By Wilmien Wicomb

The Legal Basis for the Right to Say No

Free, Prior and Informed Consent

The right of members of a community to say no to a developer wanting to enter and utilize their land is a legally established principle often referred to as Free, Prior. Informed Consent ("FPIC"). 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.

FPIC and international law

The legal history of the right to FPIC is 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. [1] 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

[1] Viljoen, Frans 2012 *International Human Rights Law in Africa* Oxford: Oxford University Press p 229.

Group on Indigenous peoples to draft an Advisory Opinion[2] on the concerns expressed by the African Union. The opinion made the following crucial points:[3]

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 also does not 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 content, 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.[4] 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.

Regional and Sub-regional 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.

[2] The African Commission is mandated to produce Advisory opinions in terms of Article 45 of the African Charter.
[3] *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Populations* adopted at the ACHPR's 41st session, May 2007, Accra, Ghana.
[4] Viljoen, Frans 2012 *International Human Rights Law in Africa* Oxford: Oxford University Press p 230-231.

The African Charter, adopted by and binding upon all African countries, 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:

[R]ights 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: [5]

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: [6]

[T]hat 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:

[T]he 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.

The African Commission has specifically called upon Mozambique, in its concluding observations to a country report submitted in 2015, to "ensure consultation with local communities 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".

[5] ACHPR/Res.224 (LI) 2012.
[6] ACHPR/Res.153 2009

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.

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 FPIC 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*[7] case against Kenya in 2003,[8] the Commission held that community's right to development was violated because:

[7] 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.

[8] 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'.

[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.[9]

In May 2017, the African Court delivered its judgment in *African Commission on Human and Peoples' Rights v Republic of Kenya*. 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 ones' wealth and natural resources may be claimed by communities in relevant circumstances. 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, this was a positive start.

The African Commission itself has stated that its decisions constitute authoritative interpretations of the African Charter that must be "respected" and "implemented."[10] 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." [11] Decisions of the African Court are, in contrast, clearly binding on member states. Although the domestic 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 should 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.

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

---

[9] At para 281-282.

[10] *Resolution on the importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights*, adopted at the Commission's 40th session, November 2006.

[11] Dugard, J *International Law* (2012) 4th ed, 560.

2009.[12] The mining directive provides explicit recognition for the continuous system of FPIC throughout the mining cycle and benefit sharing with a broader localization or empowerment perspective. It draws no distinction between indigenous and local communities. 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.

By contrast, the Southern African Development Community (SADC) Protocol on Mining 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 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. The SADC Tribunal was disbanded for political reasons in 2010 and currently no sub-regional grievance mechanism exists where SADC treaties may be enforced.

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.[13] Unfortunately, while the African mining vision does refer to local communities, their protection is by no means a central theme in the document. 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."

The African Commission, the African Development Bank and UNECA produced a Framework and Guidelines on Land Policy in Africa in 2010.[14] 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

[12] Adopted at its 62nd session in Abuja on 26 and 27 May 2009 Directive C/DIR3/05/09.

[13] 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.

[14] AUC-ECA-AfDB Consortium 2010 *Framework and Guidelines on Land Policy in Africa: A framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods* available at: file:///C:/Users/Wilmienw/OneDrive/Documents/extractives%20group/FPIC/oxfam/fg_on_land_policy_eng.pdf

policy was given further practical contents through the AU Guiding Principles on Large Scale Land Based Investments in Africa of 2014.

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.

Domestic possibilities: the recognition of customary rights in land

International, regional and sub-regional law has long seized to be the only sources of the right of local communities with customary land rights to say no. One of the most important domestic avenues available, is for communities to assert their land rights under customary law – in substance and procedure. Indeed, the South African Constitutional Court has confirmed the right to consent to be integral the customary property rights.

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.[15] 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[16] 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;

[15] See for example Chanock, M 1985 *Law, Custom and Social Order: the Colonial Experience in Malawi and Zambia* Cambridge: Cambridge University Press; Comaroff, John L. and Roberts, Simon 1981 *Rules and Processes: The Cultural Logic of Dispute in an African Context* Chicago: University of Chicago; Guy, Jeff 2015 *Power and the People in pre-conquest societies: land and the law* University of KwaZulu-Natal.

[16] Cousins, Ben 2009 *Potential and pitfalls of 'communal' land tenure reform: experience in African and implications for South Africa* Paper for World Bank conference on 'Land Governance in Support of the MDGs: Responding to new challenges' Washington.

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;

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

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. These are precisely the communities most vulnerable to land grabs, because their right to the land are regarded as weak. 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.

Secondly, customary law provides for the rights of the community and its members against the outside world. Most of the instances of gender discrimination often cited in relation to the implementation of customary law rules, 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 internal level; that is within the community boundaries.[17]However, the second level at which customary law operates–where it is a source of rights that can be defended against the outside world – 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 customary rights to these resources, including the right to say no, 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

[17] TW Bennett 2011 'Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform' in *Emory International Law Review* Vol 25 at p 1030.

happen–by providing for weak recognition of customary tenure rights[18] or assuming that state law will simply override it.

Upon independence, most African countries adopted the colonial legal framework wholesale; especially, as renowned Kenyan scholar Okoth-Ogendo[19] pointed out, in view of the development frameworks' "general ambivalence as regards the applicability 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.

The colonial settler mining and agricultural economies shaped the spatial and legal dimensions of development and underdevelopment of these colonies. 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.[20] The legislation created during this era was based on a distorted colonial understanding of custom skewed to benefit colonial interests. [21]

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.[22] Towards the end of the twentieth century, many African countries adopted constitutions which recognise customary law as an equal source of law to be applied by the courts "where appropriate". 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, 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,[23] it held:

---

[18] Recognition is often weak because if conflates rights in terms of customary law with traditional leadership. Consulting the traditional leader is regarded as a complete fulfilment with recognizing customary law.

[19] Okoth-Ogendo, HWP 2008 'The nature of land rights under indigenous law in Africa' in *Land, Power, Custom* Cousins and Claassens (eds) p 99.

[20] 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.*

[21] See Claassens and Cousins.

[22] Mnisi, S 2007 *[Post]-colonial culture and its influence on the South African legal system – exploring the relationship between living customary law and state law* Unpublished PhD dissertation, Oxford University.

[23] *Alexkor Ltd and Another v Richtersveld Community and* Others at para 50.

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 [customary] 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:[24]

"[I]s 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"

They coined the term "living customary law" as opposed to "official customary law" such as colonial codifications (and distortions) of custom.[25] It is living customary law, rather than official, static versions that is recognized by the South African Constitution.

In *Shilubana*,[26] 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*[27]):

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,

---

[24] Ibid at para 51.

[25] *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.

[26] *Shilubana and Others v Nwamitwa* [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.

[27] *MM v MN and another* 2013 (4) SA 415 (CC) at para 45.

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.[28] 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.

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. One must 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.

Equally problematic is the pattern of extraordinary chiefly control over communal land in most Southern African countries. To understand it, 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[29] 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.

---

[28] 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 (n 48 above) concerning the right of a first wife of a polygamous husband to consent to her 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 courts' 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.

[29] 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.

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."[30]

Domestic opportunities: statutory and case law

Finally, it is important to note that there are often far stronger protections of the right to say no lurking in domestic legislation than is generally believed. A general misconception often repeated in Southern African countries is that the only avenue in domestic law for community consultation is through the environmental law frameworks and in particular the development of Environmental Impact Assessments. This (mis)understanding of the applicable legal framework is driven by the skewed implementation of the frameworks which reduces the different consultation (and consent) requirements tin land, minerals and environmental legislation, to a single process related to EIAs.

But consultation towards EIAs is generally 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 many Southern African countries, there are far stronger provisions in the domestic land and minerals legislation 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. For example, decisions over communal land in most Southern African countries must, in terms of applicable legislation, be taken in terms of customary law. As explained, customary law often includes the right of land rights holders to say no. In

[30] M Mamdani *Citizen and subject* (1996), cited in S Mnisi 'Reconciling Living Customary Law and Democratic Decentralisation to Ensure Women's Land Rights Security' (2010) *Policy Brief 32 Institute for Poverty, Land and Agrarian Studies* at 1.

the mining legislation of countries like Malawi, Zambia and Zimbabwe the written consent of the lawful occupier must be sought before a mining right can be exercised. This is a far stronger protection than what communities in South Africa, for example, enjoy in terms of the applicable mining code.

2018 has been a landmark year for communities in South Africa who demand the right to say no. The members of the Umgungundlovu community of Xolobeni that stand to lose their land to an Australian mining company approach the High Court for an order that their consent is required before mining may go ahead. The applicants' lawyers told the Court:

At its most fundamental, this case is about who gets to decide if TEM will be able to mine. Is it the community, which has lived there for centuries? Or is it a foreign mining company, by submitting a compliant application to the Minister?[…] The fundamental fact that underlies this case relates to the vulnerability of communities like the Applicants. Their way of life is intrinsically linked to the land. Customary communities tend to suffer disproportionately from the impacts of mining as they are directly affected by the environmental pollution, air borne diseases, loss of their farm land and grazing land, forced displacedment and the loss of community amongst other things. Without free, prior and informed consent, they are at real risk of losing not only rights in their land, but their very way of being.

The Applicants argue that they have the right to say no based on their customary law and on the Interim Protection of Informal Land Rights Act which regulates decision-making on communal land. They say that international and African human rights law support their argument.

While judgment is still pending in that case, the Constitutional Court recently handed down a strong judgment in favour of a community that had been evicted by a mining company controlled by their own chief, but without their consent. The Constitutional Court opened its judgment with the following words:[31]

The statement by Frantz Fanon in his book titled 'The Wretched of the Earth' is, in the context of this case, apt. It neatly sums up what lies at the core of this application. He said that "[f]or a colonized people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity". Thus, strip someone of their source of livelihood, and you strip them of their dignity too.

The Court went on to emphasize the status and importance of protecting customary land rights and concluded that the mining company should have sought the consent of the rightsholders as required by legislation. When they were unable to get consent, they did not have the right to evict the community members.

31 *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* [2018] ZACC 41