in fact discriminates against communities on communal land who never had that benefit.

The environmental authorisation process also entails public consultation in the scoping report and EIA stages. However, various commentators emphasize that the parallel environmental authorization process is limited to recommendations and prescripts on mitigation of environmental, including social, impacts of the proposed mining project. The economic feasibility and social desirability of the project are not factors for consideration. While environmental authorisation applications are governed by the National Environmental Management Act 107 of 1998 (“NEMA”), the Minister of Mineral Resources is the responsible authority for considering such applications.

Where the mining right holder does not own the land, section 54 provides for compensation for loss or damage suffered as a result of the mining that is not interpreted as a right of compensation for the loss of rights in land itself.

The impact of the MPRDA on the tenure rights of communities on communal land has been profound. As the map of awarded prospecting and mining rights compared to the areas of jurisdiction of traditional councils show, the impact of the MPRDA on the already insecure tenure rights of these communities has been disproportionate. As discussed further below, this impact can largely be attributed to the fact that iPILRA and the applicable customary rights of the communities concerned, are apparently disregarded when the provisions of the MPRDA is applied. Thus, instead of seeking a resolution of affected rights holders as iPILRA and customary law require, the traditional council concerned (rather than the affected rights holders) is at best requested to make inputs on the environmental authorisation process and at worst, only finds out about the mining authorisation once the deal has been done.

\textsuperscript{187} MPRDA Section 10.

\textsuperscript{188} MPRDA Section 22(4).

\textsuperscript{189} The Constitutional Court decision in Bengwenyana Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (CCT 39/10) [2010] ZACC 26, 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) dealt with the objectives of the requirement of consultation, amongst other things. Despite the Court finding that the different notice and consultation requirements are “indicative of a serious concern for the rights and interests of land owners and lawful occupiers” the MPRDA does not require consent to be obtained. However, the Court emphasised the fact that the central purpose of consultations was to explore whether any form of accommodation is possible between the mining right applicant and the lawful landowner or occupier. Thus, adequate consultation requires an engagement in “good faith” in an attempt to reach accommodation.

\textsuperscript{190} In 2013 the Department of Mineral Resources introduced an amendment bill into Parliament that tweaked the provisions for community consultation as a discretionary requirement. These amendments are still before Parliament.
A 2008 report from the South African Human Rights Commission articulated affected communities’ experience of consultation.\textsuperscript{191} The study found that through the process of consultation between stakeholders and communities, there was a complete disintegration of trust between all stakeholders. Communities felt helpless since, in their view, the granting of mining rights to the mining company was inevitable and the community ultimately had no power to control the process.

The granting of a mining right empowers the holder of a mining right to, inter alia:

\[E\]nter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration or production, as the case may be.

The granting of such rights is clearly a deprivation of the rights of the person who owned or held rights over the land to which the mining right relates. Compliance with IPILRA is therefore required where a mining right is to be granted over land where the occupiers and/or owners hold informal rights to land as defined by IPILRA.

Mining companies sometimes argue that the MPRDA prevails over IPILRA. We believe that this is not tenable because:

1. Where the common law is inconsistent with the MPRDA, the MPRDA prevails. The MPRDA does not purport to prevail over other statutes nor over customary law.

2. The MPRDA applies generally to mining and mining rights, and generally requires consultation with landowners. But it imposes that requirement as a minimum, not a maximum. Within the circle drawn by the Minerals Act is a smaller, more defined circle dealing with land owned by traditional communities. More is required when a statutory mining right is sought in respect of land falling within that smaller circle. The Minerals Act applies, but so does IPILRA. Both statutes must be complied with: there must be consultation (in terms of the MPRDA) and consent from the affected rights holders (in terms of IPILRA).

This is particularly so given IPILRA’s significance as a constitutionally mandated remediation of Apartheid’s distortions.

Where there is to be a deprivation of a community’s rights to land, therefore, the protections of IPILRA must apply. This entails compliance with the community’s customary law of decisions relating to land. In addition, it requires, at minimum, a public meeting compliant with IPILRA’s protections. It should be noted that IPILRA is not an absolute right to prevent a development from occurring. As noted above, it is subject to any law relating to expropriation. Section 55 of the MPRDA empowers the Minister to expropriate land should it advance certain objects of the MPRDA. Thus, even if a community refuses to grant consent in terms of IPILRA, their land can still be expropriated—but then through a court process that should ensure that the Minister show why it is imperative to go against the community’s wishes.

In addition to arguing that consent in terms of IPILRA is required for the granting of a mining right, in cases where consent is granted, compensation must be determined prior to the grant of a mining right or alternatively, prior to the commencement of mining. Such compensation would necessarily encompass the terms of relocation, to the extent required, and should be determined in terms of section 54 of the MPRDA, which provides for compensation by agreement, alternatively by arbitration or by a court.

The MPRDA’s objective to redress racial discrimination and historical exclusion in the mining industry has been recognised by the Constitutional Court. Unlike the Constitutions of other countries, the South African constitution is not a document that merely formalises a historical consensus of values and aspirations. It is a “radical rupture” and a “decisive break” from South Africa’s past. At the centre of the rights and obligations in this Constitution is equality.

For this reason, and in light of South Africa’s history, the Constitution is designed to do more than record or confer formal equality. The Constitution requires that the state takes restitutionary measures to achieve the goal of equality. The Constitutional Court has stressed that “substantive empowerment, not mere formal compliance, is what matters.”

The Constitutional Court does not shy away from the fact that the transformation required by the Constitution may in some cases adversely affect particular members of society, and that it may come at a cost. Commercial arguments are often raised by those affected by restitutionary measures. However, the Constitutional Court has been clear that that these considerations cannot over-ride the need to achieve equality:

- The Constitution commits our society to “improve the quality of life of all citizens and free the potential of each person”.
- Section 25 contains the foundation for measures to redress inequalities of access to the natural resources of the country.

State Land Lease and Disposal Policy 2013

On 25 February 2013, the Minister of Rural Development and Land Reform signed the State Land Lease and Disposal Policy. While this system distinguishes between state land and communally owned land, most communal land remains state land. The Policy distinguishes between “informal rights” as envisaged in IPILRA – including customary rights – and “land tenure rights” that are defined as leasehold or any long term lease. Of course, communal land in the former homeland areas is already occupied and rights often held in terms of customary law or other statutory tenure systems.

Chapter 3, entitled ‘Commercial Developments”, deals with “enterprises” that include “mining, tourism, entertainment, small shopping centres, big malls, township development, petrol filling stations, alternative energy sources and short term accommodation like hotels [...].” Significantly, the Policy insists that government recognises “inhabitants of former homelands as rightful owners of the land they occupy, irrespective of how the ownership of such land may be reflected in the Deeds Registry”. The document continues to explain that, since National Treasury approved a recommendation in 1999 that “proceeds of long term leases on communal land [...] be paid directly to the affected communities” it has “created an attitude that the Department need not concern itself with up to date information on such leases since the immediate benefits were not directly accruing to the State”. As a result, the Policy states, the Department is unable to quantify the amount of investment that goes into communal areas as a result of leases. “The question of whether the lessees do comply with their lease obligations and whether the benefits do actually flow from the lessees to community entities and from community entities to the individual members of the community remains unknown”.

This is an important admission but is not explained by the fact that the benefits no longer accrue to the Department. The Minister continues to hold the land in trust for communities and as such has a general fiduciary duty towards the community. The members of the community, as beneficiaries, have the rights of beneficiary owners. While the ordinary principles of trusts apply – including that the Minister as trustee must act in the best interest of the beneficiaries – in the public law context the duty probably extends beyond that duty to include consultation. This is not a duty that the Minister is allowed to cede and does not depend on the flow of benefits: the Minister should continue to take responsibility for ensuring that transactions are concluded in the interest of the beneficiaries. It is not yet possible to provide an assessment of this policy safe to say that it does not seem to be invoked with any regularity.

---

192 Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC) at para 55.
195 Ibid p 27.
196 In comparative case law from the United States and English courts, it has been accepted that these types of statutory trusts are not identical to private law trusts, but rather constitute a particular public law trust that creates fiduciary duties to at least act in the best interest of the beneficiaries.
IMPLEMENTATION CHALLENGES

Based on interviews with a wide range of actors, as well as the recent extensive public consultations on the related topic of mining-affected communities by the South African Human Rights Commission,\(^\text{197}\) we identified the following key systematic challenges to implementing consent in South Africa.

1. **Executive power overrides community decision making**

The biggest challenge in the context of South Africa’s current regulatory regime and the attitude of the relevant government departments is creating greater transparency, participation and accountability around the process of decision making that impact on tenure security. Within the resource regimes, we saw that the model of state custodianship places decision-making power to grant rights and, where relevant, impact upon tenure security, squarely in the hands of the Minister. While resource-related legislation provides for some level of consultation, this rarely reaches the level of impacting upon the decision.

2. **Lack of capacity in implementing agencies**

Regrettably, despite the strong protections granted to communities in IPILRA, the Department of Rural Development and Land Reform has performed dismally as implementing authority. Most recently, at hearings of the South African Human Rights Commission as a part of their National Investigative Hearing on the Underlying Socio-Economic Challenges in Mining-Affected Communities, the Department was requested to answer a list of specific questions relating to its role in protecting the land rights of rural communities in the face of the implementation of the MPRDA. Remarkably, the Department mentioned neither IPILRA nor customary law in its entire presentation (nor, for that matter, the State Land Lease and Disposal Policy).\(^\text{198}\) Moreover, it indicated that it had no formal relationship with the Department of Mineral Resources (DMR) and does not get notified when applications are received on land that they hold in trust for communities. This is extraordinary given that the Minister of Rural Development and Land Reform continues to hold the land in trust for the communities. The Department admitted in its presentation to sometimes being engaged by “consultants, acting on behalf of mining companies”. The Department then apparently does a “land rights enquiry”, the extent of which is to establish whether the land is “occupied” by a community or not.

Specifically with regards to communal land tenure, the Department states that “it often occurs that the DRDLR will become aware after mining companies and communities have already reached agreements”. How this is possible, given the trustee status of the Department, the provisions of IPILRA, customary law and the State Land Lease Policy, is difficult to fathom. But it regrettably seemed of little concern to the Department.

3. **Unchecked power of traditional leaders**

In response to the questions as to what measures have been put in place to ensure that Traditional Authorities do not conclude surface lease and other agreements on communal land, the Department responds that “the facilitation of community resolutions is meant to prevent this however the DRDLR cannot prevent the signing of such agreements if they are signed secretly outside of an open forum”. Of course, the Department can: surface lease agreements must be signed by the Minister as nominal owner, while any other agreements that deprive any community members of rights in land but signed “secretly” will be in contravention of IPILRA and therefore the duty of the Department to stop.

Equally concerning, in the presentation of the Department of Traditional Affairs (“DTA”) at the same hearing, they indicated, under the heading “Mitigating the use of rights over land of traditional communities with regard to prospecting and mining”, that “it is important that these land rights [of communities] are used constructively by communities and other land holders when applications for prospecting and mining rights are made” [our emphasis]. It is difficult to understand what it means

\(^{197}\) National Hearing on The Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa conducted by the South African Human Rights Commission in Johannesburg on 13-14 and 26 September 2016.

\(^{198}\) Submissions by the Department of Rural Development and Land Reform at South African Human Rights Commission public hearings, Johannesburg, 26 September 2016.
to use land rights “constructively” in this context where the rights are under threat. However, given that the DTA expressed its function as supporting and empowering traditional leaders (rather than communities), and given that the Department of Rural Development and Land Reform (“DRDLR”) is giving no support to those communities as they are required to do in terms of IPILRA and other instruments, it is no surprise that the land rights of these communities continue to be under considerable threat.

In both the mineral and marine sectors, the vision of the Minister as custodian and absolute decision maker responsible for ensuring sustainable and equitable use of the resource has been challenged by communities seeking to localise decisions that affect them. In both sectors, communities resist the premise of the regulatory framework which allows the Minister to make both high-level and localised development decisions.

As a check and balance on this extraordinary ministerial power, the significance of IPILRA and customary law that decentralises the decision-making power to the affected community cannot be overstated. It is arguably the single most important mechanism of ensuring tenure security in the face of competing claims. In this context, the fiduciary duty of the Minister of Rural Development and Land Reform as the nominal owner of communal land and the office responsible for the implementation of IPILRA and customary law rights is key.

Our assessment has indicated that the Minister is not performing the role of protecting community land adequately. This failure of high level functionaries makes it all the more important for a proper understanding of the protection of tenure
security to be instilled in the officials who deal with these situations on a daily basis, as well as in the Departments whose activities impact on tenure security.

But perhaps a more effective mechanism of countering the State's inability to provide the necessary protection, is to strengthen the legal requirements of local decision making: clarify that IPILRA must be followed whenever the tenure rights of communal land owners are under threat; require land rights investigations that appreciate the value and complexity of customary tenure rights and the legal requirements of dealing with these rights; improve regulations to IPILRA to make it simpler to establish whether an adequate process was followed; reject standard timeframes for consultation that disregard local decision-making processes and invest in deep and broad community discussion.

The localisation of decision-making should of course not mean placing such power in the hands of traditional councils exclusively. Rather, the source of decision-making power is two-fold: its source is both the customary right of a member of a community and the potential for adverse impacts on those customary rights on the other.

The implementation of legislation and policies has had a severely detrimental impact on tenure security and reform as envisioned by the Constitution. These adverse impacts are the result of, amongst other things:

1. The unresolved legal questions as to the conflict between different pieces of legislation, and between customary law and statutory law;
2. The inability or unwillingness of responsible government departments to see the linkages between related pieces of legislation and tenure security;
3. The inability or unwillingness of responsible government departments to ensure the implementation of key tenure security legislation and policies in the face of conflicting claims from other sectors;
4. The movement towards top-down centralisation of decision-making through a range of relevant legislation and policies.

It is our assessment that the Constitution, current legislative protection, the recognition of customary law and the (binding) international law context all provide the mechanisms necessary to secure tenure in the face of insensitive legislation that seek to facilitate development on land without recognising the vulnerability of those impacted. However, the implementation of these mechanisms remains dismal – and tragically leads to the continued dispossession of communities in South Africa.

**RECOMMENDATIONS**

1. Strengthen local decision making of affected communities by developing regulations to the IPILRA that clearly provides that the legislation's consent requirement is not satisfied by a resolution from the Chief or his traditional council, but requires the identification of the affected rights holders and the consent of the majority of them;

2. Explicitly incorporate these consent provisions of IPILRA in all other legislation that empowers decision to be taken that could impact upon the tenure rights of communities, such as the MPRDA, the traditional leadership legislation and the legislation regulation access to marine resources.

3. Empower relevant government officials with a proper understanding of the status and recognition of customary law and how that should be implemented. Ensure that legislation that requires power to be exercised and decisions taken “in terms of customary law” is preceded with a proper assessment of what the content of the applicable customary law is.

4. The Social and Labour Plan provided for by the MPRDA is similar to the Indigenisation policy of Zimbabwe (see discussion below) in that these measures are deemed to provide for local community benefit and therefore make the implementation of FPIC unnecessary. As was recommended in the case of Zimbabwe, communities and civil society should endeavour to find good evidence, both experiential and data-based, that indicate empirically how these measures are not benefitting affected communities and therefore do not make the implementation of FPIC unnecessary.
In this Chapter we review the main Zambian pieces of legislation relevant to the impact of extractive projects, in the mining industry in particular, on affected communities and the opportunities for asserting the principle of FPIC. After a brief overview of the history of extractives in this, an old mining country, we look mainly at the Zambian Constitution, the regulatory frameworks relevant to communal and customary land, mining, the environment and, finally, resettlement. We then provide a brief assessment of the implementation of these frameworks, drawing on the interviews conducted for this study. In summary, we find that Zambia’s environmental laws (widely understood as the main opportunity for community participation in natural resource decision making) are far less protective of communities’ right to consent than Zambia’s mining laws. Written consent of Chiefs is required under the Mines and Minerals Act before a mining concession can be granted over customary lands. Read together with Zambia’s land laws, we argue that there are untapped opportunities for individually affected rights holders to assert their rights to consent in addition to that of the Chief where it can be shown to form part of local customary laws.

BACKGROUND

Zambia has a mature mining industry. Despite developments in the recent decade that saw the government introduce a more beneficial tax regime on the mining industry, Zambia continues to suffer from underdevelopment. Zambia continues to allow foreign investors to transfer their profits abroad without any ceiling or restrictions. This has a major impact on earned state revenues. Copper mining makes up 80% of export earnings, 86% of Foreign Direct Investment, more than 25% of government revenue and more than 12% of Gross Domestic Product (nearly 6% from mining taxes). These figures are exceptionally high, even for a mineral-driven country. Agricultural investment in Zambia is also showing a significant increase, with major implications for communal land acquisition.

The World Justice Project ranked Zambia 81st out of 113 countries globally in terms of their Rule of Law indicators. Amongst the 28 lower middle-income countries, Zambia places 13. While the country scores relatively high on enforcing civil justice, due process of law is at a low 0.35 points and corruption in the executive and the legislature even worse. The Oakland Institute notes that there is “a widely held perception that corruption is rampant at high levels (particularly the Minister of Land) and that many government officials cannot separate their business dealings from government responsibilities.” Access to information and to mechanisms to hold government to account remains problematic. Perhaps most telling, the index gives Zambia a score of 0.44 for “no expropriation without adequate compensation.”

199 Some of the big players in the Zambian mining industry currently include China Non-ferrous Mining Corporation Ltd, First Quantum Minerals, Gemfields, Vale, African Rainbow Minerals, Barrick Gold Corporation, Vedanta Resources PLC and Glencore Xstrata.


204 Oakland Institute n 200 above at p 6.
LENGAL ANALYSIS

Zambia is a constitutional democracy and a common law country. The current Constitution was adopted in 2016. Several respondents, including from government, referred to the problematic circumstances in which the constitutional text was rushed through in 2016 after years of wrangling. Many respondents expressed regrets about the outcome of the protracted constitution-making process given in particular the extensive good faith participation of civil society. They point to some inconsistencies in the final text indicating to what extent the final negotiations lacked careful thought.

Civil society representatives interviewed for this study held out specific hope that the constitutional amendments would make explicit reference to land and its protection, but were disappointed. Most notably, the specific protections for customary tenure that were proposed, including mandating legislation that would secure customary land, are absent from the final

205 In January that year, the President assented to an amendment that excluded the new Bill of Rights. In August 2016, a referendum was called on the passing of the amended Bill of Rights. Although more than 70% of the voters approved the amendment, the election turnout was too low to affect the amendment.

206 Given these problems with the final text, a number of respondents, notably the Zambia Law Development Commission, expressed optimism that yet another amendment will be negotiated in the near future.
text. Read with Article 166, which entrenches the capacity of chiefs to, “hold property in trust for its subjects” and, “enjoy privileges and benefits bestowed on the office of chief by or under culture, custom and tradition and attached to the office of chief”, the tenure security of households on customary land remain seriously precarious.207

Zambia is a monist country and domestication is thus required before the provisions of an international law instrument are binding. But the Ratification of International Agreements Act 34 of 2016 provides that where a treaty has been ratified, the Minister responsible shall initiate a domestication process. This legislative development creates significant opportunities for civil society to enforce the progressive provisions of international treaties ratified by Zambia.

The anecdotal experiences of persons interviewed who have sought to pursue human rights litigation in Zambia reveal various serious challenges: legal services are extremely expensive in Zambia, with very few lawyers even considering pro bono work. In addition, we were told that lawyers are weary of taking the government to court due to intimidation and, allegedly, undue influence. While they have less difficulty in pursuing cases against companies, this often proves particularly difficult given the significant inequality in resources between the parties.

Section 255 of the Constitution, entitled ‘Environment and Natural Resources’ relates to the benefits accruing from natural resources. It holds that these benefits must be “shared equitably amongst the people of Zambia”. While that may imply that no one grouping – such as directly affected communities – are entitled to greater benefit than anyone else, the interpretation of this section will probably hinge on the interpretation of ‘equitably’. In the newly included Part II of the Constitution entitled National Values, Principles and Economic Policies, the focus is entirely on promoting and protecting investment.

The Zambian legal system recognises both statute and customary law. Like in all the other countries, customary law is the applicable law inside the boundaries of rural communities. The problem is to assert those internal rights against the outside world.

**Land laws**

The Lands Act of 1995 was the result of a process financially supported by the World Bank and the IMF. With the passing of this Act, land became a commodity that could be bought and sold freely, which it had not been before.208 All land vests in the President. With regards to customary tenure, the Act requires that such land may not be alienated by the President “without taking into consideration the local customary law on land tenure”,209 without consulting the Chief and the local authority;210 and without “consulting any other person or body whose interest might be affected”.211 These requirements may be anticipated by the applicant for the leasehold title (for example, the investor) who may seek the “prior approval” of the Chief and the local authority themselves.212 The same requirements must apply when the approval is directly sought by the investors.

207 Respondents from the Zambia Law Development Commission (“ZLDC”) reported that a bill designed to protect customary tenure was drafted by the Ministry of Lands under the watch of the previous President. At the beginning of 2017, the new President announced that it was one of two bills that would be prioritized (and possibly redrafted) this year. However, it appears that the Minister of Lands, under new leadership, is obstructing the process. The ZLDC indicated that they were no longer able to work with the Ministry of Lands towards developing legislation as they had done under the previous administration.

208 Oakland Institute n 200 above at p 12.

209 Section 3(4)(a).

210 Section 3(4)(b).

211 The status of customary tenure is also entrenched. Section 7 provides that “The rights and privileges of any person to hold land under customary tenure shall be recognized and any such holding under the customary law applicable to the area in which a person has settled on intends to settle shall not be construed as an infringement of any provision of this Act or any other law except for a right or obligation which may arise under any other law.”

212 Section 3(4)(d).
On the surface, this appears to provide for no consent requirement, but mere consultation. However, the section provides important openings for community members to assert the consent principle: since the decision maker must take the local customary law into account, that means that customary tenure rights must be identified and the procedural requirements for interfering with those rights in terms of customary law, followed. This recognition of customary tenure is confirmed in section 7 of the Act.

While this provision requiring the President to consult with any other person whose interest might be affected is often read to mean persons affected other than those persons under the jurisdiction of the Chief, such an interpretation could only provide proper recognition of customary tenure rights if the Chief’s affected community members are in any event consulted (and their consent sought) under section 3(4)(a). Such an interpretation which ensures the consultation and consent of affected customary tenure rights holders must be promoted for section 2 of the Act, which gives the Chief the power to agree or refuse an application for the conversion of a customary land holding to title.

The Lands (Customary Tenure)(Conversion) Regulations under the Act provide that any person who wants to convert their customary tenure rights to leasehold may do so with the consent of the Chief. Any District Council may also, “in consultation with the Chief” apply to the Commissioner of Lands for the conversion of a piece of customary land to leasehold. Before doing so, the Council must do a rights enquiry into any family or communal rights in the land to be converted.

It is proposed that every provision in the Act and the Regulations that require the consent of or consultation with the Chief should be regarded as the consent of or consultation with the community, and this meaning be read into the Act. The Chief may still be the one that communicates the decision on behalf of his or her people, but after he/she has ascertained the view of the people through customary law processes. The Chief, in customary law, reflects the view of the community and in particular those most directly affected. These requirements for approvals and considerations apply equally to disposals involving transfer of title or disposals involving long leases and it is proposed that the same purposive reading be given to such provisions.

It is worth noting that some confusion is created by s 64 of the 2006 Zambia Development Agency Act. The ZDA was created through this Act to be a one-stop shop for facilitating private investment, privatize state assets, and assist investors through various government processes. Section 64 of its Act requires the ZDA to assist an investor in identifying “suitable land for investment” and applying to the responsible authorities for the land “in accordance with established procedures” (rather than the applicable legal framework). Section 64(2) says that:

Where an application is made under [this section], and the land has been demarcated for the purpose applied for and such land has not been allocated to any other person, body or authority, the authority responsible for the allocation of land shall, upon payment by the investor of the prescribed fees, charges or rates, allocate the land to the investor [...][our emphasis].

This wording implies no discretion on the part of the responsible authority, a provision that appears to be in conflict with the clear consent requirement in the Lands Act as discussed.

Zambia’s new Draft Land Policy (2017) does make explicit reference to the requirement of free, prior and informed consent in relation to mining (see section 65.8). The draft policy recognizes weaknesses in current legislation and practice around land management, and acknowledges some of the legacy issues related to colonialism and gender discrimination that the new policy seeks to combat. However, there are weaknesses in how FPIC is framed that will make implementation challenging.

---

213 A customary law provision that the Chief cannot speak alone on behalf of the community cannot be regarded as in conflict with the Act. The Chief may still be the one that communicates the decision on behalf of his or her people, but after he/she has ascertained the view of the people through customary law processes. The Chief is the mouthpiece of the people.


Mining laws

The Mines and Minerals Development Act 11 of 2015 came into being in August that year. Mineral rights vest in the President on behalf of the Zambian nation. The 2015 Act includes in its list of principles, that the “development of local communities in areas surrounding the mining area [shall be] based on prioritization of community needs, health and safety”. The Act itself requires in terms that the holder of a mining or prospecting license obtain the “written consent” of the owner of legal occupier of the land in question or, in the case of customary tenure, the consent of the chief and the local authority. The interpretation of chiefly consent should follow the argument above.

This provision also appeared in the 2008 Act, but none of the civil society respondents mentioned it as an avenue for asserting the right to free, prior and informed consent on behalf of communities. A representative from the Ministry of Mines claimed that “citizens have been able to protect their rights with this section”, but he could give no example and we could find no proof that this section has ever been used effectively by customary rights holders (or any tenure rights holders) to either resist mining on their land or use their right to grant consent to negotiate fair and equitable compensation.

Section 57 of the Act, dealing with compensation, requires that a holder of a mining right shall, “on demand being made by the owner or lawful occupier of any land subject to the mining right”, promptly pay “fair and reasonable compensation”. Compensation is required for any disturbance of the rights of the owner and occupier. It makes no mention of a Chief. In our view, this section makes it clear that the consent of individually affected rights holders must be sought in addition to that of the chief, where applicable.

This section backs up the consent requirements, and would suggest that the rate of compensation would be part of the negotiations in seeking consent from the affected rights holders. Given that the Act contemplates compensation to be calculated using the market value of the land as a starting point, the leverage provided by the right to withhold consent will be crucial for affected customary rights holders to negotiate decent compensation where they are inclined to agree to the development. Market value is an inappropriate yardstick for the value of customary land for a variety of reasons. Its communal nature and location (likely in underdeveloped and underserviced rural areas) means the market value is largely dismally low. In addition, the market value of land does not being to reflect the true value that land holds for members of customary communities.

The very problematic subsection 4 of the Act cannot be ignored. It provides that “a demand made in terms of this section shall not entitle the owner or lawful occupier to prevent or hinder the exercise by the holder of rights under the mining right pending the determination of compensation to be paid”. That would suggest that compensation is negotiated after consent is granted. We would argue that a reasonable interpretation would be that compensation for reasonably anticipated interference should be part of the consent requirement (and that lawful occupiers should withhold their consent pending agreement on the topic), but that further unanticipated interference and damage that would require additional compensation shall be negotiated at a later stage, and without preventing the further exercise of mining rights.

Notably, the mining rights holder must exercise the right “reasonably”, so as not to “prejudice the interest of any owner or occupier of the land over which those rights extend”. Indeed, subject to the terms of the relevant access agreement, the

---

216 In March 2017, representatives of the Ministry of Mines indicated that further subsidiary pieces of legislation that must come into effect to “give life to the new code” are yet to be promulgated.

217 Section 4.

218 Section 52.

219 S107 of the Act even makes it a criminal offence to hinder or delay the operations of a holder of a mining right.

220 It is not entirely clear how these provisions are understood in relation to the Resettlement Action Plans (“RAPs”) to be discussed below.

221 Section 5, Mines and Minerals Development Act 2015.
owner or lawful occupier of the land affected “shall retain the right to use and access water and to graze stock upon, or to cultivate the surface of the land in so far as such use, grazing or cultivation does not interfere with the proper working in the area for exploration”.

The right to consent in the Act is not absolute: it may not be “unreasonably withheld”. Section 52(3) holds that where consent is unreasonably withheld, the Director of Mining Cadaster may arrange arbitration. The prohibition of unreasonably withholding consent has become more common in mining-related regulatory frameworks, but it is not clear what factors are taken into account in determining whether the withholding is unreasonable and should likely be developed through jurisprudence.

Environmental laws

A commonly held belief in Zambia, like in many Southern African countries, is that the regulatory framework relating to the environment is the only avenue for communities or members of communities to assert their right to consultation or even consent. While this framework is, on paper, far less protective of communities’ right to consent than the land and minerals frameworks, it is important to understand the opportunities under environmental regulation. This is so in particular because the Zambian Environmental Management Agency (“ZEMA”) created by the 2011 Environmental Management Act appears to be the key Agency attempting to facilitate community consultation.

Anyone who intends to undertake a project that may have an effect on the environment must get the written approval of ZEMA to do so. It is a prerequisite for granting a mining right. The Regulations distinguish between ‘project briefs’ and EIAs. Both are required for mining operations. Both the project brief and the EIA must include: the expected socio-economic impact of the project and the number of people that the project will resettle or employ, directly, during construction and operation.

The practice that has developed in Zambia is for applicants to develop and submit Resettlement Action Plans (RAPs). The brief must be accepted if it indicates that there will not be severe environmental impacts or if it discloses sufficient mitigation measures to make the anticipated impacts acceptable.

If the brief indicates that a significant impact upon the environment is anticipated, an EIA is required. It appears that this provision is creating a loophole. Civil society respondents informed us of mining companies that allegedly fraudulently furnish briefs indicating no environmental impacts (in particular no impacts on people’s land rights) who are then not required to produce EIAs.

Opportunities for consultation arise at the following stages of the EIA process:

- The development of the terms of reference for the process;

---

222 Section 54, Mines and Minerals Development Act 2015.
223 Section 55, Mines and Minerals Development Act 2015.
224 We were advised by civil society respondents that ZEMA had recently hosted a meeting to seek input on revised regulations to the Act relating to EIAs. CBNRM made submissions arguing for the explicit inclusion of Free, Prior and Informed Consent in new regulations. CBNRM was in the process of developing examples of how developers could prove that FPIC was effectively sought. They have argued for independent CSOs and NGOs to participate in assessments of due process – and if due process was not followed, it should be punishable. Independent assessors should be for the cost of the developer.
225 Section 4 (g) Environmental Impact Assessment Regulations 28 of 1997.
226 Ibid at s 6(2).
227 Ibid at s 8(2). The developer is required “to organize a public consultation process, involving government agencies, local authorities, non-governmental and community-based organisations and interested and affected parties, to help determine the scope of the work to be done”.

---
Resettlement laws and policies

As part of the EIA process, developers are required to ascertain the need for resettling persons and develop Resettlement Action Plans. The 2015 National Resettlement Policy requires Resettlement Action Plans as “the document in which a developer/investor or other responsible entity specifies the procedures that it will follow and the actions that it will take to mitigate adverse effects, compensate losses, and provide development benefits to persons and communities affected by an investment project”.

One of the challenges to resettlement identified by the policy relates to disputes between the government, chiefs and communities over land “which are converted from customary to leasehold tenure.” Such disputes “have stalled the development of some resettlement schemes.”

The Policy provides that involuntary resettlement should be avoided where feasible, but certainly do not discount it. However, given that the Policy covers resettlement in the broadest sense, including that caused by conflict, disasters and disputes, one cannot read too much into the reference to involuntary resettlement. The danger is that the conflation of all forms of resettlement weakens the rights of communities to refuse resettlement when it is indeed avoidable.

The scant reference in the Policy to the rights of communities and their members resettled due to development does little to alleviate this danger. One of the only references in the document to the rights of resettled communities to participate in the process is a requirement for the Ministry of Chiefs and Traditional Affairs – and not the Ministry of Lands – to “ensure that the consultative process for any investment includes local community representatives”. This may be problematic, as putting the Ministry of Chiefs in charge of ensuring representative consultation processes may presume that the Chiefs are the only and best legitimate representatives of communities and affected rights holders. As was echoed by many a respondent, even from government, this is very often not the case. This concern is not assisted by the Policy placing a further duty upon the Ministry of Chiefs to “ensure that guidelines on payments of royalties or gifts to traditional leaders arising from investments are formulated”.

The primary responsibility for ensuring proper community participation in terms of the Policy appears to rest with the Zambia Development Agency (“ZDA”). The ZDA is responsible for ensuring that the investor, “in consultation with the relevant government departments, engages with affected communities through a process of informed consultation and participation.” [our emphasis]

---

228 Ibid at s 10 requires the developer to “take all measures necessary to seek the views of the people in the community which will be affected by the project” prior to submitting the Statement. In doing so, the developer must “publicise the intended project, its effects and benefits, in the mass media, in a language understood by the community, for a period of not less than fifteen days and subsequently at regular intervals throughout the process”, whereafter it must hold meetings with the affected community “in order to present information on the project and obtain the views of those consulted”.

229 Regulations (n 225 above) section 17.


231 Ibid at p 15

232 Ibid at p 35.

233 Ibid at p 36.
With regards to compensation, the Policy provides that compensation should be paid to persons that are physically and/or economically displaced before commencement of the development project causing such displacement.\textsuperscript{234} This would support our interpretation of the Mining code that requires compensation to be negotiated as part of the consent process prior to the development commencing.

While the resettlement process is overseen by the Department of Resettlement, the Resettlement Agreement reached between the developer and those to be displaced based on the RAP, must be approved by the Attorney General’s office. This requirement stems from Section 177(6) of the Constitution which provides that the AG’s office must give advice on any agreement to which the Government is a party. This is a little known function of the AG’s office and one that may be explored for useful entry points for input into agreements affecting communities.

**IMPLEMENTATION CHALLENGES**

1. **Lack of capacity**

There is a general lack of capacity to enforce the provisions described above. ZEMA, for example, is housed in a tiny office in Lusaka with a staff that appeared to number fewer than 10 people. ZEMA is in charge of approving all EIAs and RAPs and ensuring on-going compliance of projects. This appears to be simply impossible. The same can be said of the two persons in the Office of the Attorney-General tasked with vetting all agreements that has the State as a party. Given that the President is the custodian of all land, the State is almost always a party to an agreement involving communal land. They are perceived by respondents interviewed to be “overwhelmed” and as such reduced to “ticking of boxes” ensuring that their oversight function has little impact and is almost entirely unknown.

2. **Conflation of consent and consultation requirements**

Most civil society respondents identified the EIA process as the only avenue for community consultation on development projects. This is problematic given that the standard of consent required in terms of both the mining and communal land codes are far higher than the mere seeking of views towards mitigation envisioned by the EIA process. Conflating the two has had the effect of the consent requirements in the other pieces of legislation becoming obsolete – and invisible to those attempting to assert their rights.

3. **Traditional leaders as representatives of communities and owners of communal land**

All respondents interviewed indicated that the chiefs posed problems in ensuring that their community members, and in particular affected rights holders, are consulted – or provide their consent where applicable. While the representative of the Ministry of Mines insisted that they tried to ensure that affected rights holders are reached in addition to the chief, he admitted that the chiefs were playing a dangerous gatekeeping role.

In an interview with CBNRM, representatives related their experience in working on the Lower Zambezi case described above. Early on in the process, NGOs travelled to the area to have meetings with communities that will be affected and attempted expressly to emulate the UNEP FPIC framework to guide the meetings. However, at the time the relevant chiefs had already made up their minds in favour of the project and the NGOs thus received severe resistance, including threats to be reported to authorities.

\textsuperscript{234} Ibid at p 26.
This influence of chiefs extended even further, they explained. At meetings with affected communities held by developers in terms of the EIA requirements, community members are generally too intimidated to voice their concerns and indeed their rejection of projects in the presence of the traditional leaders. As a result, the traditional leaders dominate the meetings and the consultations are not meaningful at all.

4. The (mis)recognition of customary law

A number of respondents bemoaned the fact that, while customary law is recognized as a source of law by the Zambian Constitution and is referenced in legislation, it receives scant attention beyond the recognition of traditional leaders. A respondent from the Zambian Law Development Commission indicated that the only jurisprudential developments in customary law happen in the field of private law and not customary law related to land or governance issues. As a result, key aspects of the land and minerals statutory frameworks identified above are not being implemented. In addition, customary law is the single source of law that may counter the narrative of the Chief as authoritarian leader and owner of all land.

Ascertaining the customary law is not only important for purposes of identifying the affected rights holders and the nature of their rights over the land. It is equally important for ascertaining the procedural and other substantive rights arising from customary law, for example the right to be requested permission to enter one’s land. This right, typical of customary law systems, can provide the basis for consent as a principle. We could find no evidence of investigations into the content of the applicable customary law or a customary rights enquiry taking place in the implementation of the Lands Act or any other relevant piece of legislation. This is potentially a critical point of intervention.

5. Public interest litigation

Respondents indicated that public interest litigation under the Zambian Constitution has been dominated by political cases. There is a need for cases concerning customary property law, land and development to be taken to the highest courts to develop progressive interpretations of the legislative framework. But given the lacklustre implementation of existing consent provisions such as those found in the Minerals and the Lands Act and the neglect of customary law, developing the legal framework need not be the first goal. Using the courts for proper enforcement would appear to be an important first step.235

Challenges with such litigation identified by respondents included:

- The cost of lawyers in Zambia
- The fear of litigating against the government in particular when investments are involved
- A lack of experience in constitutional litigation
- A lack of donor support for sustained public interest litigation.

Despite these challenges, there is great enthusiasm amongst civil society actors for the potential of public interest litigation at the newly established Constitutional Court. This may be a very significant new frontier for the establishment of FPIC in the context of development. However, the court system remains largely out of reach for rural people in Zambia. Suggestions were made for effective complaints mechanisms to be created at a local and district level. This would make sense given the duties, under the customary tenure regulations, of local council to report on the applicable customary law and rights.

235 When asked about the consent provisions in the Minerals Act, a respondent from the Zambian Law Development Commission expressed doubt that the officials implementing the Act were even aware of these provisions given that it was, to their knowledge, never being implemented. Respondents from the Ministry insisted that it was being implemented. A well-planned legal challenge to a development project based on the non-implementation of the consent principles in the Act may go a long way in ensuring that the provision becomes more effective.
Bias towards investment

While the government respondents interviewed insisted that they were not biased towards investment at the expense of communities, some responses contradicted this. When asked whether he understood communities to have the right to say no to development projects on their land, the Director of Resettlement answered in the affirmative, but said that it was the government’s responsibility to make the community see that it is in their interest to say yes.

RECOMMENDATIONS

- It is imperative that the requirements for the President or an interested party to convert customary land into leasehold or to alienate such land in terms of the Lands Act (and the similar consent provisions in the Mines and Minerals Act) be interpreted to:
  
  (a) Require the consent of the community or, at a minimum, of the directly affected tenure rights holders through the Chief in terms of customary law (rather than the consent of the Chief);
  
  (b) That the requirement to take customary law into account include completing a land rights enquiry into all the holders of customary rights to use, occupy or access any part of the land in question; an enquiry into the proper decision making procedures in terms of the applicable customary law; that the customary law of tenure and of decision making be developed, where necessary, to fall in line with the requirement of substantive gender equality that emanates from Zambia’s international law obligations, if not at present from the Constitution.

- Clarify the role of the ZDA in the identification of and allocation of land to developers. Such clarification must ensure that the land rights of affected communities are protected at least to the extent provided for in the Communal Lands Act.

- Civil society, government and company respondents all admitted that many Chiefs do not engage with outsiders in the best interest of their communities. Yet, government and companies continue to insist that a mere agreement with the Chief as an individual is sufficient to tick the box of community consultation or consent because it is convenient to do so. It is strongly recommended that the role of the Chief be clarified in terms of the principles of customary law (and indeed in line with the imperative to protect the tenure of members of rural communities) as that of the conveyor of the views of the community. Such clarification should come from government.

- Companies should not accept the say so of the Chief that he has successfully sought the free, prior and informed consent of the affected rights holders under his jurisdiction without a report indicating what process was followed. Where necessary, the company should provide resources for an independent and objective report of the community processes to be produced as proof that the customary law of the community concerned was complied with.

- The company concerned must present directly affected members of communities with the draft versions of RAPs in a language that they can understand and consider. While the Chief must also receive copies of the RAP, directly affected community members must receive their own copies. The same applies to the finalized RAPs. Community members must have access to the promises made and processes proposed by the developer when applying for the necessary authorisations to enable communities to monitor implementation and compliance for themselves.

- It would appear that Zambia is ripe with opportunity for strategic and constitutional litigation with lawyers and activists chomping at the bit to test the new Zambian Constitutional Court. What is lacking is funding. Government and companies should be able to contribute to a legal aid fund for communities for these purposes, with the considered assistance of international funding.
ZIMBABWE

In this Chapter we review the main pieces of legislation relevant to the impact of extractive projects, in the mining industry in particular, on affected communities and the opportunities for asserting the principle of FPIC. After a brief overview of the history of extractives in this, an old mining country, we look mainly at the Zimbabwean Constitution, the Mines and Minerals Act, the legal framework relevant to indigenization in Zimbabwe, the environmental regime and the statutory regulation of communal and/or customary land. We then provide a brief assessment of the implementation of these frameworks, based largely on the interviews conducted for this study before highlighting key opportunities specific to the Zimbabwean context.

BACKGROUND

Zimbabwe has a mining history that spans hundreds of years. Pre-colonially, gold, silver, tin, copper and iron were mined. But the arrival of the colonialists at the end of the nineteenth century changed not only the ownership structure of the mining industry significantly, but entrenched the belief that indigenous forms of property and land rights were undeserving of recognition and protection and could therefore be ignored at will in the interest of expanding the colonial and minerals expansion project. Most recently, the impact of the mineral wealth of Zimbabwe on its rural communities have been described thus:

Extractive activities are not contributing to accomplishing the objective of rooting out poverty among the communities in which they take place. Instead, mining activities have brought about significant suffering to these communities. Besides the danger that mineral wealth has brought to communities, it is shrouded with secrecy and used as a political weapon, including showering the rural and pre-rural communities with empty promises by the government, in order to amass support for election campaigns.

In 1983, after independence, the Zimbabwean Mining Development Corporation (“ZMDC”) was created with a mandate to support local individuals and co-operatives in the mining industry. Critics say that they have not lived up to this mandate, however, and ZMDC is currently doing little exploration of its own. As a result, mining has remained largely foreign-owned.

While around 40 of the estimated 60 available minerals in Zimbabwe are being exploited by everyone from artisanal to large-scale mines, a large number of potential and unexploited resources remain. Despite this, mining is regarded as the key sector in the Zimbabwean economy. Mining was estimated to have contributed 9% to the GDP directly in 2015, creating 35 000 direct and 70 000 indirect jobs. An estimated 65% of private sector investment went to the mining sector.

This has not strengthened the government’s ability to provide basic services to its people. In an extraordinary statistic from the most recent Afrobarometer survey of Zimbabwe, 85% of the more than 1500 people surveyed in 2017 reported that

237 Mutlokwa, Hoitsimolimo 2014 Zimbabwe’s approach to community participation and indigenization in extractive activities: problems and prospects North-West University, South Africa p 1-2.
238 See also Mlambo n 236 above.
239 Mutlokwa n 237 above at p 2.
240 Mlambo n 236 above at p 12.
241 Mlambo n 236 above at pp 38-39.
they made no attempt or had no opportunity in the 12 months leading up to the survey to get services from government, including water, sanitation or electricity. This situation undoubtedly contributes to the vulnerability of rural communities when approached by developers—swopping their land and resources become the singular opportunity to access services that should be provided to citizens as of right.

**LEGAL ANALYSIS**

The Constitution of Zimbabwe adopted in 2013 is the supreme law of the country. It binds parliament as the institution responsible for the development and adoption of legislation. Zimbabwe also continues to recognize the common law as developed by jurisprudence as a source of law, but makes it explicitly subject to the spirit and objectives of the Constitution. The common law in Zimbabwe, like in South Africa, is largely based on Roman-Dutch and English law.

The Constitution protects both civil-political and socio-economic rights, although the latter is yet to be tested before the Constitutional Court. Notably, state institutions must endeavour to involve affected people in the formulation and implementation of development plans and to “protect and enhance the right of the people, particularly women, to equal opportunities in development”. Section 13(4) provides that “the State must ensure that local communities benefit from the resources in their areas”. The Constitution enjoins the State to domesticate international conventions, treaties and agreements to which Zimbabwe is a party.

Chapter 4 requires both the State and all persons to respect, protect, promote and fulfil the rights and freedoms it entrenches—creating both vertical and horizontal human rights obligations. Borrowing from the South African Constitution, s47 ensures that the Bill of Rights “does not preclude the existence of other rights and freedoms that may be recognized or conferred by law, to the extent that they are consistent with this Constitution”. In the similar provision in the South African Constitution, explicit reference is made to rights conferred by customary law. While this reference is not included in the Zimbabwean Constitution, the definition of ‘law’ in s 332 explicitly includes customary law in its definition. The Constitution thus recognizes rights, including property and procedural rights, conferred by customary law.

The Constitution provides for the establishment of the Zimbabwe Land Commission in Section 296(1). The functions of the Zimbabwe Land Commission include to ensure transparency, fairness, and accountability in land administration; conduct periodic land audits; make recommendations to government on equitable access to and occupation of agricultural land, eliminate of discrimination (particularly gender discrimination); advise government on systems of land tenure; and investigate and determine complaints and disputes regarding the supervision, administration, and allocation of agricultural land. The proposed Land Commission Bill of 2016 seeks the repeal of the Agricultural Land Settlement Act (1970), the Rural Land...
Act (1963)\textsuperscript{249} and to amend the \textit{Land Acquisition Act} (1992).\textsuperscript{250} The establishment of the Land Commission is critical for promoting equitable access to land for local communities, but the proposed Bill does not explicitly mention Free, Prior and Informed Consent.

While the adoption of the Constitution was undoubtedly a highlight, the State has been slow in adapting legislation to be brought in line with it and passing new legislation that would give effect to the rights and freedoms now enshrined in the Constitution.\textsuperscript{251} The Zimbabwe Human Rights Forum (ZHRF) reports that transparency\textsuperscript{252} continues to be a particular problem.\textsuperscript{253}

Perhaps most worrying, however, is what the ZHRF has described as “a culture of lawlessness termed “jambanja.”\textsuperscript{254} This trend has been on the increase, having “a profound effect on the lives of ordinary citizens”. This sentiment was raised by a number of respondents in this study, most notably by the CEO of one of the biggest mining companies operating in Zimbabwe, who told the authors: “There is not much point in talking about the law here. The law doesn’t really play a role in how things are done”.

\textbf{Land laws}

Collective rural tenure is regulated by the \textit{Communal Lands Act} of 1983. The land vests in the President who permits occupation and use of the land in terms of the Act. However, the Act does recognize occupation and use rights arising from customary law - at least in so far as the right arose before the enactment of the Act. In as far as the Communal Land Act purports to extinguish customary rights to land that have arisen after the Act came into force, it would arguably no longer be constitutionally sound to do so. At a minimum, communities and community members should be encouraged to assert their customary rights and the right to consent to any infringement on those rights.

A plain reading of the Act suggests that it aims to \textit{regulate} customary law rather than extinguish it with multiple references to consideration to be given to the applicable customary law. The recognition, however, falls short of recognizing customary rights as ownership and falls back into the notion of the District Council taking decisions on behalf of the customary rights holders. As with the Mining and Minerals Act, communities should be encouraged to claim their rights as customary owners, and, where necessary, challenge the constitutionality of discriminating between customary and common law owners.

Be that as it may, the Act’s limited recognition of customary law provides a crucial legal weapon in the arsenal of rural communities: it provides the opportunity of demanding decision-making processes to be done in terms of customary law, and demands that the time be afforded for the deep consultative processes aimed at seeking consensus that characterize customary law, be adhered to. In addition, it militates against the fiction often peddled by companies that customary land are not titled and therefore not owned, and require no compensation (above and beyond the use rights on the land).

The Minister may set communal land aside for “any purpose whatsoever [..] which he considers in the interests of inhabitants of the area concerned or in the public interest or which he considers will promote the development of communal land generally or of the area concerned”. While this discretion is incredibly wide, the Minister is required to follow a number of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{249} Chapter 20: 18 \textit{Rural Land Act} (1963).
\item \textsuperscript{250} Chapter 20: 10 \textit{Land Acquisition Act} (1992).
\item \textsuperscript{252} Ibid at p 3.
\item \textsuperscript{253} Ibid.
\item \textsuperscript{254} Ibid.
\end{itemize}
\end{footnotesize
procedural steps in order to give effect to such a decision. It is not clear whether this discretion would override the consent requirements in the mining legislation, as it has not been tested in court. In our opinion, the standards and thresholds for statutory extinguishment of property rights have been set at a high bar in commonwealth jurisdictions elsewhere in the world\(^{255}\) in neighbouring South Africa\(^{256}\) and by the African Commission in its interpretation of the African Charter.\(^{257}\) The Minister’s discretion should therefore not lightly be presumed to override the customary property rights and consent rights created in customary law and the mining legislation.

The Act thus does not even provide for consultation, let alone consent, prior to the Minister deciding to relocate persons for any purpose whatsoever. An alternative piece of land is regarded as adequate compensation – not taking into account the full extent of what persons loose when they are forced to relocate from traditionally occupied land. The constitutionality of this scheme after the 2013 Constitution must be in doubt. However, it is difficult to assess how often this section is used to relocate communities by force or with development undertakings – and in particular in compliance with the procedural requirements of this section.

**Mining laws**

It appears that Zimbabwe is currently operating within something of a policy vacuum in the minerals sector.\(^{258}\) The Mines and Minerals Act still on the books was promulgated in 1961. A new minerals policy that is supposed to form the basis of legislative reform has been on the cards since 2013, while an amendment to the Mines and Minerals Act 1961 has been in parliament for years.\(^{259}\) The situation is not likely to change soon.

The stated purpose of the existing Mines and Minerals Act is to facilitate the maximum exploration and extraction of minerals. While the Act provides that all state-, communal and titled land is open to prospecting (s26), this is subject to the written consent of the owner or occupier of the portion of land,\(^{260}\) or of the President in the case of State land (s31). Similarly, anyone occupying a portion of communal land that does not exceed 100 hectares in extent must consent in writing to prospect on that land.\(^{261}\)

In the case of communal land occupied by a village, the written consent of the rural district council must be sought.\(^{262}\) This provision, based on the racially discriminatory premise of the 1960s that communal tenure was not a form of ownership and that the State should make decisions over the land on behalf of the occupants, must be inconsistent with the Zimbabwean Constitution that now recognizes both equality and the property rights that arise from customary law.

Section 188 of the Mines and Minerals Act reinforces this outdated prejudice, providing that any payment of compensation to landowners where a mining location is established is, in the case of communal land, negotiated with and paid to the Rural District Council who acts as the landowner.

Certain Zimbabwean commentators have identified these sections as key to the problems facing affected communities.

---

255 In particular, in Australia, Canada and New Zealand.

256 In Alexkor, n100 above.

257 See Centre for Minority Rights Development (Kenya) n 45 above.

258 This lack of a contemporary, comprehensive and cohesive piece of mining legislation has been described as Zimbabwe’s greatest challenge in ensuring community benefits. Mutloka n 237 at p 5.

259 A parliamentary insider indicated that the amendment had little hope of making it past the Parliamentary Committee on Mines and Energy.

260 This applies to a radius of 450 meters of the site of a (existing or intended) principal homestead, on any land under cultivation (of within 15 meters thereof).

261 Section 31(1)(g)(ii), Mines and Minerals Act 1961.

These sections deny local communities occupying communal land their tenure rights over the land they occupy, in particular their right to provide or withhold consent, and limits their recognition as an important stakeholder in decisions related to projects on their land. In practice, we heard that the mining companies in most cases do not engage and negotiate with the communities with regards to issues of relocation and fair and adequate compensation. This situation has allegedly seen some local communities being displaced without being given any compensation whatsoever for the properties they have erected on the land they occupied.

Section 31 of the Act that requires the written consent of lawful occupiers who will be affected must be interpreted to include the occupiers of communal land. In particular under the Zimbabwean Constitution, there can be no justification for treating common law and customary law land rights holders differently. If this interpretation is wrong, then the Act must be unconstitutional. A constitutional and purposive interpretation must be preferred.

While government officials and parliamentarians interviewed readily agreed with our interpretation and insisted that the consent of affected occupiers is sought, the website of the Ministry of Mines, insists that only notice should be given if one intends to prospect. Notice is not the same as seeking consent, the website advises:

"This [giving notice] has been confused with seeking permission to prospect. The Prospecting License holder is merely notifying the landowner that he intends to prospect within his farm. The farmer cannot refuse prospecting on his land that is open to prospecting and pegging as the mineral rights are vested in the State. It simply means that the farmer does not own what is underneath therefore cannot give permission."

This, we submit, is a misleading description of a process that clearly involves seeking consent. If the consent is “unreasonably withheld”, the Minister or Mining Board may order that prospecting should go ahead, a decision that should be reviewable. Disputes may be referred to an Administrative Court.

It is virtually impossible to know whether any of the requirements of this Act are effectively implemented, as there is no public disclosure by the Zimbabwean government of how and to whom licenses are issued. From recent interviews with stakeholders from government, civil society and even industry, the impression was that the legislative requirements and procedures for obtaining prospecting and mining licenses exist on paper only.

**Indigenisation and Economic Empowerment Act 2010**

In interviews with government officials, indigenisation was often raised to argue that the outcomes or community benefits that may be achieved under a consent regime are equalled if not surpassed by the indigenization policy and program. Similar to South Africa’s BEE [Black Economic Empowerment] program, indigenization is argued to make local communities “part owners and shareholders of the mines on their lands.” This claim that indigenization or quota shares can substitute for community negotiated participation agreements requires brief consideration.

Zimbabwe’s indigenisation law imposes equity quotas in favour of nationals on foreign mining companies. Every business with an asset value of or above US$500 000 must, within five years, cede a controlling interest of not less than 51% of the shares or interests therein to indigenous Zimbabweans. 10% community ownership and 10% employee ownership is a...
requirement applicable to all mines whether foreign, state owned or indigenous owned. In addition, a small 5% equity stake may be reserved for “community trusts.” The Act provides for the establishment of Community Share Ownership Trusts (CSOTs). These CSOTs represent community interests and are expected to hold a 10% shareholding in mining companies operating in their locales.

The trusts are operationalised through donations from the mining companies. In January 2013, Zimplats announced that it had entered into a “non-binding term sheet in respect of proposed indigenization implementation plans” with the Zimbabwean Ministry of Youth, Development, Indigenisation and Empowerment. The terms included that 10% interests in Zimplats would be sold to the Zimplats Mhondoro-Ngezi Chegotu Zvimba Community Share Ownership Trust “for the benefit of communities surrounding the business operations”. They agreed to provide US$ 10 million seed capital to the community trust. In our interview with Zimplats, they pointed to this project as one of their success stories.

It appears that the agreement came at a considerable cost to the state, however. The press statement indicates that the agreement was conditional upon, amongst other things, that a certificate of compliance is issued confirming current and future compliance with applicable indigenization laws and requirements by Implats, Zimplats Holdings and Zimplats; that Zimplats get “all necessary regulatory approvals, including Zimbabwe exchange control approval” and that a 2006 Release of Ground Agreement is amended “to provide for a payment by the Indigenous Entities to Zimplats of US$153million in settlement of the Government’s outstanding ROGA obligations”. In addition, the government commits to “use its best endeavours” to amend the 2012 Mining Regulations and the Mining Agreement to adjust the rental and royalty rates applicable to Zimplats. These terms seem heavily skewed in favour of the mining company, suggesting that in return for complying with the Indigenisation policy, mining companies are able to gain extraordinary advantages. Commentators are skeptical about the potential of the model to create real benefit for communities. Matzyszak has argued that only political elites and chiefs in the targeted districts are benefiting from the schemes.

Environmental laws

The Environmental Management Act of 2012 stipulates that mining operations may only commence after a holder of a mining license has carried out an EIA. The project developer is first required to get approval for its prospecting and/or mining program before commencing with the EIA (s 98). The EIA itself must include (s99):

- A detailed description of the project and the likely impacts, both short-term and long-term;
- Why the proposed site was chosen;

268 Mutlokwa n 237 above at p 43.
270 Mutlokwa n 237 above at p 43.
272 That project was followed by the Unki Mine launching the Tongogara Community Share Ownership Trust and Mimosa Mine launching a CSOT in Zvishavane and Blanket Mine which launched a CSOT and pledged to donate US$ 1000 000 to the local Gwanda community.
273 Matyszak, D 2011 Everything you Ever Wanted to Know (And Then Some) About Zimbabwe’s Indigenisation and Economic Empowerment Legislation But (Quite Rightly) Were Too Afraid to Ask Zimbabwe Research and Advocacy Unit. Available at: http://www.swradioafrica.com/Documents/indigenisation-report70410.pdf [Last accessed 28 February 2018]. See also Shumba-Busisiwe 2014 An Evaluation of Indigenisation Policy In Zimbabwe Dissertation submitted in fulfillment of Master of Social Science, University of KwaZulu-Natal, p 61: In 2012, Local Government Minister, Ignatious Chombo, allegedly forced several chiefs from the Zvishavane Tongogara Community Share-Ownership Trust to give back the US$2 million they had corruptly pocketed from the community’s trust account. This shows that two groups have come out as the major beneficiaries of indigenization programmes: ZANU-PF’s ruling elite and community leaders.
274 See section 98, Environmental Management Act 2012.
Specify the measures proposed for “eliminating, reducing or mitigating any anticipated adverse effects the project may have on the environment [...].”

Unusually, the Act requires no consultation of the project developer with anyone, including with the affected community. Section 100(3) gives the Director General the option, if he or she so chooses, to consult “any authority, organization, community, agency or person which or who, in his [sic] opinion, has an interest in the project”.

The 2007 Environmental Management Act Regulations do refer to consultation, and requires a developer to “carry out wide consultations with stakeholders” prior to submitting the EIA report. The Regulations are extremely vague. There is no specific reference to affected communities, while the manner, parameters and outcome of the consultations are not described in any detail whatsoever. No specific timeframes are provided for.

The fact that the EIA has to be done after a mining license has been issued by the Mining Commissioner means that environmental and human rights issues are not relevant to granting permission for minerals extraction itself. In these circumstances, it becomes even more important to ensure that the process of applying for a mineral license includes at a minimum seeking the consent of affected customary land rights holders as discussed above.

Other relevant legislative references

There is one statutory instrument that explicitly requires the prior, informed consent of communities. That is the Access to Indigenous Genetic Resources and Genetic Resource-based Knowledge Regulations of 2009. In fact, the regulations provide that the community can withdraw its consent “if it is or is likely to be detrimental to its natural or cultural heritage, or to place restrictions to such access in those circumstances”, but the consent principle applies to genetic resources only and not land or other resources. It is unclear whether these provisions have ever been implemented.

IMPLEMENTATION CHALLENGES

Despite the possibility of enforcing community – and in particular affected community members’ – consent, communities in practice are granted almost no means of participating in this industry and in decisions made over their land and resources.

Perhaps the greatest concern we had in seeking to understand how communal/customary land rights are protected in Zimbabwe was the fact that it appeared unclear to everyone who was responsible for protecting those rights. While we were at first referred by the Ministry of Mines to the Ministry of Lands, Land Reform and Resettlement, our engagement with the Acting Permanent Secretary of that Ministry eventually made it clear that that Department in fact had nothing to do with the process through which communities are engaged about development planned for their lands. They are exclusively interested in land reform and resettlement for the purposes of land reform. She was unable to point us to the Department who would is responsible for communities affected by investment and development.

By chance, at a meeting with the Permanent Secretary of Justice, a receptionist informed us of the existence of a Ministry of

275 Section 4 of the Environmental Management Act 2012 sets high normative standards for the interpretation and implementation of people centred environmental management including the following two principles:

b) People and their needs should be put at the forefront of environmental management;

c) All people should participate in environmental management...

However, the normative principles have not been tested against the more specific provisions which undermine community participation rights elsewhere in the principal statute and in the delegated legislation.

276 Section 10 (4).

Rural Development, Promotion and Preservation of National Heritage and Culture. She knew about the Ministry as she had received a calendar from them that was presented to us. All our attempts to contact this Ministry failed, however. We were able to reach one official on a mobile phone, but were told that he had left the Ministry.

Most remarkably, when asking members of civil society active in this sector about the Ministry and what it does, no one knew of its existence. It is thus safe to assume that the Ministry does not play an active role in protecting communal land rights and ensuring that the relevant regulatory framework is implemented.

A specific concern in this regard expressed by civil society is the powers of the government to convert agricultural land to non-agricultural land (for the purposes of, for example, development). The only constraint on this power is that it must be approved by an inter-ministerial committee composed of the Ministry of Local Government, Public Works and Housing, the Ministry of Lands and Rural Resettlement and the Ministry of Agriculture, Mechanisation and Infrastructural Development.278

There is no place, it appears, for the Ministry of Rural Development to ensure that the voice of the affected communities might be heard when such far-reaching decisions are taken.

It appears that parliament, and in particular the Portfolio Committee on Mines and Energy, play a more significant role in the management of natural resources in Zimbabwe than in most of the other countries under review. While the committee has no direct role in the administration of mining in Zimbabwe, it can summons officials and any citizen for questioning – and has flexed its muscles. Maguwu describes a recent incident in which the legislative and the executive had a public fallout over the Marange diamonds. The Portfolio Committee reported “there was a contestation of power between the Executive and the Legislature over access to information and entry by the Committee to carry on-site visits in Marange”.

Indications are, however, that these moves by the Portfolio Committee may also be influenced by personal interest rather than the public good. Indeed, Maguwu writes that “officials from the Ministry of Mines and mining companies are summoned to the PCC on Mines and Energy to talk about their operations and give details on mining contracts...The silence of the Executive, even the shielding of lying mining officials when giving evidence to Parliament, is evidence of a serious governance crisis in the mining sector that is further undermining the law”.279

Some lessons could also be drawn from the two attempts to use litigation to protect the people of Chiadzwa where the Marange diamond fields are located. Perhaps the most infamous case of mass forced displacement for development purposes in Zimbabwe, more than 1400 families were forced to move following a military crackdown on the diamond fields.

No consultations preceded the raid.280 In the first application brought in 2009, Mr Malvern Mudiwa’s applied to halt the relocation of people by the government, ZMDC and two private mining companies, until an agreement of the terms were reached. The Court threw the application out because it lacked urgency and because it found Mr Mudiwa did not have standing to represent the community.281 In 2016, a legal entity called the Marange Development Trust went back to court, this time against the Ministry of Lands and Rural Development, Promotion and Preservation of National Heritage and Culture. They argued that the Ministry’s decision to destroy the homes of the people was illegal as it did not follow the proper procedures.

278 Chambati, Walter, Mazwi, Freedom an Mberi, Steven 2017 Land, Agriculture and Extractives in Zimbabwe- an Overview Friedrich Ebert Stiftung p 33.
279 Maguwu, Farai 2017 Extractivism, Social Exclusion and Conflict in Zimbabwe - the case of mining Friedrich Ebert Stiftung p 59.
280 “villagers witnessed their homes being razed to the ground by bulldozers while they were being loaded onto trucks by Zimbabwe’s security forces. No valuations were carried out prior to the destruction of their homes to determine the losses they incurred. Government, which held 50% shareholding in the nine diamond-mining firms that took over operations in the area, except for Marange Resources, where it had a 100% stake, has yet to publicly state its position regarding compensation”.
281 Communities in South Africa have run into the same problems in asserting their standing before the court. The problem is that in South Africa, Zimbabwe, Zambia and Malawi, communities are officially understood to be represented by their traditional leaders. In terms of customary law, the chief is supposed to reflect the views of his community. But with the statutory recognition of traditional leadership, chiefs no longer have to reflect the views of their communities. The result is that communities often disagree with their leaders, and have to approach a court in the name of a different representative than the traditional leader. Courts in South Africa and in Zimbabwe continue to struggle to accept this situation. A South African High Court, for example, in 2015 held that it was not possible for a community to hold a different view from their traditional leader (South African National Roads Agency Limited v Reinford Sinegugu Zukulu and Others South Gauteng HC case No 1955/15). While the entire community, chief included, at first rejected the proposal of a national road over their ancestral land, the chief was persuaded to accept the idea. The Court subsequently refused to entertain the community’s arguments that they continued to reject the road despite what their Chief said. They were forced to follow the word of their leader.
time to halt the operations of the ZCDC pending approval of their EIA certificate. While the application was successful, the non-compliance of the ZCDC is easily remedied which will render the court victory moot.

This illustrates the importance of attempting more strategic litigation in Zimbabwe, picking specific cases to challenge practices that constrain community objections. For example, it could be possible to challenge the narrow standing rules that make it difficult for communities not organized as legal entities to approach the Court.

RECOMMENDATIONS

- We saw that section 13(4) of the Constitution provides that “the State must ensure that local communities benefit from the resources in their areas”. While the State respondents, and some representatives of civil society, understand the indigenization policy to represent the fulfilment of this constitutional imperative, civil society and communities should endeavour to find good evidence, both based on affected community experience and empirical data, to show that the policy is not in actual fact allowing communities to benefit. This is an argument in favour of the agency and relative bargaining power that FPIC would afford affected communities. Useful indicators for challenging top-down community benefit policies include:
  
  (a) Well-being before and after mining: Household income, employment numbers, communicable diseases, crime (both experiential and statistical information, where available)

  (b) Loss of livelihoods: access to land used for agriculture prior to mining; loss or restriction of access to that land following mining; loss of access to job opportunities as a result of damaged or stretched transport infrastructure.
(c) Mining has resulted in greater pressure on infrastructure and/or has not been accompanied by improvements in overall infrastructure: state of roads and railway prior to and following mining; damage to roads linked to vehicles used to transport materials to and from mine; increased traffic due to mine and resulting increased journey times.

(d) Mining is associated with diminishing access to basic services and/or has not been accompanied by improvements in access to basic services: access to potable water and water sources in community; access to sanitation and electricity.

(e) Mining is associated with diminishing living and housing conditions and/or has not been accompanied by improvement in living and housing conditions: availability of decent housing prior to mining; data on dwellings within community; availability of housing following mining; structural damage to housing as a result of mining activities; number of houses with damage ascribed to mining; description and approximate value of damage.

(f) The environment of the community is more harmful to health than prior to mining: harm to health as a result of water pollution; observed deterioration of water quality following mining; observed illnesses or deaths in community due to drinking water; harm to health as a result of air pollution; more dust on surfaces following mining; any clouds or smoke plumes observed following mining; observed increases in prevalence of and/or mortality from respiratory illnesses in community following mining (including asthma emphysema, and lung cancer); observed increases in prevalence of and/or mortality from skin diseases in community following mining.

(g) Lack of compensation or insufficient compensation for damages and deprivation: nature of damages linked to mining including damages to houses; loss of productive land, food security and livelihoods, health expenses due to ailments associated with mining pollution; nature of compensation process/s for damage and deprivation suffered; whether compensation was offered by mining company/s, (if applicable) the quantum of compensation offered and whether this is sufficient to compensate for the full damage and deprivation suffered.

- The Zimbabwean Constitution, as the South Africa one, provides for horizontal application of fundamental rights. That means that communities may assert their rights to property, for example, against non-state parties such as investors directly. It would be very important to begin systematic strategic litigation to test the extent to which this horizontal application can be used to protect customary land rights and the customary principle of FPIC, for example, directly against companies.

- Section 31 of the Minerals Act that requires the written consent of lawful occupiers who will be affected must be interpreted to include the occupiers of communal land. It may be necessary to seek the Court’s confirmation, under the Constitution, that there can be no justification for treating common law and customary law land rights holders differently and therefore not requiring the written consent of customary tenure rights holders.

- The Communal Lands Act must be understood as the regulation of customary tenure and customary law rather than replacing customary law. That means that the richness of customary tenure and procedural customary rights – subject to the constitutional protections of gender equality – must be read alongside the Communal Lands Act.

- At the moment, it appears that there is no strong functioning Ministry that is responsible for ensuring the proper implementation of the statutory and customary frameworks that protect customary land rights. It is crucial that the Zimbabwean government clearly assign this function to a Ministry and provide it with the necessary resources to perform this function properly, even if only playing an oversight role over local and district government functionaries.

- No decision that affects the land and resource rights of communities may be taken without the approval of the Ministry responsible for ensuring that the affected rights holder consented to the decision based on good available information.

- Companies should actively resist the culture of “jambanja” or lawlessness that appears to permeate Zimbabwean society.
DISCUSSION

In the preceding Chapters we identified key opportunities arising in each country for addressing the most pertinent challenges and furthering progressive implementation of FPIC related principles and provisions. In this Chapter we draw out some higher level observations that cut across the five countries and that point to longer-term approaches to furthering the implementation of FPIC in Southern Africa. We conclude with further recommendations that, in our assessment, would be helpful in all five countries under review.

What does law have to do with it?

We have noted that in a country like Zimbabwe, and paraphrasing a mining executive interviewed, the law is simply not a central factor in organizing the relationships between the government, investors and communities. Even in a country with a judicial system as strong as that of South Africa, the Bakgatla ba Kgafela case study showed that a culture of extra-legal activity to “get things done” prevails.
We have to take this phenomenon seriously and allow ourselves to develop strategies that do not place all our faith in the development of perfect laws. As WoMin argues, we must understand legal rights as one piece of a much larger political struggle building on community organisation and solidarity from the outside. This approach should even inform the way public interest lawyers identify and frame cases. That means constructing cases in a way that would allow for the highest level of community organisation. Using customary law in asserting a community’s rights to land and to natural resources, for example, is ideal: it engages everyone in the community in a dialogue as to who they are where they came from – and indeed who they want to be. Whatever the outcome of a court process that will likely take years, the community will most likely be far stronger in being able to assert their rights and their chosen development paths.

Keeping momentum and unity within a community for the years that a court case will likely take requires more than internal community mobilization. It would need solidarity from, for example, other communities in similar situations, from similarly situated political struggles (locally and internationally) and from academic institutions.

The implementing agents

In the same way, achieving perfect legislation does not yet mean that those responsible for implementation are capable of doing so effectively. As the implementing agents of legislation and policy, the officials in relevant government departments are key to the successful implementation of the legislative frameworks. It was apparent from the interviews conducted, both with government officials directly and from anecdotal evidence relayed by civil society representatives, that many officials are:

- Not sufficiently conversant with the contents of the legislation; and/or
- Not capacitated and resourced to implement the provisions.

This study aims specifically to illuminate legislative and policy provisions that may be used to promote local communities’ rights to consent or at least proper consultation when their land rights are under threat. It may provide a starting point for opening discussions with officials on new terms. While educating officials about the contents of legislation and policy is not a civil society responsibility, the value in the context of such a pervasive misinterpretation of key provisions may well outweigh the disadvantages.

In most of the countries reviewed, strained relationships between relevant government departments worsen the situation.

Civil society narratives

In most of the countries surveyed, respondents in particular representing civil society, informed us that the only avenue for community consultation is through the environmental law frameworks and in particular the development of Environmental Impact Assessments. It was apparent that this understanding of the applicable legal framework is driven by the skewed implementation of the frameworks which reduces the different consultation (and consent) requirements in land, minerals and environmental legislation, to a single process related to EIAs.

But consultation towards EIAs in all five countries is exclusively aimed at assessing the potential impacts of the development project and designing acceptable mitigation measures (at least, in the best case scenarios). Such consultation assumes that the development project will happen; it gives no voice for affected communities to participate in the development decision and precludes the possibility of asserting a right to consent. If this form of consultation is truly the only avenue towards community consultation and consent, the picture would look pretty dismal, even on paper.

In our assessment, there are other, far stronger provisions in the land and minerals legislation, in customary law and in regional human rights law instruments that could be used to promote the right to consent. These provisions have become obsolete through non-implementation, but creative legal and advocacy work may well enable the existing frameworks to work in favour of communities’ rights to FPIC. This study aims to cast a light on those provisions.
The denial of the legal personality of members of communities

Another recurring pattern identified is the tendency from all stakeholders to disregard the legal rights and agency of individual community members. Rural people in all five African countries appear to often be regarded as ‘subjects’ of their traditional leaders, or as part of a collective only, with no recognition of any form of individual agency. This contributes to the difficulties that community members have in bringing court cases against or at least without the assistance of the traditional leader (as we saw in Zimbabwe and South Africa).

This assumption also mitigates against an understanding of ‘lawful occupier’ in the mining legislation of Malawi, Zimbabwe and Zambia, as referring to individual members of customary communities. In South Africa, “affected rights holder” as defined in land legislation are assumed to be ‘the community’, denying directly affected peoples the right to voice their concerns. This false assumption not only plays into problematic colonial conceptions, but seriously undermines the possibility of affected community members, both individually and as a collective, asserting their rights.

Distorted custom and chiefly dominance

The denial of the individual rights of members of communities is facilitated by the idea, perpetuated by colonialists, that the chief is an all-powerful despot, owning and controlling all the land under his jurisdiction. 282 We saw that this distortion continues to prevail in all five countries, whether entrenched in legislation or not.

In particular, the colonial pattern of turning traditional leaders into state officials, gaining their status from and accounting to the state, has undermined the accountability mechanisms inherent to customary law that kept traditional leaders in check. Where the chief used to be the mouthpiece of the community, voicing the opinion of his community, he is now an individual who can speak on behalf of himself and his community whether they agree or not. As the chief gets his status from the state, he has no fear of losing the support of his community when disregarding their views.

The problems created by this version of traditional leadership were evident in all four former British colonies under review.

Centralised decision-making

In South Africa, Zimbabwe and Zambia, respondents pointed to the challenge of the upward centralization of decision-making regarding resources. In fact, all the countries under review prefer a model of state custodianship of resources.

Some of the problems identified with such centralization are the inability of decision-makers to properly take local circumstances into account; the bias towards “public interest” in such an approach; the direct line afforded to developers to decision-makers in contrast to the difficulties faced by communities to reach those in power in the big cities.

Arguably, the furtherance of the community right to consent is one of the most effective ways in countering upwards centralization of decision-making.

Mining trumps all other land uses

In Mozambique and South Africa, legislation explicitly privileges mining over all other alternative land uses. In Zimbabwe and Zambia, while not explicitly codified, in practice mining appears to trump all alternatives. Where this is the position, effective consent can never be realized. The decision to mine becomes, in the words of the African Commission in the Endorois decision, a fait compli. In a stark example of this attitude on the part of the state, is the government’s response to the violence that emerged in Xolobeni, South Africa as the community mobilized to say no to the planned mining on their land.

The response from the Director-General of Mineral Resources was that they had obviously not yet done enough to convince the community of the benefits of the mine and will strive to do so.

**Opportunities**

**Working with, and litigating on behalf of, communities**

In our experience, the divisions and tensions that inevitably exist within communities are sometimes used by opponents to further weaken the community position. Litigation provides an opportunity to build community identity and unity. In particular, when court cases are built on the rights of communities arising from their customary law – including their history – it may create an opportunity for individuals and communities of resource users to come together to elaborate on the narrative of their history and culture.

But litigation can at times also create new divisions and tensions within a community. Proposed strategies to employ with organisations and lawyers working with communities to mitigate this challenge include ensuring, as far as possible, absolute transparency. For example, before calling a meeting with some or all of the community members, notify every possible party, stakeholder or structure within the greater community – even those structures whose legitimacy or intentions may be in doubt. Minutes of meetings should be recorded, typed and distributed across the villages while the representative structures of communities should be required to provide regular feedback to the greater community. Sometimes, depending on the context, it may be necessary to support one part of the community (for example a vulnerable group) against another or against corrupt and unaccountable leadership.

Lawyers are often forced to ‘strategically essentialise’ communities as entities for the purposes of litigation. That means that lawyers must speak about ‘the community’ as an entity with a single view all the while knowing that it is a far more complex and fluid phenomenon. This can only be done once the idealistic notions of ‘community’ as unproblematic and reified entities are discarded; that is, if lawyers learn to live with and learn from the tensions.

As lawyers working with claims based on custom, culture and history, one must learn to cope with the tension between the language of law and the language of ‘facts.’ Anthropologists, historians and sociologists also try and understand the history and customs of communities. But in these sciences, researchers are encouraged to avoid essentialism and reductionism and instead unveil the complexity of communities and cultures. But a court is rarely interested in hearing about concepts that are too complex to define. Courts want to work with clear principles. The job of a lawyer representing communities, then, is to make sure that principles are infused with meaning that would benefit the poor and vulnerable – rather than the rich and powerful. The job, as lawyers, is to unashamedly inject meaning into these legal concepts before the more powerful forces do so – and re-appropriate those terms already conquered.

**Law from below**

Community development and law focus on legal strategies supporting political and organisational strategies to promote community self-determination and self-governance. Community development starts from the principle that within the community there is knowledge, skills and experience which can be strengthened through democratic action to achieve the community’s desired development goals. Community organisation and institutional structures represent community knowledge and decision making in action. If community actions and decisions can only claim authority and legitimacy with reference to the law, then communities may fruitfully turn to the system of living customary law as law in terms of which they claim their authority and legitimacy.

Law should in principle assist vulnerable communities in changing power relations. Law is fundamentally a ‘neutral’ set of rules that constrains power by requiring decisions and actions of those in power to comply with legal rules, rights and obligations. Unfortunately, the powerful often appropriate law as a tool for only protecting and strengthening its interests.
As such, communities can use the law against those who have appropriated it as a tool in the hands of the powerful only. Just as powerful agents use the law to obscure and complicate issues to the point of eliminating those not versed in the law from the conversation, communities may appropriate other versions of the law to change the subject of the conversation from technical legal jargon to a language of rights and community agency. Customary law and rights are tools for communities to change the topic – and the parameter of the conversation – in their favour. It has proved to be an effective form of lawfare against the overwhelming tide of extractive expansion.

Courts across the world have accepted that the discrimination against indigenous forms of law cannot be tolerated further. If that is the case, communities should ensure that the proper recognition of customary law benefits them— and all their members, including the most vulnerable.

**Addressing the tensions inherent to customary law head-on**

Customary law is of no effect if it lives only on paper or in the minds of a privileged few. Customary law becomes a rallying tool for communities if they live it, practice it, debate it, develop it and organise around it. That is how customary law is enriched and developed to become increasingly in line with constitutional principles and the changing needs and demands of communities. That is also how communities ensure that the law is truly local. It is truly empowering.

But do the benefits of organising in terms of customary law outweigh its dangers? There is no simple answer to that question: while we intuitively believe that the power imbalances within customary communities can be solved through statutory regulation, it has been shown that an imposition of ‘foreign’ norms and standards on communities is not an effective way of changing the way people engage with each other. Forcing gender equality, for example, in an insensitive way onto patriarchal systems generally leads to one of two results: either the community ignores the imposed values (even if these are imposed in the form of state law) and continue with its own approach or the imposed principles create confusion that often further enhance inequalities. This is particularly true of property rights.

Property relations are created through processes of human interaction at the local level and are not established by the introduction of laws. While law per se cannot create new property relations (and is likely to have unintended consequences when applied beyond its limits), it is a critical factor in establishing the balance of power within which people interact to create property relations.

The better approach, we argue, is to start with the values the communities hold and develop these to be brought in line with, for example, international human rights principles. The fluidness of customary law provides opportunities for such development to happen rapidly and bottom-up.

**Rights enquiries**

Given the difficulties in ensuring the proper recognition of all the layered customary tenure rights of men, women, households and communities, it is imperative that communities insist, as a starting point, that a proper rights enquiry be done by a developer or the state before consultation, participation or the seeking of consent happens. This is crucial as it is necessary to establish who the directly affected rights holders are, who should at a minimum be included in participation. This entails more than simply identifying households and speaking to one person on behalf of that household, but understanding the overlapping rights within the household and the communal rights that may be affected (to grazing land, forestry and other resources etc.).

---


Strategic litigation

The analysis of a number of legislative frameworks in this report indicated that, on paper, there often exists far stronger rights of participation and even consent for, in particular, ‘lawful occupiers’ (members of communities) than is generally believed. This is because our understanding of the law is to a large extent based on the way in which it is interpreted and implemented by the government (and, sometimes, developers).

While litigation in protecting local communities’ rights to land, a clean environment and due process do happen sporadically in all the countries under review, the use of strategic litigation to develop progressive interpretations of the legislation remains underutilized. The recent adoption of progressive constitution by the four Anglophone countries provides the ideal opportunity to use the courts, and in particular the Constitutional Court, to unlock the potential of existing legislative frameworks. Some South African public interest litigators have been able to do so, but this is far simpler within the culture of constitutional litigation that permeates the South African legal landscape. Respondents from in particular Zambia indicated a strong desire to encourage the same culture in their jurisdictions. Investing in such an approach appears absolutely worthwhile, in particular given the opportunities available in existing legislation.
Civil society and affected community solidarity

The research uncovered divergent civil society approaches to advocacy for the rights of local communities faced with extractivist projects. On the one hand, South African civil society and affected community networks have deliberately sought to negotiate a uniform position on key demands to improve the position of mining-affected communities. While organisations have varying points of departure and emphases, a united position has been articulated in particular around the demand for consent. On the other hand, the Zimbabwean civil society appears to be more clearly divided on fundamental issues. It was more difficult to establish coherent positions in the other countries.

While it would be difficult, and likely counter-productive, to attempt to unite civil society organisations in a way that binds them to a single framework or position in general, it is of huge value to attempt to find common ground on as many key demands, or non-negotiables, as possible. Demanding the requirement of consent for local communities is such a non-negotiable. Unity in this demand within domestic civil society sectors will undoubtedly give significant weight to the position and may well provide the basis for a sub-regional position on demanding consent on behalf of mining-affected local communities.

Encouraging alternatives

Even if consent finally appears in every legislative framework, its implementation could only be successful if communities have alternative development options to choose from. If giving away your land and resources is the only available option for accessing services, there can be no real choice involved.

It is thus imperative to encourage states to recognise alternative development models beyond large industrial sectors in agriculture, mining and even fishing. More importantly, communities must be supported, capacitated and encouraged to debate and decide upon their own vision for their development path. Where would they like to be in ten or twenty years’ time as a community? What development opportunities may realistically be available to them, such as eco-tourism, farming collectives or finding new markets for produce?

Cost-benefit analyses

Cost benefit Analysis (“CBA”) is a tool used either to rank projects or to choose the most appropriate option. The ranking or decision is based on expected economic costs and benefits. The rule is that a project should be undertaken if lifetime expected benefits exceed all expected costs.

One could interpret the development of the right to consent of indigenous populations in international law as the development of the principle of a cost-benefit analysis. That State’s absolute right to expropriation in the public interest (based on eminent domain) is constrained in international law only by the rights of indigenous peoples to not have their land and resources expropriated if it is central to their identity. In essence, the rationale is that the cost to a customary rights holder (the loss of land and resources central to their identity) is greater than any benefit that the development may bring.

That cost-benefit analysis is an important principle to try and unpack in other circumstances where local communities (not “indigenous”) are affected. One option is to develop jurisprudence around the reasonability of decision-making dealing with development. The African Commission on Human and Peoples’ Rights has adopted this language.

While the reasonability standard can be subjective, it may be possible to develop a standard using complex cost-benefit analyses.

Attempts at developing such standards have generally proven problematic, but interviews showed that a practice is emerging in South Africa, combining the expertise of community members, anthropologists, resource economics and lawyers, to at least show that the value of a community losing its land is far more than calculating the crops and measuring the house. This
exercise entails significant resources to ensure good information about the projected costs of the project for the affected community and indeed for the public in general (instead of relying solely on the information provided by the developer) and the potential and real benefits on both levels. Another approach, from Namati, encouraged community fieldworkers to work with communities to do assessment of the value that their land has for them.285

If it can be established that the costs of a project significantly outweigh the benefits (and it is anticipated that this will indeed be possible to do in a number of cases), it may well be possible to attack a decision to allow for a development on the ground that it is unreasonable.

RECOMMENDATIONS

Affected communities:

- Prioritise the internal mobilisation and organisation of ordinary community members. For example, communities, and interest groups within communities (women, the youth), must meet as regularly as possible to ensure that information is not hoarded by a few elites, to debate and develop the community’s customary law to ensure it evolves with the community’s needs, and to build solidarity around issues. The strength of the community’s internal cohesion is perhaps the most important building block in effectively exercising the right to consent.

- With strong organisation, the community can develop their own development paths. The right to say no is less powerful if the community does not have a vision of the future that it wants, whether that incorporates large scale development on their land or not.

- Internal organisation should include internal accountability and reporting on process, information received and decision taken, and being open and accountable to members about benefits received.

- Communities must be encouraged to understand their customary law as law, and to insist on developers and the government to respect and follow the applicable customary law of tenure and of decision making. This changes the conversation from a legalistic affair based on statute law and opaque reports to one based on the law of the community. It changes the power dynamic.

- Community members should also understand that custom as law (rather than as ‘tradition’) is, like other sources of law, subject to the Constitution. Neither customary law nor tradition may be used as an excuse for denying fundamental human rights such as gender equality.

- Community members should insist on the internal accountability mechanisms inherent to customary law and, where appropriate, develop their customary law to deepen internal democracy and accountability in line with their respective national Constitutions;

- Communities should reject colonial impositions of customary law upon them, including the notion of the traditional leader as autocratic despot and lone centralized decision-maker who ‘owns’ the land, and insist on the customary rights of members to be respected.

- Communities must understand that the right to consent is different from the right to be consultation. Consent includes the ability to say no.

- Community members must understand that they have both tenure and decision-making rights as individual members of households and of communities. They must insist to be heard as affected rights holders.

- Insist on compensation that takes into account, at a minimum, the rights in land lost (without resorting to market-value in the case of communal land, but assessing the cultural and social value of the land that cannot be compensated by merely providing an alternative piece of land of the same size), impact on livelihood, cultural, development and association rights. Customary property rights arise within the context of a community and in relation to all other members of the community. Relocating a part of the community to a different piece of land destroys or seriously impedes that structure that is fundamental to the rights of the community members. Compensation in the form of land or cash for additions to the land does not come close to providing fair and equitable compensation for what
is lost. Compensation should not be limited to the head of a household, but, in line with the customary recognition of nested rights, compensate the access, use and occupational rights of women and other vulnerable groups in particular.

- Require sufficient information to be supplied bearing in mind language and technical issues.
- Join networks of communities with similar struggles, next door, elsewhere in the country or even regionally and internationally.

![People's Mining Charter](image-url)
**Civil Society:**

- Provide support to communities to encourage their internal organisation and development of their own future visions.
- Where appropriate, capacitate communities in their internal transparency, accountability and information sharing.
- Promote clarification of the difference between ‘consent’, ‘consultation’ and ‘participation’. The conflation of these terms tends to weaken an understanding of what consent requires.
- Progressively interpret the consent-references in existing legislation, including the African Charter and related jurisprudence, resolutions of the African Commission on Human and Peoples Rights and the consent requirements contained in land, mining, petroleum and forestry codes. Beyond participation in environmental authorisations, insist on the written consent of the lawful occupiers. Develop strategic litigation that would set precedents in this regard.
- Highlight and resist the afterlife of colonial impositions on customary communities that render community member’s mere “subjects” of all powerful and autocratic traditional leaders.
- Develop multi-pronged strategies to support community struggles that go beyond activism for law reform and even strategic litigation, but include mobilisation of the community and solidarity movements; media campaigns; shareholder activism etc.
- Support communities and advocate for proper cost-benefit analyses as a basis for reasonable decision-making around projects. At a minimum, require the State or the developer to show concretely how the benefit of the project will outweigh the costs – for the directly affected communities, the indirectly affected communities and the public at large. These analyses should explicitly include the environmental, social and developmental costs and benefits, if any, of the project.
- In advocating for law reform and better practice, promote the representation of women as part of the household consulted, recognizing that while the man may be considered the ‘owner’ of the land in question, women’s use rights have equal standing and should have equal protection.

**The State:**

- Develop clear guidelines on minimum thresholds for valid consent, consultation and meaningful participation processes. This may include, where appropriate, threshold requirements such as a simple majority of affected rights holders.
- Provide clear guidelines on how representatives of the community (whether traditional leaders or other community structures) may be granted a valid mandate in particular when seeking to alienate or encumber community land. In particularly large communities, where community meetings that facilitate meaningful participation are not feasible, the guidelines should prescribe how the consent of directly affected members will be sought by other means.
- Where the applicable customary law provides for negotiated outcomes, the timeframes for decisions on behalf of the community should allow for such outcomes to be reached.
- In developing guidelines or regulations on community consent, the State should move away from tick-box exercises to an outcomes-based approach in assessing the effectiveness and validity of the process.
- These guidelines of regulations should, in the word of Rachel Knight, “be explicit and clear, leaving no room for interpretations that can weaken protections for the rights of rural communities or vulnerable groups”.
- Capacitate the officials who facilitate consent, consultation and participation processes and developer-community engagement directly to understand the status of customary law, how to establish its content and how to implement it.
In particular, ensure that they understand the gender dynamics within local communities and that they are equipped to ensure that constitutional protection of gender equality in decision-making.

- Develop guidelines on doing rights enquiries whenever there is interest in the acquisition of communal land. A rights enquiry should include identifying the households, and individuals within the households, with occupational, use and access rights, in other words the lawful occupiers whose written consent must be sought.

- The ministry responsible for overseeing rural community land must be involved in all decisions and processes by other ministries that may impact upon community land.

- The State should develop clear guidelines as to what information pertaining to contracts engaged in between developers and itself, communities and other local entities should be (a) in the public domain, (b) available to the parties involved (which, in the case of the community, means all affected community members) and (c) strictly confidential for commercial purposes.

- The State (with, where appropriate, the financial assistance of the developer involved) should ensure that the affected community has access to independent legal and other expert advice on information made available to them through the FPIC process. In this regard, the State should consider creating an independent fund, with mandatory contributions from operating companies, to which communities can apply to cover the costs of such services.

- Develop clear guidelines for cost benefit analyses that may provide a rational basis for decisions to allow projects “in the public interest”, in particular where such decisions override the wishes of the affected community. The development of this analysis should include meaningful public participation.

- Develop clear guidelines for establishing compensation for relocation that includes at least the cultural, social, spiritual and economic value of the land, and that clearly recognizes the rights of women.

- Consolidate line ministry responsibilities so that the requirements and process of different ministries are not inconsistent with each other creating loopholes;

- Equip government officials in district administration and cadastral services to facilitate processes through emphasising development aspects and building community decision making structures. This could be supplemented by mediation specialists and or development specialist to better facilitate such programmes;

- Ensure that the FPIC process precedes any decisions taken at state or other level that may put pressure on the community process;

- Ensure that officials are protected from fear or favour when making decisions to allow or disallow development projects. At the very least, provide neutral checks and balances between departments so that the ministry promoting the development in question is not the same one deciding whether to pursue the project.

Companies:

- In a negotiation, the parties must know each other in order for the negotiation itself to be informed. Companies must be transparent about who they are (company structure and where the local subsidiary fits in), major financiers, and major partners along the supply chain (where applicable).

- The information to be shared by companies and affected communities engaged in during a FPIC process must include any bankable feasibility studies, financing models, human rights impact assessments, social impact assessments, cumulative environmental impact assessments, participatory monitoring and auditing programs and plans. These should be made accessible through, at a minimum, translation into the local language. Where possible, the information should also be shared publically.
RECOMMENDATIONS

- Companies must participate in annual participatory audits of the project, including financial, human rights and social impact audits. The audit must be made available to the affected community.

- Where the applicable legislation (whether pertaining to land acquisition, surface lease agreements, operating licenses, compensation and relocation) require any decisions to be made (including by community representatives and officials) ‘in terms of’ or ‘taking into account’ the local customary law, or where the applicable Constitution recognizes customary law, the company should ensure that they understand the content and application of the relevant local customary law pertaining in particular to the tenure arrangements and decision making procedures of the community.

- Companies should establish grievance mechanism/system, which receives and acts upon complaints and suggestions for improvement, and facilitates resolution of concerns and grievances arising.

Cross-cutting recommendations

Ensuring that the voice of vulnerable groups, and in particular of women, are heard in the consultation, participation and consent processes (where they exist), remains a problem. Some organisations have become creative in attempting to promote the voices of vulnerable by using the following strategies, which should be employed by communities, the State and companies:

- Having separate meetings with different group (women, men, elders, youth) in a community rather than always one community meeting;

- Insisting on female representation on the representative structure of the community (where possible);

- Where customary law and land histories are important to the community’s struggle, rely in particular on female elders to recite the history of the community to ensure their participation in meetings;

- Ask specific questions to women present in meetings.

The outcomes sought in development decision making which impacts on tenure could include the following:

Legitimacy: meaningful community discussion and negotiation, both within the community and with the third party developer and public sector investor will result in richer development which distributes political, social and economic power democratically.

- Integrated development: This is hard development that builds value locally, diversifies the local economy, involves local ownership, local partnerships and local processes to realise local potential and fair benefit according to or in proportion to contribution. It is not about capturing and removing i.e. extractivism.

- Inclusive development: Development and planning decisions that address both the physical and infrastructure aspects and the institutional shortcomings and challenges expected in the developmental endeavour.

- Tenure arrangements and forms that are appropriate: Legality and formality, including ownership and freehold, do not necessarily equate with tenure security in all circumstances. Informal customary tenure regimes may achieve greater security for certain communities at a given time. Actual security of tenure depends on a range of extra-legal factors and not only on property law.

- Effective administrative systems and supporting bureaucracies: Sufficient resources and efficient institutions are necessary to support development. Otherwise efficiency with equity will remain an elusive goal.
CONCLUSION

With this study, the authors set out to find gaps and opportunities for furthering Free, Prior and Informed Consent as a principle, a standard and a right in the existing legal and policy frameworks of five Southern African countries – not only on paper, but also in practice. The study was done against the political background of, on the one hand, an increased focus of Southern African countries on extractivism as a strategy of long term economic benefit that may eventually trickle down to the poor, and on the other, the growing backlash from affected communities who bear the brunt of such extractivism, while seeing little of the benefit. From Marikana to Marange, resource extraction is becoming a synonym for oppression rather than opportunity.

In the legal sphere, equally fascinating tensions are arising as diverse developments of law are beginning to converge. While the powerful international movement towards the protection of indigenous peoples rights have for some time been resisted by Southern African countries, the recent recognition of customary law and tenure rights of the constitutions of these countries provide an avenue for affected African customary communities to assert ownership and consent in their own right. That this convergence of two worlds towards the same conclusion – Free, Prior and Informed Consent for affected communities – is unstoppable, is perhaps best illustrated by the move of the traditionally conservative World Bank to broaden the scope of its Economic and Social Safeguards to Indigenous Peoples and Sub-Saharan African Historically Underserved Traditional Local Communities.

But this study showed the multiple challenges of implementing consent provisions. The challenge is exacerbated by the nuanced approach that is required to make FPIC work because of the many variables involved. Even before the consent process can commence, difficult questions must be answered: who is the affected ‘community’? Whose rights will be affected and what is the nature of those rights? Who can speak for the affected? How are decision made by the affected community, households and/or individuals? How does one deal with the tensions inherent to ‘the community’ that is bound to arise? How is the ‘community’ guarded against the capturing of elite interests, both internal and external to it?

It has become trite that complex problems require complex, multi-pronged solutions. In the case of building a strategy towards realising the right to Free, Prior and Informed Consent of communities affected by extractivism, such a multi-pronged approach seems particularly vital. We are unlikely to ever have government departments populated with decision makers able to identify, recognise and protect the rights of affected communities in a way that eliminates the power asymmetry between them, the investor and the State. In the same way, we cannot expect communities, and the individuals of which they comprise, to independently organise themselves into a coherent, transparent and manageable unit able to navigate negotiations that may change the destiny of the community forever. Companies have resources, but can hardly be expected to be the champions of community rights while keeping their shareholders satisfied and managing their own internal dynamics. And while clever strategic litigation to establish helpful legal precedents are crucial, they mean nothing if they are not implemented and disseminated.

Indeed, our pursuit is not to tweak the existing process, but to redefine it completely to see stakeholders, government, companies and affected communities sit at the table as equals. In our assessment, this will require a coordinated effort from all involved to work systematically towards a joint goal. No one pursuit is necessarily more important that the other. While this is a daunting task, it also means that every contribution across diverse sectors is important towards reaching the ultimate goal.

286 World Bank’s 2016 Environmental and Social Framework: Guidance Note for ESS7 Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities. November 2017
In conclusion, we would like to propose key areas of further study that would complement the process towards the realisation of the FPIC in Southern Africa.

1. **Who is the community?**

Throughout this study, we have highlighted issues that arise from the definition of ‘community’ when asserting the rights of the members of that group. Oftentimes, the concept of community is, for convenience sake, reduced to the identity of the traditional leader or traditional structures, while the identities and rights of the households and individuals that make up the community are obscured. Sometimes, legislation defines the boundary of a community of tens of thousands of people, while those affected make up no more than a hundred. In other instances, those flocking towards the promise of employment integrate over time with those who have occupied the area for generations.

For purposes of moving towards the effective implementation of FPIC, we need not solve the most difficult conceptual questions about what constitutes a community, its ‘inside’ and its ‘outside’. Rather, we must find practical and equitable solutions to making the best possible guess as to who the affected persons will be, what their rights are vis-à-vis the rest of the community, and how decisions should be made by them and by the larger group.

Perhaps an important first step is to abandon – or at least radically rethink – the notion of community itself in favour of a concept that allows for the members of the group to regain their identities as rights holders.

2. **Beyond compensation towards reparation**

In the Southern Africa context, and in particular the older mining economies in this region, bear the legacy of colonial dispossession (and Apartheid) dispossession, forced removal and forced migrant labour. In the region, countries are grappling with how to bear the burden of these historical wrongs. Reparation and restitution programmes reflect one way in which a society can choose to invest in a future that addresses past violations of human rights.

The right to FPIC provides a potential legal basis for arguments towards reparation of historical wrongs, in particular those related to land and resource dispossession. The potential of FPIC to play this role requires further investigation. In South Africa, for example, debates are currently raging as to whether the Constitution provides the opportunity to explore inter-generational equity even to the extent that historical benefit from historical human rights violations may result in expropriation without compensation?

But reparation for present and future losses also requires further analysis and expansion, and again could look to FPIC as a tool to demand such expansion. Compensation alone is often proven to be insufficient to restore assets, livelihoods, and the productive systems dismantled by land acquisition, displacement, the closing of businesses, and the loss of mutual help and service networks. As such, compensation becomes nothing more than a form of repayment for inflicted losses, not a development investment. The new system we envision, demands more.

3. **Cost-benefit analyses**

Finally, we have alluded to the possibility of using cost-benefit analyses as a mechanism for introducing the reasonableness standard into the debate on eminent domain and expropriation ‘in the public interest’. At the same time, cost-benefit analyses is a first step towards calculating compensation, in the case of expropriation, that places the community in a better position that if the expropriation had not happened.

Much more time and thought need to be spent on understanding how to do such analyses without falling in the trap of reducing intangible values and assets by attempting to quantify these. In addition, the assessment of cumulative impacts on a site-specific basis is complex - especially if many of the impacts occur on a much wider scale than the site being assessed
and evaluated. It is often difficult to determine at which point the accumulation of many small impacts reaches the point of an undesired or unintended cumulative impact that should be avoided or mitigated. In other words, determining the point at which the local damage outweighs the national benefit or interest. There are also often factors which are uncertain when potential cumulative impacts are identified. A range of issues may influence the identification and assessment of potential cumulative impacts.

While these and other aspects of the implementation of FPIC in Southern Africa, as in the rest of the world, remain a challenge, not knowing all the answers cannot mean that we do nothing. On the contrary, it is by doing, failing, and sometimes succeeding, that we learn.


An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia


Legal Resources Centre Not in Our Backyard available at https://minesweeper.openup.org.za/


