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DONAL K. COFFEY
STEFAN VOGENAUER (EDS.)

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MAX PLANCK INSTITUTE
FOR LEGAL HISTORY AND LEGAL THEORY

Sonya Cotton

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1. Introduction

Official legal pluralism, or the institutionalised coexistence of state and non-state normative orders – such as religious or customary laws – is characteristic of post-colonial African legal systems.[1] This is especially the case for former British colonies that applied the system of "indirect rule", whereby African rulers – frequently appointed by colonial administrators – governed "native" communities through a distorted version of African Customary Law (ACL) that accorded to European moral standards and preconceptions of African society.[2] Despite its contested[3] and – in certain cases – invented origins,[4] customary laws, rather than state laws, often enjoy a de facto normative monopoly on communities, particularly in rural regions of Africa.[5] Further, the recognition of customary laws on the basis of equality with transplanted colonial laws is perceived as a hallmark of post-colonial legal reform, embodying the principles of group rights and the right to culture valued within African traditional communities.[6] However, the legitimacy of customary laws does not merely pertain to cultural freedoms, but also has material consequences for land use and ownership. Anglophone African countries widely recognise customary (also called communal, traditional, and tribal) land alongside conventional forms of freehold and leasehold

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1 Merry (1988).

2 Bond (2008) 300; Táíwò (2010) 40–41; Amoo (2020) 21.

3 Diala (2021).

4 Mamdani (1996).

5 Wily (2011).

6 Bennet (2009). See also Article 5(2) of the African Union's Charter for African Cultural Renaissance (2006).

tenure. In contrast to the latter types of property, access to customary land is predicated on one's identity and accepted status as a member of a traditional or customary community.[7]

From a human rights perspective, the legal effects of the recognition of customary title in anglophone Africa has been mixed. Bolstered by a growing body of international jurisprudence recognising that land for indigenous peoples is not merely an economic entity, but also inextricably connected to its spiritual, socio-cultural, and ecological properties,[8] traditional communities in Africa have successfully approached the courts to safeguard ancestral land against extractivist industries and/or state appropriation.[9] At the same time, multiple factors – such as lacunae in the law, lack of formal title, and unilateral actions taken by traditional leaders without the consent of their constituent communities, to name a few – make communal land particularly vulnerable to land grabs, resulting in widespread dispossession and inability to access the legal remedies available to ordinary citizens.[10]

In the context of accelerated globalisation, where rural land in lower- and middle-income countries is particularly attractive for extractive industries and agri-businesses, there is a dual incentive for African countries to affirm traditional systems of knowledge denigrated under colonial rule, whilst maintaining control over customary lands in so far as it is economically and politically advantageous. Describing a comparable situation in the Americas, Forte observes how, as indigenous title becomes established in mainstream international law as an alternative to state or private land, there has been a "growing anxiety on the part of states as they attempt to define, identify, and manage the explosion in Indigenous self-identification".[11]

This chapter explores how this "growing anxiety" is managed in five neighbouring southern Africa countries that reflect the British practice of indirect rule, namely Namibia, Botswana, South Africa, Zambia and Zimbabwe. It furthermore unpacks the ways in which these strategies are not

7 Cousins (2007).

8 Cotula (2015). See also Strecker (2018), 168 ff. *Sawhoyamaxa Indigenous Community v Paraguay* (2006); *Saramaka People v Suriname* (2007).

9 *African Commission on Human and Peoples' Rights v Kenya* (2017) ("*Ogiek*"), *Baleni v Minister of Mineral Resources* (2018). On "extractivism" see Kröger (2022).

10 Claassens/O'Regan (2021); Kepe/Hall (2018); Manson/Mbenga (2011) 110; Wily (2010).

11 Forte (2013); Bhandar (2018) 150–151.

grounded in local realities but rather aim to constrain the capacity for a grassroots legal pluralism, inadvertently employing colonial ontologies of land governance in Africa.

Following this introduction, Section 2 explores the relevance of "community" with respect to communal land rights in anglophone Africa. This includes a discussion of the position in the region of international indigenous people's rights, which provides the normative basis for many community land claims in the absence of formal title. While international indigenous people's rights are increasingly being referenced in African jurisdictions with respect to the collective land rights,[12] I argue that there has been insufficient engagement with what it means to be a community, despite the importance of this concept to the collective legal personhood. The remainder of this section looks at the lay meaning of community. Section 3 looks at the contemporary statutory definition of "community" in five neighbouring southern African countries with respect to customary land. Particularly it asks the following two questions: who qualifies *for* the protected status of community and who/what *qualifies* for/as communal land. It argues that despite affirming legal pluralism; in practice communities are defined through a prism that limits and curtails the type of pluralism that is allowed, and customary land is regulated in a manner that does not, for the most part, afford communities agency in self-identification or self-determination. Section 4 discusses the ways in which the statutory understanding of communities, including the ways in which they are allowed to use customary land, reflect Occidentalist and colonial (mis)interpretations of Africa. It also reflects on the appropriateness of the company as a model for community. Finally, section 5 summarises the arguments of the chapter, and, drawing on the decolonial scholarship of Mbembe, Mignolo and Federici, argues for a purposive understanding of "community" based on an ethic of repair, restitution and reparation, embedded in the local landscape.

The purpose of this chapter is not to engage in debates about the legitimacy of indigeneity as a legal status,[13] or comment on communities who identify as indigenous or employ strategies of international indigenous peoples' rights,[14] but rather to invert the ethnographic gaze towards normative

12 *Ogiek*; *Baleni*; Gilbert (2017).
13 Young (2020); Kuipa (2017); Povinelli (2002).
14 Lehmann (2007).

Eurocentric ontologies of "community", which, as will be argued, continue to haunt postcolonial legal systems. This is relevant to critical legal geography perspectives, which, in contrast to much traditional legal scholarship, reject a despatialised understanding of law as neutral, universal and/or based on a teleology of progress.[15] Instead, legal geography pays attention to the way in which law and space are co-constitutive, mapping the borders of social reproduction, which includes the (post)colonial demarcation of collective identity.[16]

2. The spatial idea of "community"

a) Ordinary meaning of community

In the ordinary sense of the word, "community" is commonly connotated spatially.[17] This is seen in the 10th edition of the Concise Oxford Dictionary provides the following definitions of community, ranked by the dictionary in order of its perceived relevance and applicability:

1) "A group of people living together in one place, especially one practising common ownership;"
2) "A place considered together with its inhabitants: a rural community;"
3) "The people of an area of country considered collectively; society;"
4) "A group with something in common;"[18] and, finally,
5) "A group of interdependent plants or animals growing or living together".[19]

Here, the first three meanings relate to notions of physical space, property/ownership, and social identity. The fourth meaning is general and allows for the metaphorical and despatialised use of the term (as in the phrase "LGBTQ+ community").[20] Like the first three definitions provided, the fifth sense of "community" is grounded in place and space. However,

15 Sandberg (2021) 169–171; Bennet/Layard (2015). See the introduction in this volume.
16 Sandberg (2021) 181; Bennet/Layard (2015); Blomley/Bakan (1992).
17 On such metaphorical uses, see Mulligan (2015) 349 on grounded verses projected communities.
18 10th edition of the Concise Oxford Dictionary, 289.
19 Ibid.
20 Ibid.; Hopper (2003) 3.

unlike the other entries, its defining characteristic is interdependence, "a group of interdependent plants or animals growing or living together", and its use is constrained to ecology ("plants or animals").[21] The implication is that this defining community through interdependence is esoteric and specialised. And yet, this latter definition is most reflective of indigenous and non-Western cosmologies;[22] as well as a growing body of scholarship rejecting the post-Enlightenment distinction between nature and culture as both qualitatively incorrect and normatively harmful, having provided the ideological foundation for colonialism, capitalism and environmental destruction.[23]

Still, the sense of "community" as connoting a stable spatial and political entity – often relating to anthropocentric notions of exclusive possession – remains salient within international law. This is most obvious in the metaphor of the "international community" as comprising the totality of sovereign nation states, despite widespread critique of the latter as the unmarked and default subject of international law.[24] Particularly within the last few decades, "community" in international law has also come to establish categories of rightsholders, particularly land-dependent groups and indigenous peoples, who are often antagonistically positioned within the nation-state.[25] Yet the term "community" in this sense remains largely undefined.[26] When qualified with the adjective "local", community is widely used in the same context as "indigenous peoples".[27] Despite the efforts of a few legal scholars arguing for a normative distinction between these two categories,[28] in practice these terms are frequently discursively interchangeable, allowing for example, groups with tribal identities to benefit from indigenous peoples'

21 10th edition of the Concise Oxford Dictionary, 289.
22 Deloria (2003); Todd (2016); Elechi (2006); Tănăsescu (2020).
23 Graham (2011); Olwig (1996); Davies (2020). See also the chapter by Byer in this section of the volume.
24 Lixinski (2019); Francioni (2014); Cotula (2015); Benda-Beckmann / Turner (2018).
25 Cotula (2015); United Nations Declaration on the Rights of Indigenous Peoples (2007) ("UNDRIP").
26 Hossain (2016) 119.
27 E. g. Article 8(j) of the UN Convention on Biological Diversity (1992); FAO (2016); 2021 Operational Guidelines for implementation of the World Heritage Convention I(C)(12).
28 Cocks (2006).

rights.[29] This is particularly relevant to contexts where communities became dispossessed and racialised through the process of settler-colonialism but are unable to prove first occupation in an area.[30] Still, the recipient communities of indigenous peoples rights requires additional discussion in the context of southern Africa, where, in contrast to former British colonies such as Australia, Canada, USA and New Zealand, European settlers and their descendants in comprise numerical minorities of the population.[31] As such, communities in Africa potentially pose a greater threat to state monopoly of land, creating incentive to curtail and streamline potential land claimants, as well as to prescribe acceptable forms of land use.[32] The following section further unpacks this dilemma, particularly the meaning of "community" with respect to indigeneity in legally pluralistic Africa.

b) Community and indigeneity in Africa

Given the potential risk of indigenous title to State monopoly over arable and resource-rich lands, various African governments have fiercely protested the need for a special protected status of indigenous communities in Africa on the grounds that "everyone is indigenous".[33] However, in no small part due to the activism of NGOs and indigenous groups,[34] this perspective has been rejected by various African jurisdictions which recognise indigeneity as a status for protection.[35] This is further reflected in the recent judgement at the African Court on Human and People's Rights, which found that in expelling the Ogiek from their ancestral land, the government of Kenya

29 *Moiwana Village v Suriname* (2005); *Samaraka People v Suriname* (2007); *Comunidad Garífuna v Honduras* (2015).

30 *Moiwana Village v Suriname* (2005) and *Saramaka People v Suriname* (2007) at the Inter-American Court of Human Rights; AHPR/IWGIPA (2005).

31 E. g. *Mabo v Queensland* (1992); *New Zealand Maori Council v Attorney-General* (1987); Veracini (2011).

32 Gilbert (2017); Odendaal (2021) 10–11.

33 Gilbert (2017) 3. See also Crawhall (2011) for a discussion on African political concerns around UNDRIP at the General Assembly.

34 Crawhall (2011); Murray (2011).

35 Gilbert (2017); *Baleni* (2018); also s 1 of South Africa's Interim Protection of Informal Land Rights Act (1996).

had violated that community's rights as indigenous peoples.[36] An authoritative definition of indigeneity for the African context comes from the African Commission Working Group of Experts on Indigenous Population/Communities, which understands the concept as not merely applying to the groups who historically were first present in the region, but being predicated on, among other factors, self-identifying as indigenous, experiencing institutional marginalization and living traditional lifestyles distinct from mainstream society.[37] Since this conception does not rely on neatly bound ethnic identities, it better reflects the dynamism of precolonial identity-formation.[38] Likewise, it accommodates the phenomenon whereby indigeneity was not an ontological state of existence, but instead emerged in relation to settler-colonialism, whereby the status and rights of local communities were defined by colonial laws shaped by European racial cosmologies.[39]

While there is considerable exploration of the legal dimensions of "indigeneity",[40] the legal discourse around defining "community" is less well developed, despite the latter concept being central for determining the legal standing of claimants in land-related cases.[41] In South Africa, it is widely recognised that the demarcated boundaries of traditional African knowledge, including ethnic boundaries, was shaped by colonial and racist stereotypes, and as thus cannot be relied upon to give accurate representations of traditional communities.[42] Likewise, it is widely acknowledged that the legislation of African communal identity was inextricably linked with colonial statecraft, sowing animosity between "tribes" to prevent collective resistance to Europeans; placing indigenous peoples in strategically situated "reserves"; as well as keeping the "natives" in check in a way that used minimal colonial resources yet ensured labour supplies for the colonisers.[43] This necessitated that African communities be understood as "monarchical, patriarchal, and authoritarian. It presumed a king at the centre of every

36 *African Commission on Human and Peoples' Rights v Kenia* (2017).
37 ACHPR/IWGIA (2005).
38 Keese (2019).
39 Odendaal (2021) 9–11.
40 Engle (2010); Rösch (2017); Veracini (2011).
41 Diala/Cotton (2021); Averweg/Leaning (2015); Kepe (1999).
42 Bennet (2009); Himonga/Diallo (2017); Manson/Mbenga (2012).
43 Mamdani (1996); Dedering (2006); Friedman (2005); Chimhundu (1992).

polity, a chief on every piece of administrative ground, and a patriarch in every homestead or kraal".[44]

Recognising the colonial distortion of African traditional society, South African judges have recognised that in practice, communities do not necessarily conform to these immutable fictions of customary law, but are constantly adapting and contesting the meaning of custom in response to new circumstances.[45] Judge Moseneke, at the Constitutional Court of South Africa, attempted to grapple with the meaning of community as it pertained to claimants seeking land restitution:[46]

> [W]hat must be kept in mind is that the legislation has set a low threshold as to what constitutes a "community" or any "part of a community". It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a community. This generous notion of what constitutes a community fits well with the wide scope of the "rights in land" that are capable of restoration. These rights, as defined, go well beyond the orthodox common law notions of rights in land. They include any right in land, whether registered or not; the interests of labour tenants and sharecroppers; customary law interests; interests of a beneficiary under a trust; and a beneficial occupation for a continuous period of not less than ten years before the dispossession. The legislative scheme points to a purpose to make good the ample hurt, indignity and injustice of racial dispossession of rights or interests in land that continued to take place after 19 June 1913.[47]

Despite this progressive understanding of community, which acknowledges the need to look further than traditional common law doctrine, Moseneke does not say what a community *is*, only the liberal lens through which these land claims must be assessed.[48] Furthermore, subsequent cases and statutory developments illustrate that this definition was by no means universally endorsed nor consistently applied in South Africa's legal system.[49] For instance, lower courts have rejected the application for land restitution on the grounds that appellants were not a proper community,[50] a matter that is becoming increasingly apparent as revivalist and newly recognised Khoi and San indigenous communities approach the courts to litigate land

44 Mamdani (1996) 39–40.
45 *Mabena v Letsoalo* (1998).
46 *Department of Land Affairs v Goedgelegen* (2007).
47 Ibid. at para 41.
48 Personal correspondence with Donal Coffey (2023).
49 As well as other southern African countries, for instance see *Tsumib v Namibia* (2022).
50 *Elambini Community v Minister of Rural Development and Land Reform* (2018).

disputes.[51] It thus remains useful to broadly interrogate the normative underpinnings of "community" to understand the ontological forces that shape the recognition and misrecognition of claimants in land disputes.

3. Anxious pluralisms

The previous section discussed the normative (and spatial) understanding of "community" and the problem that new protections for "local communities" in international law represent in the context of legally pluralistic Africa. It also argued that despite being closely related to indigenous peoples' rights, the "community" as a legal subject and rightsholder remains considerably less explored, which, given the colonial distortion of African identity, is particularly problematic. With respect to five anglophone countries in southern Africa – Namibia, South Africa, Botswana, Zambia, and Zimbabwe – this section unpacks the national legislative language used to define, constrain and shape "communities" with respect to the rightsholders and occupants of customary/traditional/communal lands. The following sub sections do so with respect to two guiding questions: (1) Who qualifies (as a) community – in other words, what statutory guidance is given, if any, to demarcate, define or identify the collective rightsholders of customary land? (2) Who/what qualifies communal land? The second question examines who owns (or at least who is able to exert the highest epistemic authority over) communal land,[52] as well as the statutory mechanisms designed to govern that land. The latter is entrenched in particular ideologies of property/land use, which, as I will argue, further shapes the legal meaning of community. I refer to these strategies collectively as "anxious pluralisms", since they reflect the dual incentives of postcolonial African countries to affirm legal pluralism, and at the same time frantically constrain its effects, particularly with respect to collective land rights.[53]

51 Ellis (2019). This is also exemplified in the ongoing litigation in Cape Town to stop the development of Amazon's African headquarters, which increasingly hinges on whether litigants are "legitimately" indigenous. *Observatory Civic Association & Goringhaicona Khoi Khoin v Liesbeek Leisure Properties Trust* (2021); *Khoin and Others v Jenkins and Others* (2022).

52 This draws on notions of hermeneutical injustice, as discussed by Fricker (2007).

53 This analysis focuses on laws, rather than policies. The countries discussed, for instance, have experimented to various degrees with Community Based Natural Resource Management policies, which have attempted to devolve the management of natural resources,

a) Who qualifies (as a) community?

Namibia

Namibia's Traditional Authorities Act of 2002 (henceforth "TAA") defines "traditional community" as an:

> [I]ndigenous homogenous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognises a common traditional authority and inhabits a common communal area, and may include the members of that traditional community residing outside the common communal area.[54]

The insistence on homogeneity (including shared ancestry, language, cultural heritage, customs, and so forth) reflects a Westphalian and Eurocentric understanding of the world as comprising bound, mutually exclusive categories.[55] The stipulation that traditional communities recognise a common traditional authority furthermore reflects colonial practices of statecraft through "indirect rule".[56] With respect to its understanding of traditional community, Odendaal and Werner observe that the Act was written with particular notice to Namibia's Oshiwambo-speaking groups (comprising over 50% of the population), whose traditional structure "is characterised by a hierarchical authority structure with a single representative leader for a large group".[57] However, this definition by no means applies to all ethnic minorities, such as San communities, who traditionally, rather than recognising a single traditional leader, are egalitarian with internal checks and balances to prevent centralised despotism.[58]

Following the logic of the TAA, to be recognised as a traditional community meant that certain communities were required to compromise their own traditional values and systems of organisation, for example appointing

such as wildlife and biodiversity, to communities (Nelson 2010). However, drawing on critiques that these policies have ultimately not empowered local communities (Murombedzi 2010; Rihoy/Maguranyanga 2010), this chapter focuses instead on acts of legislation governing the demarcation of collective identities in the context of land rights. The latter, arguably, represents a far greater risk to state monopoly over land.

54 S 1 Namibia's Traditional Authorities Act ("TAA") (2002).

55 Mbembe (2018); Bak McKenna (2022) 29.

56 Mamdani (1996) 90.

57 Odendaal/Werner (2020) 4.

58 Dieckman (2020) 101; Koot/Hitchcock (2019).

someone in the community as a traditional leader where customarily such a post did not exist.[59] Furthermore, despite providing for the removal of traditional leaders,[60] the TAA may in fact exacerbate the difficulty in doing so. This is because the traditional leader is the paramount authority over the customary law of that community, and yet it is through customary law that the traditional leader can be removed.[61] The TAA thus seems to depend on a circular logic that essentially allows the person empowered to dictate the community's customs to be the person in charge of removing his or her own leadership, with minimal checks and balances to prevent corruption.[62]

59 Certain sections of the Act, such as sections 4(1)(b) and 5(10), allude to the fact that some communities do not have "chiefs" or a royal family from which a leader can be appointed. However, recognizing a traditional authority is a named requirement for being recognized as a traditional community by the Act (as per section 1), and hence it is impossible to be a traditional community in terms of the Act without appointing someone to the role of traditional leader. Thus, where no such leader exists, they must be found.

60 S 8 TAA.

61 S 8 (1) TAA on the removal of traditional leaders. Conversation with Peter Watson, legal researcher and consultant for Legal Assistance Centre, 7 November 2022, Windhoek, Namibia. Watson also observes that this argument is, at present, based on conjecture, since this issue has not yet been tested in court directly. Nonetheless, to his understanding, no traditional authority has, at present, successfully been removed by their community.

62 A possible exception to the lack of checks and balances is section 5(10) of the Act, which states that where traditional communities have no customary law regarding appointing a traditional leader, or there is uncertainty or disagreement regarding the customary law applicable, "[t]he members of that community may elect, subject to the approval of the Minister, a chief or head of the traditional community by a majority vote in a general meeting of the members of that community who have attained the age of 18 years and who are present at the meeting". Still, this leaves much to be desired. There is neither a positive obligation to hold democratic elections for a traditional leader, nor any guidelines to ensure transparency in the election. The stipulation that those "present at the meeting" may elect a traditional leader is open to corruption, and furthermore does not regard the geographic and economic reality of Namibia, particularly rural areas, whereby population is sparce and roads are often in poor condition. Furthermore, s 3(4) of the Act imposes fines and/or imprisonment sentences to members of the community who recognise a traditional authority besides the one established through the Act. In practice, this may create a chilling effect within the community, disincentivizing potential dissenters from straying outside the borders of the traditional authority, irrespective of the latter's legitimacy. In my own fieldwork in Namibia September 2022, I was informed by several unrelated people that traditional leadership, including their appointment, is often blurred with party politics. See also Friedman (2011) at 167 and Koot/Hitchcock (2019) 63.

The shortcomings in the Act have contributed to the unjust treatment of indigenous people by Namibia's courts, seen in *Tsumib and Others v Namibia and Others*, one of the first and only ancestral rights claims to be litigated in independent Namibia.[63] The applicants belonged to the Hai//om people, the largest San group in Namibia, who traditionally were hunter-gathers in the region of the country that today houses Etosha National Park, a major tourist attraction.[64] Following Germany's annexation of Namibia (then German South West Africa), the Hai//om people were permitted to remain in the area and practice their traditional lifestyle, including after the demarcation of the area as a Game Reserve in 1907.[65] However, starting in 1954, the apartheid South African government (who effectively treated Namibia as its own colony following Germany's defeat in World War One) forcibly removed the Hai//om people from Etosha in order to preserve the "purity" of the park's natural environment, thereby forcing the community to give up their traditional subsistence to work as poorly-paid labourers in surrounding farms.[66]

In 2015, eight members of the Hai//om community approached the court requesting permission to represent their people in order to claim rights over their land, which included two parts of the Etosha National Park, drawing on their rights as indigenous peoples under international law.[67] Their application was rejected in the High Court due to the fact that the traditional leader registered under the TAA was not joined to the proceedings, meaning that the applicants lacked legal standing to represent their community.[68] The Supreme Court of Namibia upheld the High Court's decision that the claimants lacked the locus standi to proceed, albeit departed from the logic that the TAA fundamentally precluded the possibility for members of the community to litigate without the traditional leader.[69] Instead, the Supreme

63 Odendaal (2021) 15; Dieckmann (2020). I say "one of the first" in acknowledgement of former unsuccessful efforts by the Rehoboth community to litigate against the state for their traditionally held land. *Bastergemeente v Government of the Republic of Namibia* (1996).

64 Odendaal (2021); Dieckmann (2020).

65 Dieckmann (2020) 97.

66 Dieckmann (2020) 98–100.

67 Odendaal (2021).

68 *Tsumib* (2022); Odendaal (2021).

69 However, it must be stated that the reason for rejecting this interpretation was vague and unclear, stating that such an outcome was not part of the "intention" of the Act, and that

Court reasoned that the claimants had not sufficiently established the need to broaden Namibia's (extremely narrow) rules on legal standing, and argued that the claimants instead could have pursued other means to have their requests addressed, including changing "the customary law" of the community, or forming an "unincorporated voluntary association". While it is beyond the scope of this chapter to fully go into why these alternatives are neither realistic nor viable, two brief points shall be made. Firstly, as discussed, the TAA disproportionately empowers the authorised traditional authority to make epistemic decisions relevant to the customary law of the community, meaning that the suggestion to "change the customary law" from within is not feasible. Secondly, the "unincorporated voluntary association" is a legal fiction used largely with respect to non-profit organisations and requires a technical knowledge of the common law that may be unavailable to people experiencing extreme marginalisation, lack of infrastructure and poverty.[70] In focusing on the technical minutiae of its own common law, the Supreme Court ignored the socio-political context in which this claim emerged, and ignored its obligations to international laws on indigenous peoples.[71]

South Africa

Despite the recognition that customary law must be recognised on its own terms, and not through the prism of Western laws,[72] the interpretation of the legal meaning "community" in South Africa is often contradictory, oscillating between inclusive definitions that provide for bottom-up identification while also perpetuating apartheid ontologies of "tribes" in later attempts to demarcate and define customary identity.[73] Traditional leaders

the power of the traditional authority was limited by the independent rights of the community, as well as by the terms of the Act itself. As discussed earlier, this argument fails to capture the contradictions in the Act – including the lack of checks and balances – or account for its social consequences, whereby it creates vast disparities between community members and their prescribed leaders. *Tsumib* (2022) at para 45.

70 On the socio-economic conditions of the Hai//om, see Koot/Hitchcock (2019) 61–62.

71 On Namibia's monist constitutional model with respect to international law, see Odendaal (2021).

72 *Bhe v Magistrate*, *Khayelitsha* (2005) at paras 87 and 90; *Gumede v President of South Africa* (2009) at para 20.

73 On the latter, see Claassens (2019).

are paid a salary by the state, with kings and queens receiving the highest numeration,[74] which further speaks to the institutionalised position of traditional leadership despite the fluctuation in legislative meanings of community.

A number of laws passed shortly after the transition from apartheid to democracy include broad definitions of community, reflecting the desire to democratise land governance according to constitutional values of human rights and dignity.[75] The Restitution of Land Rights Act of 1994 defines community as "any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group".[76] Likewise, the Communal Property Act (CPA), established for land restitution claimants to form juristic persons in charge of governing communal land, defines community as a "group of persons, which wishes to have its rights to or in particular property determined by shared rules under a written constitution and which wishes or is required to form an association as contemplated in section 2".[77] Another broad definition is found in the 1996 Interim Protection of Informal Land Rights (IPILR), which defines community as "any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group".[78] Used in conjunction with international law, this latter law has been successfully used by customary communities to defend unregistered land title from appropriation by mining companies, some of whom were working in conjunction with the communities' own traditional leaders.[79]

At the same time, there has been concerted efforts to streamline and standardise "community" to empower traditional leaders at the expense of communities, thereby reinscribing Apartheid and colonial methods of land governance for rural black South Africans.[80] The Traditional Leadership and Governance Framework Amendment Act (henceforth TLGK) of 2003 extends recognition of the "tribes" and "tribal authorities" established under

74 Proclamation Notice 73 (2022).
75 Kingwill (2021) 194–195; *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* at para 31.
76 Restitution of Land Rights Act 22 (1994).
77 S 1 Communal Property Act 28 (1996).
78 Interim Protection of Informal Land Rights Act 31 (1996).
79 *Baleni* and *Maledu*.
80 Claassens (2019); Kepe/Hall (2018); Duda/Ubinck (2021); Pienaar (2017) 21–22.

Apartheid, maintaining the boundaries of former Bantustans.[81] The TLGK further reifies the centrality of traditional authority in the recognition of the community, stating that a "community may be recognised as a traditional community if it is subject to a system of traditional leadership in terms of that community's customs; and observes a system of customary law".[82]

The TLGK was replaced by the 2019 Traditional and Khoi-San Leadership Act (henceforth "TKSLA"), which defines traditional community as:

(a) [A] system of traditional leadership at a senior traditional leadership level recognised by other traditional communities;
(b) observ[ing] a system of customary law;
(c) recognis[ing] itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities;
(d) occup[ying] a specific geographical area;
(e) hav[ing] an existence of distinctive cultural heritage manifestations; and
(f) where applicable, [having] a number of headmenship or headwomenship.[83]

Despite for the first time acknowledging the existence of Khoi and San communities alongside other South African customary communities, the Act reifies apartheid and colonial conceptions of "community" as something that is culturally and spatially fixed, and predicated on a hierarchical system of traditional authority, irrespective of the applicability of these features to the social organisation to indigenous groups.[84] Furthermore, the conceptualisation of indigenous community, which gives disproportionate power to traditional leaders, has the capacity to undermine the flexibility and capacity for bottom-up decision making permitted by the IPILR, reinscribing apartheid "tribal" systems.[85]

Consequently, the Act was recently challenged in South Africa's Constitutional Court.[86] The applicants of this case, comprising largely activists and grassroot organisations, argued that the TKSLA pooled legal capacity and

81 S 28 TLGK. Buthelezi/Vale (2019) 10.
82 S 2 TLGK; Duda/Ubinck (2021) 142.
83 S 3(4) TKSLA.
84 Puckett (2013); Ellis (2019); Mamdani (1996) 39–40.
85 Claassens/O'Regan (2021) 165–166.
86 *Mogale v Speaker of the National Assembly* (2023).

decision making power disproportionately into the hands of traditional leaders, thus stripping the community of their rights to impact and give / withhold consent to decisions relating to the land on which they lived – inadvertently, reinstalling apartheid-era Bantustan governance in rural areas.[87] The case was decided in favour of the applicants, not on the merits of the substance of the TKSLA, but rather in recognition that there had not been meaningful public consultation from the government.[88] Despite the importance of this decision for democracy, there is once again statutory ambiguity regarding who can be legible as a traditional community in the eyes of the State.[89]

Zimbabwe

The definition of "community" in Zimbabwe is, according to the 1998 Traditional Leaders Act, "a community of persons who, according to customary law, fall under the jurisdiction of a chief".[90] This again reifies hierarchical leadership as the basis for customary community, a matter that conveniently places the State in control of customary land, since traditional leaders are appointed by the president and receive a salary from the government.[91] Further, section 2 of the Act gives the president considerable liberty to define and (re)adjust the boundaries of communal land "in any […] manner that he thinks appropriate",[92] which invites comparison with the 1927 Native Administration Act of colonial South Africa, that allowed the minister to manipulate or even create tribal boundaries strategically.[93]

87 *Mogale* at paras 8 and 43. See also Claassens / O'Regan (2021) at 165 who made similar arguments.

88 *Mogale* at para 45.

89 This ambiguity is compounded by the discreet removal of the definition of "community" from South Africa's environmental legislation. For instance, section 1(d) of South Africa's National Management Amendment Act (2008) defines "community" as "any group of persons or a part of such a group who share common interests, and who regard themselves as a community; and (b) in relation to environmental matters […] means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law". This definition was subsequently removed by section 1(d) of the National Environmental Management Laws Amendment Act (2014).

90 S 2 Traditional Leaders Act 25 (1998).

91 S 3 ibid.

92 S 2 Rural District Councils Act 8 (1988).

93 Mamdani (1996) 67.

Botswana

In Botswana, the "tribe", rather than the "community", is the official idiom through which the regulation of customary land tenure is expressed.[94] Botswana's Constitution recognises eight tribes of the Tswana ethnic group, the dominant population of Botswana.[95] Customary leaders act as public officials, fulfilling ministerial obligations in addition to customary ones and are paid a salary by the State.[96] In effect, Botswana has standardised and codified customary identities, which were dynamic and overlapping before colonisation.[97]

That "community" is understood as a tributary of "tribe" is seen in the Customary Law Act of 1969, which provides a definition of "tribal community" as "any community which is living outside a tribal territory but is organized in a tribal manner".[98] Botswana's Bogosi Act of 2008 prescribes the conditions in which tribal communities can be recognized as a tribe.[99] The final decision ultimately lies with the Minister, who when consulting with the "tribal community" in question takes into account "the history, origins, and organisational structure of the community, and any other relevant matters".[100] Despite the potential for legislative recognition and formal inclusion of communities outside Botswana's recognised tribes, Bishop expresses doubt that this framework is "culturally appropriate" – let alone logistically possible – for communities not identified in the Constitution,

94 However, a definition of "community" exists at a policy-level in environmental management. Botswana's Community Based Natural Resources Management Policy (2007: ii) defines community as, "[A] group of people bound together by social and economic relations based on shared interests," which, for the purposes of the Policy, "may consist of a diverse group of people, living in one or more settlements, with varied socio-economic interests and capabilities sharing an interest in the management and sustainable use of natural resources in their common area".

95 S 78 Constitution of Botswana (1966). Also, Botswana's Mineral Rights in Tribal Territories Act 31 (1967). The Act further includes eight schedules of memorandums of agreement between the President of Botswana and the respective Chief of these tribes, with the effect of bestowing mineral rights to the State. Werbner (2002) 676.

96 S 17 Bogosi Act; Manatsha (2019).

97 Werbner (2002); Wilmsen (2002) 827–829.

98 S 2 Customary Law Act of Botswana (1969).

99 S 3 Bogosi Act (2008).

100 Ibid.

namely San and pastoral communities, whose social organisation is not "tribal" but characterised by mobility and horizontality.[101]

Finally, Botswana's statutory regulation of customary law retains a repugnancy clause, a colonial proviso whereby African customary law was permitted to govern Africans in so far as it did not offend Victorian standards of respectability and decency (or, as it was worded, "natural justice and morality").[102] The repugnancy clause is seen in Botswana's definition of customary law as "the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice".[103] While conspicuously used as a means to curb harmful customs and cultural practices (particularly related to polygamy and other personal law matters), in practice, the repugnancy clause was a function of indirect rule, ensuring that African culture was constrained in the borders of Western interpretation, and thus inherently regarded as deficient and inferior.[104] Thus, the continued existence of the repugnancy clause in contemporary Botswana suggests state anxiety about traditional leaders' normative monopoly on communities, despite the latter's power being codified during colonialism.[105]

Zambia

While customary law is a protected source of legal authority in Zambia's Constitution,[106] and customary land is identified as a system of tenure,[107] there is to my knowledge no concise statutory definition of "community" in Zambia's written laws with respect to customary land.[108] Still, like the other

101 Bishop (1998) 120–121; see also Molebtsi (2019) 48; Gilbert (2017); Ellis (2014); Hitchcock (2006).

102 Banda (2005) 16.

103 S 2 Customary Law Act of Botswana. See also s 2 Bogosi Act.

104 Mamdani (1996) 115–117.

105 Morapedi (2010); Manatsha (2020).

106 S 7(d) Constitution of Zambia.

107 S 254 Constitution of Zambia.

108 Rather, the definition of "village" in Registration and Development of Villages Act is functionally almost identical to the other definitions of community in the other countries examined, particularly Zimbabwe. The Act, in section 2, defines "village" as "means a settlement in a rural area of which there is a Headman recognised as such by all or a majority of the villagers and their Chief under their customary law, and 'villager' shall be

countries discussed so far, it is evident that it is conceived with respect to traditional authorities, who must first be approved by the president and are then paid a salary by the state.[109] That customary communities are imagined in a top-down manner is affirmed in the policing role of the Chief who is "required to take reasonable measures to quell any riot, affray or similar disorder which may occur in that area".[110] Zambia's Land Act of 1995 furthermore recognises that any customary land rights held prior to the Act remain valid, and these may not be infringed upon by any other law, however this right is contingent on permission from the relevant authority.[111]

Discussion

For the most part, with the exception of certain legislation in South Africa, "community" is widely constructed with respect to traditional authorities, whose roles and powers are prescribed through legislation, and who often receive renumeration from the State. Likewise, community is affixed to specific territories zoned as communal / tribal land. This results in the erasure of communities who do not fit within these categories, for example San peoples, but also communities whose rights in land were violated through unilateral decisions taken by their traditional leader.[112] It furthermore forecloses self-identification as a means of establishing a community, contradicting international guidelines on indigenous peoples' rights.[113]

Namibia and South Africa provide the most detailed ethnographic criteria of what it means to be a customary or traditional community, perhaps a

construed accordingly". Here, village refers to the collection of people who practice customary law as determined by their traditional authority (a headman, who is governed by a Chief). It is also spatially affixed. However, the Act in other ways departs from the other counties' understanding of community, requiring each village's respective traditional leader to record the movement and details of villagers. Thus, in contrast with other countries examined, status on customary land is delinked from a particular ethnic identity, but more related to the land itself. See section 4.

109 S 8 and s 3 (2) The Chief's Act of Zambia.

110 Ibid., s 11. This top-down approach is further seen at a policy level with respect to environmental governance. Lubilo / Child (2010).

111 S 7 and 9 Zambia's Lands (Amendment) Act (1996).

112 See section 3.2 below.

113 Art. 1(2) ILO 169 (1989).

114 Bhandar (2018) 1–4.

legacy of the previous apartheid regime, which, more so than colonies used primarily to extract resources to the metropole, meant that white settlers were more inclined to exert greater levels of epistemic authority over the identification and subsequent disposal of indigenous peoples.[114] At the same time, in South Africa, certain pieces of legislation, particularly those passed in the early years after apartheid define community in terms of structure rather than form – that is through possessing "shared rules" and / or a particular relationship to land – rather than a through a normative description of ethnic identity. Its corresponding structures of land governance, namely the communal property association, is discussed in more detail in the following section, which considers the statutory guidance for the administration of communal lands, and its ideological meaning in terms of acceptable land use.

b) Who / what qualifies as communal land?

Zimbabwe

Despite the Constitution of Zimbabwe providing wide discretion to traditional leaders in ruling communal land,[115] at a statutory level, communal land is strictly regulated by the government. All communal land is vested in the president,[116] who in turn appoints chiefs – the highest rank of traditional authority.[117] Traditional leaders are required to cooperate with Rural District Councils, which are bodies corporate[118] who have overall authority over the use and allocation of customary land.[119] These Councils are affectively governmental offices, and enjoy the power to create by-laws.[120] Ultimately, traditional leaders play both a cultural and administrative role, assisting the State with tasks that range from law enforcement to tax collection.[121] While communities are not in charge of their boundaries or membership, there are some statutory measures in place to provide for grassroots participation in rural governance: for instance district council members are sup-

115 Article 282(2) Constitution of Zimbabwe (2013); Tsabora / Dhliwayo (2019).
116 S 3 Communal Land Act of Zimbabwe (1982).
117 S 3(1) Traditional Leaders Act (1998).
118 Ibid. Rural District Councils Act (1988).
119 Ibid., s 26.
120 Ibid., s 88.
121 Zimbabwe Constitution article 282 1(a) and (b). Traditional Leader's Act 5(1)(f).

posed to be democratically elected,[122] and through the village there exists a platform for adult members of the community to be in dialogue with the traditional leaders and district councils.[123] Still, the regulation of customary land and the borders of "community" reflect a top-down system of control, with little recourse to protect communities members from land grabs and dispossession.[124] This has been made apparent in the government's decision in 2021 to evict thousands of Shangaan people from their ancestral land in Chilonga to make space for large-scale lucerne farming.[125] It is further seen in Zimbabwe's Environmental Management Act, which, despite acknowledging the bidirectional relationship between communities' well-being and environmental sustainability,[126] nonetheless considers the consultation of affected communities in developments to be an option that is taken at the discretion of the Director-General.[127]

Zambia

In Zambia, like in Zimbabwe, customary land is vested in the President.[128] In terms of land governance, Chiefs, subject to the Constitution and so long as it is not "repugnant to natural justice and morality", enjoy significant discretion to govern customary land.[129] For instance, their permission must be granted to alienate parts of customary land into private leasehold land.[130] However, this office may be abused at the expense of the community, as seen in the recent case, *Asa Lato and 30 Other Village Owners v Chibale and Others*, where a traditional leader sold customary land without consulting his community.[131]

122 Constitution of Zimbabwe article 275(2)(b).
123 S 14 Traditional Leaders Act of Zimbabwe.
124 CCMT (2014) 14.
125 Marewo/Ncube/Chitonge (2021); Gwerevende (2023).
126 S 4 Environmental Management Act (2002).
127 S 100(3) Environmental Management Act.
128 S 3(1) Zambia's Lands (Amendment) Act (1996); s 8 The Chief's Act of Zambia.
129 S 10(1) The Chief's Act of Zambia.
130 Murombedzi et al. (2017).
131 Daka (2019).

Botswana

Unlike Zimbabwe and Zambia, communal land in Botswana is officially vested in land boards in trust for the country's citizens.[132] Botswana's land boards are bodies corporate, capable of suing or being sued in their own name, whose authority over land includes granting, cancelling and modifying land rights, as well as authorizing transfers of tribal land.[133] They receive their funding through a combination of government payments, grants and donations, income through its investments, as well as through charging fees for their services.[134] With the exception of mineral resources, which vest in the State, the State is required to make an application to the land board if it requires tribal land be repurposed for public purposes.[135] The high status of land boards is further expressed in the strict confidentiality requirements that, at the risk of fines or imprisonment (and unless required for legal reasons), all members and people assisting land boards must "observe and preserve the confidentiality of all matters coming before the land board, and such confidentiality shall subsist even after the termination of the term of office or mandate of such member or other person, as the case may be".[136]

The extensive power of land boards in Botswana reflects the fact that the latter were conceived of as a replacement in function to the Chief, who previously served British colonial interests by keeping the local population in check.[137] The shift in authority from Chiefs to land boards reflected the perceived need for modernisation of the rural populace (reflecting Botswana's postcolonial trajectory towards Bureaucratism and privatisation); as well as the desire to weaken the monopoly over customary land previously enjoyed by traditional leaders.[138] However, Manatsha critiques the top-down process by which this change was implemented, observing that this failed to capture the lived realities of communities to whom customary laws continue to have significant normative sway.[139] Similarly, various authors critique

132 S 4 Botswana's Tribal Land Act (2018).
133 S 5(1) Botswana's Tribal Land Act.
134 S 18 ibid.
135 Ibid., s 29. S 2 of Mineral Rights in Tribal Territories (1967).
136 S 16 Tribal Land Act.
137 Ng'ong'ola (2019) 6; Mamdani (1996) 46–47.
138 Ng'ong'ola (1992) 148–149; Manatsha (2020) 111–115.
139 Manatsha (2020) 112; Morapedi (2010) 226.

Botswana's approach to land governance as favouring economic development in the abstract at the expense of social equity and uplifting the country's most marginalised.[140]

Namibia

Customary land in Namibia is vested in the State "in trust for the benefit of the traditional communities residing in those areas".[141] Traditional leaders may also, with the consent of community members, own assets in trust for the community.[142] However, like in Botswana, many powers over land previously held by traditional leaders have been statutorily transferred to Communal Land Boards (CLBs) established in the Communal Land (Reform) Act and paid by the government.[143] Indeed, Chiefs are barred from joining CLBs, precluding their ability to monopolise influence over customary land.[144] All Board positions are elected by the Minister, with the exception of representative of the traditional community, who may be elected by the traditional authority.[145] Traditional leaders are permitted to grant and cancel usage rights over communal land, however to have legal effect these rights must be ratified by the CLB.[146] CLBs are also empowered to recognise or reject individual applicants who held customary land rights prior to the commencement of the Act, with written permission of the recognised traditional authority.[147] If the CLB doubts the validity of the applicant, or if they find there is a conflict of interest, they are empowered to reject the application and/or alter the location and boundaries of the land.[148] Failure to approach the Board in the prescribed time results in the applicant losing their customary land rights.[149]

140 Malope/Batisani (2008); Molebatsi (2019).
141 S 17 Namibia's Communal Land Reform Act 5 (2002).
142 S 18 TAA.
143 Ss 2–3 and 11 Communal Land Reform Act.
144 Ibid., s 5 (b).
145 Ibid., s 4 (5).
146 Ibid., s 21 and 24(1).
147 Ibid., s 28.
148 Ibid., s 28(9) and (10).
149 Ibid., s 28(13).

The modernising agenda behind Namibia's regulation of customary land is laid out in the Communal Land Reform Act, whose purpose is "promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities."[150] This is reflected in the CLB's make-up, comprising – among others – representatives of organised farming, and civil servants representing regional government, land matters, environmental matters and agriculture.[151] Thus the Board reflects the colonial/modern "ideology of improvement", whereby economically productive land use is privileged over all other values of land, including its socio-cultural and ecological meanings.[152] At the same time, freehold ownership is forbidden over any part of communal land,[153] which extends to a blanket prohibition of putting up fences.[154]

On the one hand, the prohibition of fences provides, at least in theory, a legal mechanism against illicit alienation and enclosure of communal land, thereby protecting land-dependent communities from certain types of exploitation and dispossession.[155] On the other hand, the prohibition of fences reflects colonial oversimplification of African tenure systems as equivalent with the European commons, thereby neglecting the former's characteristic adaptability and the networks of duties and relationships that structured precolonial tenure systems.[156] With respect to the Americas, Engle critiqued the phenomenon that – through obtaining state recognition as indigenous peoples – indigenous culture and livelihood is essentialized, limiting indigenous people's right to self-determination and to "freely determine their political status and freely pursue their economic, social and cultural development".[157] Drawing on this argument, while acknowledging the need for legal frameworks to protect people dependent on communal land, the TAA inadvertently perpetuates a colonial paternalism that inhibits the capacity for organic change and flexibility at a grassroots level.

150 S 17 (1) Communal Land Reform Act.
151 Ibid., s 4.
152 Bhandar (2018).
153 S 17(2) Communal Land Reform Act.
154 Ibid., s 18.
155 Kashululu et al. (2020).
156 Cousins (2007); Peters (2009); Mamdani (1996) 139–140; Moguerane (2021) 165.
157 Article 3 of UNDRIP (2007); Engle (2010).

South Africa

In South Africa, most customary land is found in the former Bantustans, imposed ethnic homelands that forced black South Africans into an artificially tribalised environment.[158] Following the end of apartheid, the borders of these Bantustans (and too frequently its power structures) have remained largely unchanged.[159]

While attempts to pass laws that exclusively place customary land in the hands of traditional leaders have been struck down, in practice, Claassens observes that "government has treated traditional leaders as landowners with the sole authority to represent the rural people residing within the apartheid boundaries that the TLGFA reinstated."[160] In other cases, the title for customary land is held by Communal Property Associations (CPAs), which are juristic persons comprising members of the community and governed according to a constitution. In theory, CPAs provide mechanisms for inclusive decision-making and democratising rural land governance, but in practice, CPAs face a host of challenges, including lack of institutional support and reliance on legal technicalities often not available to communities.[161] In addition, there is considerable ambiguity regarding the hierarchy between traditional leaders and CPAs, often resulting in antagonism and conflict between these different structures of governance.[162]

The centrality to the CPA of the membership list, which determines who is part of the community and hence a beneficiary of customary land, is another obstacle to human rights and dignity in customary land governance.[163] In the aftermath of Apartheid's forced removals, the determination of community members, including the criteria by which members are identified, encourages tension and conflict, cleaving "outsiders" from "insiders" amongst people already experiencing marginalisation.[164] Despite the intention of CPAs to emancipate communities from apartheid structures of tradi-

158 Mamdani (1996).
159 Cousins (2007) 288; Claassens (2019).
160 Claassens (2019) 77.
161 Barry (2011); McCusker (2002); Weinberg (2021) 220.
162 Sjaastad et al. (2013); Pienaar (2017); Ntshona et al. (2010) 358; Mnwana (2021) 73.
163 S 5 Communal Property Associations Act (1996).
164 Barry (2011); Sjaastad et al. (2013); Kingwill (2021) 191; Mnwana (2021) 76; Weinberg (2021) 217, 220–224.

tional leadership and promote bottom-up governance, CPAs cannot depart entirely from Western ideas of property,[165] which conceives of rights in land as alienable, exclusive and abstract.[166] Not only does this embed indigenous land rights within a Eurocentric paradigm of property, but promotes hostility and social friction, following critiques that the Western conception of property is structurally incompatible with an ethic of care, mutuality and sustainability.[167]

Discussion

This section has briefly unpacked the statutory and legal actors and instruments that prescribe the administration of communal land in five southern African countries. For the most part, customary land is held in trust for the community by the State, traditional leaders, or land boards, but not by the community itself. South Africa's CPAs, which allow for the registration of communal property in the name of a demarcated community, is an exception. However, as discussed above, the potential for CPAs are constrained by lack of institutional support, coupled with a conceptual foundation in Western property law that may promote social conflict, contrary to the post-apartheid project of reconciliation and restoring dignity to dispossessed people.[168]

Based on the above analysis, two general models of communal land governance can be identified, graphically illustrated below in Figure 1. These are by no means mutually exclusive but reflect a spectrum of legislative approaches to managing the anxiety of legal pluralism. Zimbabwe and Zambia represent what I am calling the "state-traditional leadership model", where traditional leaders, appointed by the president and acting for the State, administer customary lands. On the other side of the spectrum is what I am calling the "neoliberal managerial model", where bodies corporate, typically in the form of land boards, administer communal land. This model, represented here by Namibia and Botswana, reflects the State desire to "modernise" customary tenure so that they operate alone the lines of corpo-

165 Weinberg (2021) 224–225.
166 Graham (2011); Bhandar (2018).
167 Davis (2020); Graham (2011); Shoemaker (2019).
168 Atuahene (2016).

rations. It reflects the ideology of improvement, that values economic productivity over the multiple other values people may attach to a landscape.[169] South Africa, with the continued high position of traditional leaders as well as the adoption of neoliberal land policies that disproportionately privilege agrobusinesses,[170] reflects a mixture of both models.

Figure 1. Statutory approaches to regulating customary land.

As will be developed in more detail in the following section, both models are consistent with colonial epistemologies of community and property: the state-traditional leadership model sees African sociality as predicated on neatly defined and hierarchically organised "tribal" units, a fiction necessary to give effect to indirect rule.[171] As seen in the previous section, the neoliberal managerial model does not necessarily depart from this understanding – seen, for instance, in the detailed ethnographic criteria Namibia requires to be legible as a customary community. Instead, the neoliberal managerial approach to governing customary land has a strong normative agenda towards development, perpetuating a paternalism evocative of the colonial civilising mission.[172] Furthermore, as seen with respect to the cases briefly discussed above, as well as by a wealth of literature examining customary land rights in these five countries, neither statutory approach is especially effective at protecting communities against large scale dispossession of customary land.[173] Even South Africa's CPAs, which arguably go the furthest to develop a mechanism that may give effect to grassroots demo-

169 Bhandar (2018).

170 Hall/Kepe (2017); Sebake (2017).

171 Mamdani (1995); Scott (2009) 239–253.

172 Tzouvala captures this dynamic in her argument that the colonial "standard of civilization" is animated by two competing logics, namely the logic of improvement verses the logic of biology. See Tzouvala (2020). Also Bhandar (2018); Bielefeld (2016); Kepe/Hall (2018).

173 Marewo et al. (2021); Gwerevende (2023); Claassens (2019); Bishop (1998); Dieckmann (2020); Chitonge et al. (2017), and so forth.

cratic governance of customary land, reflect the limits of imposing corporate structures on communities and customary land.[174]

4. Mapping the meaning of "community" from the metropole

The previous section considered the mechanisms by which five southern African countries regulate its legal pluralism, including the manner community is defined, and the statutory constraints placed on the use and management of customary land. I argued that these strategies reflect neo-colonial epistemologies of African social life, creating idealised legal fictions that may be unattainable, undemocratic, and open to exploitation. Put another way, the legal meaning of community is grounded in an abstract ideal, originally a foreign export, that does not consider the social geographies of communities in practice.[175] This section develops this argument, identifying certain characteristics of legal "communities" common to southern African legal systems within their historical and epistemological context.

a) Occidentalism and the invention of tribes

The concept of Occidentalism is useful in making visible the unequal geographies of epistemic power that have shaped the meaning of community in southern Africa. Vlassopoulos defines Occidentalism as:

> [T]he ideology that there exist clearly bounded entities in world history, such as the West, the Orient and the primitives […] that there is a pattern in human history, which leads to the evolution of the modern West, which is the natural path of history, while the history of the rest of the world is a story of aberrations that have to be explained; that the whole world is actually following the lead of the West and one day it will manage to assimilate; that the conceptual tools and the disciplines created by the West are in some way the natural way to organise experience and

174 This can be seen also in the aftermath of the famous South African land restitution case, *Alexkor v Richtersveld* (2003), in which the Richtersveld traditional community was granted mining title held in conjunction with a mining company. Since then, the assets awarded remain held up in various trusts and corporate entities, whose operation remains murky and overwhelmingly not to the advantage of the community. Personal correspondence with Marthinus Fredericks (6 July 2023). See also *Louw v Richtersveld Agricultural Holdings Company (Pty) Ltd* (2010); *Alexkor v Richtersveld Mining Company* (2017).

175 Strecker (2018); Graham (2011).

> analyse reality, and that the reality of the past, and the present outside the West, ought to be explicable in these Western terms.[176]

In a similar vein, various scholars have argued that "common-sense" rules relating to property and sovereignty were significantly shaped by Western imperialism and the resulting dispossession and appropriation of indigenous peoples' land and labour.[177] Mbembe observes that the period of European colonial expansion coincided with an intellectual moment obsessed with the identification, enumeration and standardisation of all social life so that "people and cultures were increasingly conceptualized as individualities closed in upon themselves".[178] It is in this context that the "community" emerged as a distinct ethno-cultural unit.[179] As Mbembe puts it, "The expansion of the European spatial horizon, then, went hand in hand with a division and shrinking of the historical and cultural imagination and, in certain cases, a relative closing of the mind."[180] This imposition of classificatory schemes upon human diversity lent a veneer of scientific respectability to European imperialism by cleaving the world into "civilised" and those requiring civilisation.[181]

While much scholarship on this phenomenon is located around the 17th to 19th century[182] – during the era of industrialization and capitalist modernity[183] – several concepts that provided the legal technologies of colonization can be traced to classical Greece and Rome, for instance *terra nullius* derived from *res nullius*, which justified the appropriation of lands not used "productively".[184] This classical period – particularly its symbolic role as an idealised account of premodern Europe[185] – is relevant for the Occidentalist

176 Vlassopoulos (2007) 19.
177 Miles (2013); Tzouvala (2020) and (2019); Bhandar (2016) 16–17.
178 Mbembe (2018) 16–17.
179 Ibid.; Bhanda (2018).
180 Mbembe (2018) 16–17.
181 Tzouvala (2020).
182 The 17th to 19th century as the starting point reflects scholarship about colonization in the English-speaking world. Walter Mignolo, for instance, who focuses on the colonization of Latin America, temporarily locates this time to the late Renaissance. Mignolo (2002).
183 Mignolo (2002).
184 Tuori (2015) 177 and 179.
185 On alternative readings of Aristotle's role in modernity, see Vlassopoulos (2007); Dietz (2012); Trott (2013).

construction of human development, as well as the criteria by which communities are politically and legally legible.[186]

In the context of the doctrine of evolutionary functionalism – which understands social progress as linear and evolutionary in nature[187] – it is easy to infer how colonising Europeans may have projected idealised accounts of their own history onto non-Western peoples. Aristotle's *polis* can thus be used to provide a hermeneutic for understanding societies outside Western modernity. In *Politics*, Aristotle distinguished between "lower" communities – namely the family unit and collection of family units (the "village") – and the most ideal type of community, the *polis* (cognate with the English word "politics").[188] A *polis* is smaller than a nation (*ethnos*), and requires common territory, a shared system of centralised governance, and is distinct from other polities.[189] Inferior communities were by nature interdependent, and required interaction with other communities through domestic economic activities for survival. In contrast, while economic activities occurred within the *polis*, the *polis* was conceived as a self-sufficient entity encompassing a hierarchical and centralised governance structure.[190]

The analogy of the *polis* as an internally complete and hierarchical structure was convenient for European engagement with African communities during the centuries of colonization. Firstly, it elevated the position of traditional leaders to an autocratic level, manufacturing the legitimacy of colonial treaties and facilitating indirect rule – to the extent that where communities did not have centralised traditional leadership, these positions were invented and/or distorted.[191] Secondly, the interpretation of the *polis* as superior to interdependent social groupings provides a rudimentary classification schema that justified which peoples could be left out, namely communities with fluid practices of identification and itinerant / non-sedentary social structures.[192] An example of this is the brutal treatment of nomadic San peoples in Namibia and South Africa and their exclusion in the racial

186 Shrinkhal (2019) 9; Vlassopoulos (2007); Mignolo (2012) 13.
187 Gordon cited in Sandberg (2021) 59–63.
188 Aristotle (1943) 31–33; Mathie (1979) 15.
189 Elden (2013) 21–52.
190 Mathie (1979); Deudney (2008); Leshem (2016).
191 Mamdani (1996) 54 and 81; Geschiere (2018).
192 Zhakupbekova (2019).

architecture of apartheid, which granted limited land rights in the form of "native" reserves only to those groups who were deemed sufficiently "civilized" (notably being sedentary and embodying hierarchical leadership).[193]

The strong influence of classical scholarship in Europe's understanding of African identities is in no small part due to the fact that the European "experts" who authored the material on Africa that served as epistemic repositories of knowledge (including dictionaries and ethnographic work) were typically educated in Europe and trained in philology, which meant that African societies were clumsily strained through a prism of ancient Greece, Latin and Hebrew.[194] Whether due to methodological ineptitude or strategic misrepresentation, a significant amount of epistemically authoritative texts, including "native" laws, has been shown to reflect European and colonial preconceptions of Africa.[195] Namely, precolonial societies that were pluralistic, multilingual and multi-ethnic became recognised as "tribes" (monolingual, monocultural and monoethnic) for the purpose of colonial identification and administration of native peoples.[196] Even precolonial societies that arguably reflect stable ethnic categories with a system of centralised authority, such as the Zulu Kingdom, significantly transformed during the colonial period, as ethnic boundaries and the role of traditional leaders became ossified under colonial rule according to European standards.[197]

Creating tribal cartographies was crucial aspect to colonial "divide and rule" tactics.[198] This is visible in the legislation of British South Africa, for instance the 1927 Native Administration Act which appointed colonies' governor-general "supreme chief of all natives", and allowed him to "divide", "amalgamate" or even create new tribes as he saw fit.[199] Since tribes were further conceived territorially, the creation and control of indigenous legal

193 Gordon (1992) 119–126. For a Botswanan example, see Wilmsen (2002) 929–931.

194 Gilmour (2006) 67–117; Errington (2001); Makoni/Pennycook (2005); Strommer (2015); Chimhundu (1992); Gordon (2021) 27–28. On the persistent relevance of classical and Christian scholarship in the creation of the foundations of international law, see Koskenniemi (2021).

195 Hamilton/McNulty (2022) 135; Hamilton/Wright (2017); Hamilton/Leibhammer (2009); Chimhundu (1992); Gordon (2021) and (1988).

196 Mamdani (1996) 140; Scott (2009).

197 Hamilton/McNulty (2022) 137–138; Hamilton/Wright (2017); see also Wilmsom (2002) on a similar phenomenon in Botswana.

198 Mamdani (1996) 90.

199 Mamdani (1996) 67.

identification was a technology used to control people's movement, or even strategically manufacture hostility between ethnic groups.[200]

Rather than repositories of accurate information, much archival material may be read as psychological biographies of settler-colonial anxiety, with early Europeans in Africa overemphasizing their epistemic authority in compensation for feelings of alienation and lack of control.[201] In this regard, Rachael Gilmour describes how the 19th century missionary-linguists tasked with creating grammars and spreading Christianity among indigenous peoples, put excessive amounts of faith in "scientific" classification schemes to compensate for the lack of control they experienced in their daily lives, as well as the humiliation of requiring assistance (social and linguistic) from the racialised subjects the authors believed to be inferior.[202] However, to credit this misrecognition only to colonial insecurity is to undermine the direct and deliberate role that categorising communities played in the functioning of colonies, as well as socio-political legacies they have left behind. The latter may be seen with respect to the discourse of "autochthony", a standard of authenticity that can be seen, for example, in Namibia's statutory definition of "traditional community" or South Africa's recently struck down TKSLA, and which frequently emerges in ancestral land disputes, particularly as groups formerly racialised as "mixed"/Coloured reconnect with their indigenous heritage.[203]

b) The role of autochthony in the community

Autochthony, meaning "born of the earth", refers to an unbroken spatial connection to a particular place and provides a normative foundation for "indigeneity".[204] The concept of autochthony emerged in Europe, providing a mythical foundation for ancient Greece in which gods inseminated the earth, which led to the birth of the first Athenian kings whose progeny was the city-state's first inhabitants.[205] The concept gained significant traction during the Persian conflict of 490–479 BCE, during which there was polit-

200 Ibid.; Wilmsen (2002); Blanton et al. (2001) 484.
201 Gilmour (2006); Chouchene (2020); Hölzl (2017).
202 Gilmour (2006) 20.
203 Geschiere (2011); Ellis (2014).
204 Elden (2013).
205 Forsdyke (2012).

ical incentive to create a shared identity among Greek city-states.[206] This produced a discourse of "pure" communities verses "mixed" communities, and, importantly, coincided with other narratives of origin.[207] Therefore, autochthony is neither intrinsic nor immutable to premodern societies, but should instead be viewed in terms of its political function in cleaving insiders from outsiders.[208]

The rhetoric of autochthony is frequently accompanied with violence.[209] This idea has a long tradition in Western political philosophy. Max Weber, considered the forefather of sociology, defines a political community as "a community whose social action is aimed at subordinating to orderly domination by the participants a 'territory' and the conduct of the persons within it, through readiness to resort to physical force, including normally force of arms".[210] In this way, "community" is necessarily reduced to a zero-sum, often violent, competition between groups wanting to dominate a particular territory[211] – an idea that was significantly shaped by Western interpretation of its own classical history.[212]

Much like the invention of the "tribe", the discourse of autochthony is relatively recent in Africa. Bøås and Dunn argue for large parts of history, "African social formations have generally been characterised by mobility and inclusiveness, with permeable and shifting boundaries".[213] Likewise, Mbembe observes that precolonial identities were shaped by a contextual and "itinerant territoriality" whose borders were "characterized by their extensibility and incompleteness".[214] He writes:

> Historically, attachment to Africa – to the territory, to its soil – was always contextual. In some cases political entities were delimited not so much by borders in the classic sense but by an imbrication of multiple spaces, constantly produced, unmade, and remade as much through wars and conquests as by the movement of goods and people […]. Strangers, slaves, and subjects could in effect rely on

206 Forsdyke (2012) 123.
207 Forsdyke (2012) 126.
208 Forsdyke (2012) 138.
209 Bøås/Dunn (2013).
210 Weber (1954) 338–340.
211 Weber (1954) 339.
212 Deudney (2008) 91–113. On Hegel's contribution to colonial thought, and its connection with Aristotle, see Táíwò (2010) 30–33.
213 Bøås/Dunn (2013) 5.
214 Mbembe (2018) 99–100.

> several different sovereignties at one time. The multiplicity of allegiances and jurisdictions itself responded to the plurality of the forms of territoriality. The result was often an extraordinary superposition of rights and an entanglement of social links that were not based on kinship, religion, or castes understood in isolation. Such rights and links combined with the signs of local belonging. Yet they simultaneously transcended them.[215]

Thus, rather than legal abstractions, the boundaries of identity were grounded in the social and spatial landscape, as "network[s] that operated according to the principle of entanglement".[216] In contrast, the discourse of autochthony has contributed to violent land disputes in Africa.[217] In the context of land scarcity, discourses of autochthony work to cleave "sons of the soil" from foreigners, strangers and immigrants.[218] Bøås and Dunn draw connections between the autochthon and the original idea of the citizen: both are members of gated communities who are legally entitled to monopolize resources of a given area to the (violent) exclusion of non-members.[219] This observation applies too to the social conflict engendered by South Africa's CPA's structure, which requires a definitive methodology for establishing who is and who is not a community member, ignoring the multiplicity of networks and interrelationships that emerge from living with other people in a particular landscape.[220]

c) The corporation as a model for community

The previous sections identified an Occidentalist construction of African communities as polities that functioned like proto nation-states, frozen in a state of sub-modernity, but (theoretically) the same social material out of which Europe's own modern states emerged.[221] This section briefly considers the other side of the spectrum, whereby communities are conceived as corporations, namely through land boards and communal property associations.

215 Ibid.
216 Ibid.
217 Bøås/Dunn (2013); Geschiere (2011).
218 Bøås/Dunn (2013) 8.
219 Ibid.
220 Olwig (1996).
221 Comaroff (2005).

In the context of neoliberalism, corporations play a major role in driving global capitalism, and increasingly have replaced the state in providing basic public services.[222] Consequently, it is argued that there is normative pressure for indigenous and traditional communities to organise as corporations to prevent theft of indigenous knowledge and to exercise their rights to Free, Prior and Informed Consent – often with ambiguous success.[223] However, in reshaping the "community" so that it can be an actor in a neoliberal global context, boundaries between member/non-members may become reified, both restricting the self-determination of indigenous peoples and rendering FPIC a tokenistic exercise for developers and states.[224]

In considering the extent to which the corporation serves communities, it is worthwhile to unpack the ways in which the former is neither an ahistorical nor a-geographic concept (i. e. conceived as placeless and abstracted), but, among its other uses, emerged as a tool of empire, notably associated with the Dutch East Indian Company and its competitors.[225] Prior to this, the history of corporations has a long history in Western Europe, for instance in the ancient Roman concept of *societas*, which allowed "individuals to bind together into a collectivity, whose existence and perpetuation was independent of any individual member".[226] Later, during medieval times, corporations were shaped by Christian theology, conceived as a "transcendent body" which existed on a higher spiritual plane than its individual members.[227]

In locating the emergence of corporations in the temporal, religious and geographic enclave of the West,[228] it is not my argument that corporations are fundamentally imported entities whose goal is the enclosure of African traditional communities. Instead, in thinking through the purposes and contexts in which corporations emerged, their roles in late-stage capitalism, and the way in which they were shaped in certain theological contexts, an opportunity is provided to critically question the affordances they provide;

222 Baars / Spicer (2017).
223 Comaroff / Comaroff (2009); Hayden (2003); Greene (2004); Rodríguez-Garavito (2011).
224 Hayden (2003); Rodríguez-Garavito (2011); Cuipa (2017); Engle (2010).
225 Brandon (2017).
226 Stern (2017) 25; Porterfield (2021).
227 Stern (2017) 22. See also Koskenniemi (2021) 103; Porterfield (2021).
228 Porterfield (2021).

and assess the extent to which this is the appropriate vehicle to express the diverse and place-based needs, values, and aspirations of communities.

5. Summary / conclusion

This chapter has explored the normative construction of "community" as a term conferring collective land rights but also inadvertently reifying colonial and Occidentalist standards of identification in postcolonial southern Africa. Section 3 of this chapter identified the way in which Botswana, Namibia, South Africa, Zimbabwe and Zambia define "community", and the statutory mechanisms that govern collectively held (customary) land. It argued that "community" is conceived largely from the top-down, requiring ministerial or presidential approval to be recognised. It is furthermore conceived as hierarchically organised and hermetically sealed. More explicit ethnographic criteria of communities are provided in Namibia and South Africa, arguably a legacy of apartheid's fixation on racial typology which, in the absence of any well-founded scientific criteria to establish immutable racial differences, relied on visual signifiers, determined by the (white) administrator.[229] With respect to who controls customary land (or the statutory mechanisms put in place for that purpose), I identified two patterns. On the one side, Zimbabwe and Zambia reflect a state-traditional leadership model, where traditional leaders, working with and supervised by the state, administer customary land. On the other side, Namibia and Botswana employ a neoliberal managerial model, where the power formerly enjoyed by traditional authorities has been transferred to land boards, who act as trustees for the community. This model reflects an ideology of improvement, whereby land is valuable above all for its productivity and economic potential. Both models rely on fictitious abstractions that do not consider the agency or specificities of communities at a grassroots level, including the plural meanings of land as embodying socio-cultural values and place-based meaning. As argued with respect to South Africa's CPAs, which were intended to democratise rural land governance and to give effect to the lived realities of communities, the imposition of legal fictions based on a corporate understanding of property are structurally ill-equipped for achieving spatial justice and / or meaningful self-determination.

229 Ss 1(xv), 5 and 10(5) South Africa's Population Registration Act (1950).

Section 4 discussed these normative qualities of "community" and their related system of land governance in more detail. The idea of "community" as "tribal"; affixed to territory; possessing hierarchical and centralised governance; premised on principles of exclusion (and hence adversarial in nature); and being closely associated with "autochthony" comes from a particular moment in European intellectual history. Defining non-Western "communities" with respect to Europe's interpretation of its own ancient past was used to justify colonial expansion. Later, when imported to the colonies, it served as an invaluable legal instrument used for racial and spatial engineering. Behind the paternalistic confidence in the superiority of Western civilization,[230] defining "community" may have also helped to manage the psychopolitical anxieties of pluralism, projecting order and authority over a world that otherwise might have seemed illegible.[231] Nevertheless, these ontologies continue to haunt postcolonial legal systems, straining groups with legitimate land claims through a standardising and normative prism of identification. Likewise, projecting corporate structures onto communities is not ideologically neutral, but "involve specific systems of relations" and "disciplinary and cognitive regimes" that shape social production.[232]

This raises additional questions: if dominant narratives of community defer to colonial ontologies, what could a decolonised or prefigurative understanding of community look like? It is beyond the scope of this chapter to do justice to this question, but I conclude with a brief deferral to some decolonial perspectives. Mignolo argues that the goal of decolonisation should not be merely to invert power relations so that formerly colonized peoples replace former colonial positions of power, but should instead expand the types of identities, thinking and modes of emancipation that are possible (or new "loci of enunciation").[233] Similarly, Mbembe advocates for the "radical dis-enclosure of the world",[234] engaging with and adopting a radical version of pluralism that goes beyond an understanding of diversity as a "multiplicity" of singularities, and includes an ethical orientation

230 Táíwò (2010) 133–137.
231 Gilmour (2006).
232 Federici (2018) 191.
233 Mignolo (2012) 5–8.
234 Mbembe (2018) 160; Gerber (2018).

towards repair, restoration and restitution.[235] As such, any subsequent legislative reform grappling with the meaning of "community" might be guided by the goal of "restor[ing] the humanity stolen from those who have historically been subjected to processes of abstraction and objectification."[236] Rather than seeking to restore an idealised past, Federici refers to the need to prefigure social-spatial relationships around the act of "communing" – a verb rather than a noun – implying a commitment to continuous engagement to social and environmental justice and community repair.[237] This cannot be an a-geographic process, reliant on abstract meta-narratives applicable to every situation,[238] but must be grounded in the realities and spaces of communities.

Unpacking "community" thus represents an opportunity to make transparent state considerations regarding who, legally, is allowed to stand on land.

Abbreviations

CCMT	Centre for Conflict Management and Transformation
CLB	Communal Land Boards
CPA	Communal Property Association
FPIC	Free, Prior and Informed Consent
TAA	Traditional Authorities Act of Namibia
TKSLA	Traditional and Khoisan Leadership Act of South Africa
TLGFA	Traditional Leadership and Governance Framework Act of South Africa
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

235 Mbembe (2018) 157–158; 180–183. Mignolo makes a similar argument, in Fraga (2015) 175–177.
236 Mbembe (2017) 182.
237 Federici (2018) 8.
238 Or what Scott (1998) calls "high modernist" ideology.

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