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The right to self-determination in rural and indigenous politics in South Africa

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The right to self-determination in rural and indigenous politics in South Africa

Daniel Huizenga

Abstract

Self-determination refers to the fundamental international right of collectivities to decide their own development path and negotiate terms of their engagement with the state. It is widely criticized as contributing to forms of ethnic essentialism and promoting state separatism, yet indigenous and rural peoples continue to struggle for self-determination and autonomy, particularly in the context of disputes with mining companies and struggles for land rights. The apparent disjuncture between divisive and progressive politics is explained by illuminating the diverse contexts and conditions in which claims to self-determination are being made. This paper provides evidence to suggest that self-determination as a form of political identity defined in relation to the modern state is being reconfigured by rural practices wherein peoples assert rights to property in struggles involving extractive industry, traditional leaders, international non-governmental organizations, international agreements and standard-setting bodies. The paper introduces two case studies to illustrate diverse articulations of self-determination and draw out some of the contested politics at stake. First, the Bakgatla-ba-Kgafela tribe, exemplifies how neoliberal conditions help facilitate the valorization of 'culture' and ethnic identity. Second, the ongoing resistance in Xolobeni illustrates that self-determination is not simply an identity claim based on forms of ethnic essentialism, but is a claim to a collective way of life defined by customary practices of decision-making, agricultural production, and resource use.

1 Introduction

The right to self-determination is the fundamental right of collectivities to decide their own development path and negotiate the terms of their engagement with the state. Self-determination is the backbone of international law and originally applied to colonized peoples asserting their rights against the colonial state. Historically it has been critiqued for offering a legitimate base for claims to ethno-nationalism and state separatism and potentially contributing to conflict. However, contemporary claims to self-determination challenge these presumptions, particularly because their fora is so diverse. For example, the right to self-determination is the bedrock of the United Nations Declaration on the Rights of Indigenous Peoples and it is now used in the proposed UN Peasants Rights Declaration. The right to free, prior and informed consent (FPIC), now widely leveraged by communities asserting their rights against extractive projects and large-scale investment on their territories, is grounded by a more fundamental claim to self-determination.

In conditions of rising nationalist-populism it is worth reflecting on the particular role and use of self-determination. Is it a useful strategy towards emancipatory politics in the context of extractive projects? Or does it provide a legitimate base for forms of ethno-nationalism and state separatism (as many, particularly those critical of the indigenous rights movement in Africa, continue to argue)? These questions are pertinent in South Africa. The paper begins by providing a general overview of the political economy of land reform and mining reform (two areas where collectivities are struggling to assert and carve out their rights) in South Africa. I then introduce approaches to self-determination in international law, and introduce a more dynamic conception of self-determination in conditions of neoliberalism. This paper contextualizes contemporary articulations of self-determination by focusing on the dynamics present in two different case studies: the Bakgatla ba Kgafela traditional territory on the platinum belt in the North West province, and the struggles of the Xolobeni community in the Eastern Cape province to assert their right to consent, and fundamentally their right to self-determination, against a 'post-colonial' state reluctant to recognize the legitimacy of their chosen livelihoods, historical attachment to territory, and visions for the future. The first case study illustrates how neoliberal conditions contribute to the valorization of 'culture' and ethnic identity. The ongoing resistance in Xolobeni illustrates that self-determination is not simply an identity-based claim based on forms of ethnic essentialism, but is a claim to a collective way of life defined by their customary practices of decision-making, agricultural production, and resource use. The case studies help illuminate some of the contested politics at stake.

2 Political economy of land reform and mining governance reform in South Africa

Land Reform

The post-apartheid South African state developed an ambitious land reform program to re-distribute land and secure tenure for black and coloured peoples whose land rights were undermined during colonialism and apartheid. The program was split into three areas to address the scale and complexity of forced dispossession under apartheid: land restitution, land tenure reform, and land redistribution. The areas of reform pertinent to this paper are restitution and tenure reform.

It is by now not contentious to say that the land reform program in South Africa has largely failed to carry out its basic objectives. The land reform agenda and resources have been captured by elites and marginalized rural communities have been ignored (Cousins 2016, 11). This is particularly the case for peoples living without formal tenure, this includes 17 million in communal areas, 2 millions on commercial farms, 3.3 million in informal settlements, 1.9 million in backyard shacks, 5 million in RDP houses without title deeds, and 1.5 million in RDB houses with inaccurate title deeds (Cousins 2016, 9-10). Land reform has been completely disconnected from agricultural reform "thus severely constraining its impact on rural poverty and inequality (Cousins 2013, 47). It has not contributed to increasing food security in the country. Small-scale farming is important of food security in some

areas of the former apartheid reserves, however today most people, urban and rural, buy their food and very few people participate in agriculture (Walker and Cousins 2015, 4). This is true of land transferred, where the level of agriculture remains very low; "many land reform projects are mired in leadership and community disputes" (Walker and Cousins 2015, 5).

There have been profound changes in processes of agrarian change in post-apartheid South Africa. Ruth Hall (2015) highlights four. First, since the end of apartheid land ownership has become more concentrated, not less. While in the 1990's there were an estimated 60,000 commercial farm units in existence, in 2015 there were an estimated 35,000. Second, the commercial agricultural sector has shed 30,000 jobs since 1994, and nearly 2 million black people and their families have been evicted from their homes on farmland. Third, many families hold land but are still unable to use it due in part to lack of capital and access to markets. Finally, agribusiness corporations have gained the most from the state's liberalisation policies and famers have taken on most of the risk of farming while corporations accumulate the bulk of the profits. As Hall drives home, the current land reform policy in South Africa "has no answer" to these changes and their devastating impacts on black South Africans dispossessed of rights and land under apartheid (Hall 2015, 142-143).

Contemporary politics of self-determination highlighted below emerge out of a land reform program that continues to struggle to define 'collective' ownership in land. In land reform different strategies have been endorsed in land restitution and tenure reform. In restitution, 'communal property associations' were created as the legislated 'owners' of land returned to 'communities' through land restitution. These associations were, in law, defined by collective conformity to shared rules determining access and use of land and resources. The CPA Act, which legislated CPAs, included strict stipulations regarding democratically writing a constitution, clearly outlining decision-making structures and processes, 'fair' representations of men and women as leaders and decision-makers, and clear timelines for elections of board members. However Klugg (2006) finds little evidence to suggest that 'communities' organized as CPAs "actively participated in constituting or defining themselves in very specific ways during the constitution-drafting process" (Klugg 2006, 134). Some argue that the CPA model was far to bureaucratic and demanded far too many resources to be successful in the long term, while others have highlighted that the model parallels trends in neoliberalism whereby state functions are relegated to non-state actors (Beyers and Fay 2016). An effect of this is the streaming of grievances inwards, to members of CPAs, leading to long and resource-heavy litigation, while the state stands back as an apparent 'neutral' actor in what is otherwise a 'local' conflict between land claimants (Beyers and Fay 2015).

Tenure reform has been the subject of ongoing attempts to legislate the access, use, and property rights of rural peoples living in the former bantustans, where an estimated 17 million people continue to live. There have been successive attempts at developing law and policy (and many proposals were being debated at the time of writing this paper). Most notable is the 2004 Communal Land Rights Act which was struck down in 2010 due to the legal activism of four communities challenging its adherence to patriarchy and the legislated authority of traditional leaders and their councils. In sum successive proposed legislation and bills on communal tenure have attempted to bolster the authority of traditional leaders by making them the ultimate owners of land in communal areas while relegating 'institutional use rights' or leasehold to rural peoples (for an overview see Weinberg 2015, Claassens 2015). This model has been challenged through multiple constitutional court decisions recognizing 'living customary law', rather than 'codified' customary law (Claassens 2011). However there appears to be no real agreement on how 'living customary law' will be spatially or territorially defined outside of the general statement that peoples live by a shared set of rules.

New ideas for protecting communal tenure regimes as a form of ownership continue to be proposed. For example, prominent historians William Bienart and Peter Delius argue that property in land must vest in the family unit, and that legislation must be created to support that. From their research they have found that this reflects customary practice, and is the most pragmatic way to secure land ownership for people in communal areas. The broader communal tenure model has not work, and

there must be a way for individual groups to secure land ownership: "Our approach is to move away from communalist and traditionalist policies and to focus on cementing individual and family land rights. We argue that all South Africans should hold their land in systems that are akin to ownership and as secure as ownership. Such a strategy may facilitate investment and production as well as rural development more generally" (Bienart and Delius 2017). The social unit of ownership is a deep point of contention. Many, however, seem to agree with Ben Cousins who argues in a paper often cited on these issues that:

> "Land and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character (e.g. individual rights within households, households within kinship networks, kinship networks within wider 'communities')… They are thus both 'communal' and 'individual' in character" (Cousins 2007, 293).

Claims to self-determination are articulated in conditions of a failing land reform program as well as in the context of layered and nested forms of authority and collective identities. They are also emergent through ongoing struggles to secure title in both land reform and mining governance reform.

Extractive industry

The political economy of mining in South Africa has been incredibly resistant to strategic counter-movements to its hegemonic place in the country's political economy, despite continued calls for its reform. One would have imagined the pressure to reform the racialized distribution of mining revenue to while capital would have set in motion radical restructuring after 1994. However, despite the strong rhetoric promoting racial equality and the redistribution of profits, the actual state response was one that simply protected investments while promoting 'equal opportunity' for all South Africans. The Mineral Development Bill, introduced as a legislative pillar to facilitate reform in the post-apartheid extractive industry, "above all remained a reform of mineral policy relations designed to accelerate capital accumulation in the mining industry by eliminating the barriers to investment and competitive entry posed by the private ownership and control of mineral rights, not least by the mining houses themselves" (Capps 2012, 316). In addition to the aforementioned Bill, the post-apartheid state has introduced legislation to improve relations between mining companies and local communities by making them more beneficial to the latter. Towards this end, a number of measures have been key. These include introducing royalty payments to local communities, black economic empowerment (BEE) plans, mine-community partnerships, and social and labour plans as requirements for mining companies (Capps 2012). Like transnational discourses of corporate social responsibility, mining companies are meant to gain a 'social license to operate' engaging directly with impacted communities.

The kinds of relationships that mining companies have established with impacted communities post-1994 have certainly changed, however these connections continue to exist outside of real local engagement. Rather than stipulating real engagement with communities, post-apartheid legislation has mandated that mining companies make deals with traditional leaders, the assumption being that traditional leaders represent the impacted communities. Many researchers have now found that these kinds of partnerships amount to 'elite capture' of mining revenue while local peoples continue to live in extreme poverty. Sonwabile Mnwana finds that the post-apartheid legislation has largely failed to take stock of the complexity of relations at the community level, particularly in circumstances involving mining and revenue, while it has defaulted to a simple idea of community engagement that relies on traditional leaders as representatives and partners (Mnwana 2015, also see Capps and Malindi 2017). Mnwana and Capps argue that the effect of the post-aparthied legislation, such as the TKLB and MPRDA, "is that chiefs are increasingly controlling the interactions between mining corporations

and the 'traditional communities' they formally represent… With the state's support, traditional leaders have become powerful intermediaries of mining deals and mineral-led development in the former homelands" (2015, 6). The state mineral reform policy, which has integrated traditional authorities into mining deals, has failed to grasp the complex community level dynamics and conflicts that result in the context of relations between mines and communities (Mnwana 2015).

The focus of this paper is on the dynamic relations of power emergent in this context of failing land and mining governance reform and how collectivities are identifying themselves and asserting their rights in this political economy. Bridget O'Laughlin et al (2014) highlight the important contribution Mahmood Mamdani has made to understanding colonialism as more than just a question of labour. He argues that colonialism was also focused on producing particular structures of power, and more specifically tribal power. O'Laughlin et al argue in response that agrarian questions are both political and economic, "and their historical foundations and social dynamics take us beyond the territorial boundaries of the countries of the region to look at their interconnections" (O'Laughlin et al 2014, 8). In this paper I attempt to draw out some of the ways that collectivities are leveraging the international human right to self-determination. I argue that these struggles unsettle any simple understandings of a relationship between a modern state and its citizens.

3 The Right to Self-Determination

Focusing on the right to self-determination is a way to acknowledge the continued imposition of colonial forms of governance while also looking specifically to the kinds of resistance that has emerged in these conditions; to the articulations of community identity and self-governance. While often approached as a right, self-determination is fundamentally a question of power. More specifically it is a question about who has the power to make, as well as contribute to, decisions that will impact their future. It thus involves fundamental human rights, as well as fundamental political and economic concerns. Collective claims to self-determination are potentially a response to growing impatience with human rights discourse and the limits of socio-economic rights in the context of land reform (Cousins and Hall 2013), a perspective elaborated on below.

The right to self-determination is deeply embedded in international law. It is enshrined in the International Covenant on Civil and Political Rights (ICCPR) as well as the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Article 27 of the ICCPR states that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. Article 15 of the ICECSR stipulates that states must recognize the right of everyone to take part in cultural life.

The right to self-determination is often reactively associated with the right to establish ones own state and political structure against the sovereignty of the nation state in which they live. The right to self-determination has been seen by some as a ticket to promote ethno-nationalism. Contrary to these fears developments in international law have been much more specific than these fears presume. It is recognized that the principle of self-determination is an articulation of the recognition of the variety of ways that people associate with one another and the groups that they self-identify with. As Aboriginal law scholar Shin Imai explains: "'Self-determination' refers to a choice, not a particular institutional relationship. It is dynamic and not fixed on particular arrangements". Strict legislation demarcating the boundaries of authorities, as the TKLB does, for example, is actually the antithisis of self-determination. Returning again to Imai, indigenous peoples' "approach to self government may be better understood as a 'bundle of dynamic legal relationships, political aspirations and affirmations of cultural continuity'" (Imai).

Many commentators understand self-determination as dealing either with issues internal to a particular self-defined 'community', such as their distinct cultural rights, or issues related to the external

definition of the community and the related drive to succession. As James Anaya (former UN Special Rapporteur on the Rights of Indigenous Peoples) highlights however that this is a limited approach to self-determination as it understands the world as split into two registers of humanity - the state and the person. This is a perspective deriving from Western intellectual traditions and fails to account for the diverse forms of human association that exist. It is worth quoting Anaya at length:

> "The limited conceptions of "peoples", accordingly, largely ignores the multiple, overlapping spheres of community, authority, and interdependency that actually exist in the human experience. Humanity effectively is reduced to units of organization defined by a perceptual grip of statehood categories; the human rights character of self-determination is thereby obscured as is the relevance of self-determination values in a world that is less and less state centered... The term peoples as it related to a contemporary understanding of self-determination must attend to the broad range of associational and cultural patterns actually found in the human experience" (Anaya 2004, 101).

This approach to self-determination is strikingly similar to claims to living customary law in South Africa. In their research report on customary law in Msinga, Cousins et al explain that "Our Msinga material suggests that so-called communal land tenure regimes in rural South Africa are best understood as systems of living law, which have the potential to adapt and evolve over time and are sometimes deliberately and consciously adjusted to meet changing circumstances. The term 'customary' is a misnomer, since this seems to imply that the system is handed down relatively unchanged from the past, and that its content is derived primarily from a discrete and unique set of cultural norms and values." (Cousins et al 2011, 83). Self-determination, too, is an ongoing process that "continuously enjoins the form and functioning of the governing institutional order" (Anaya 2004, 106).

In their submission to hearings regarding the Traditional and Khoisan Leadership Bill on 3 February 2016, NGO Ntinga asserts a similar perspective: "Allowing for genuine and substantive consultation of rural dwellers over the desired system for the recognition and regulation of customary self-rule and governance thereby enabling rural dwellers to choose and develop their own democratic systems of customary self-rule, governance, laws and practices; and also enabling rural dwellers to opt in or out of governance by tribal chiefs" (Ntinga submission 2016). Here they clearly advocate for a perspective of self-determination not defined by chiefly authority, but rather by a more broadly perceived understanding of rural dwellers who can define their own customary self-rule.

4 Self-Determination in the context of neoliberalism

It is a central contention of this article that self-determination as a form of political identity defined in relation to the modern state is being reconfigured by rural practices of self-determination wherein peoples struggle against multi-scalar governance regimes involving extractive industry, international non-governmental organizations, international agreements and standard-setting bodies in conditions characteristic of neoliberalism (Ferguson 2006). There are studies that examine the rise of traditional leaders in South Africa's democracy (Ainslie and Kepe 2016, Oomen 2005), and others that illustrate the valorization of 'tradition' and the role of chiefs in contemporary neoliberal political economies of extraction (Comaroff and Comaroff 2009; Capps 2016). Self-determination, in conditions of neoliberalism, must be understood more broadly as 'practices of self-determination'. This optic includes an examination of livelihood practices, political economies of local agriculture, as well as assertions of custom and collective identity, and their articulation in processes of re-territorialization in

South Africa. Anthropologist Andrea Muehlebach argues that "The potential of the concept of self-determination lies in its history of indeterminacy and varied applicability" (Meulbach 2003, 244), a point that continues to have relevance in the South African context.

5 Case Studies

Self-determination is fraught with political conflicts. The two case studies presented below highlight two different sides to these conflicts. First, by explaining the ongoing conflicts in the Bakgatla be Kgafela traditional territory in North West province I demonstrate how traditional leaders construct and assert their own forms of 'self-determination' through their engagements with both the state and transnational capital. Second, by explaining struggles against large-scale mining in Xolobeni in the Eastern Cape I demonstrate how self-determination is used as a strategy of local communities against traditional leaders, mining capital, and the state through articulations of their living customary law and transnational standards on community consent.

Self-Determination and the valorization of culture and tradition

The role and authority of traditional leaders has increased in South Africa's democracy. Many of the chiefs who were propped up under colonial legislation lobbied to secure their authority in the dying days of apartheid. In 1987 the Congress of Traditional Leaders of South Africa (CONTRALESA) was formed to lobby for their representation in Government, and in 1997 the National House of Traditional Leaders was established in order to guarantee their inclusion in the new South Africa and to establish state budgets for their remuneration. Significantly, in 2003 the Traditional Leadership and Governance Framework Act (here on the Framework Act) was passed. Although it did not specifically outline the statutory powers and authorities of traditional leaders, it provided a framework by specifying, "that the national or provincial governments may enact laws providing a role for traditional councils and leaders on a wide range of issues, including land administration, welfare, the administration of justice, safety and security, economic development, and the management of natural resources" (Claassens 2015: 75-76). Laws introduced since the Framework Act have used this opening to define their authority. These changes have been particularly detrimental to the land reform program and for mining industry.

There are many reasons for the rise of traditional leaders. Dysfunctional local governments unable to deliver the leadership needed for land and rural reform post-apartheid has helped to strengthen the position of traditional authorities (Ainslie and Kepe 2016, 22). The unwillingness of newly elected state officials in the mid-1990s to engage with real law and policy issues regarding land also opened new opportunities for traditional leaders, who previously had very restricted roles in government, to re-assert themselves and become leaders and advocates for rural peoples (Ainslie and Kepe 2016, 24). Struggles for self-determination are much more than ethnic struggles against the modern state, however. Contemporary struggles for self-determination emerge in conditions of neoliberal governmentality, where actors can draw on discourses of 'tradition' and 'autochthony' to construct collective forms of legitimacy to appeal to both state government departments as well as transnational capital. As Ainslie and Kepe explain, "the resurgence of traditional authority lies in the opportunities that opened up with the simultaneity of the global neoliberal economic shifts of the 1990s and the complex re-assertion of African identity politics. Identity politics in this context include, among other things, an affirmation of indigenous cultural practice, the assertion of gender equality, and strident calls for the return of land to African ownership." (Ainslie and Kepe 2016, 20). In their book Ethnicity Inc., prominent anthropologists John and Jean Comaroff (2009) describe the ways that processes to commodify cultural and ethnic identities are an essential characteristic of neoliberal capitalism in South Africa and elsewhere.

Neoliberalism has created conditions where only certain collectivities have been able to act as market actors – those who are able to demonstrate a form of meaningful difference. For example, traditional territories are being justified through a transnational field whereby claims to culture, heritage, and

tradition are celebrated, regulated, and governed. Ongoing struggles for the legitimacy to represent the 'community' in the Bakgatla be Kgafela traditional territory provide an example of some of these dynamics. The Bakgatla community is in the North West province on an area called the platinum belt which is home to the world's largest platinum reserves, making them the potential beneficiaries of an unimaginable amount of wealth. While the Bakgatla are often referred to as a 'community', to refer to them as such is a misnomer as upwards of 350,000 people live under the governance of the Bakgatla traditional council, led by Kgosi Nyalala Pilane.

Despite the rich wealth of the area, the vast majority of the peoples who live under the authority of Pilane continue to live in poverty and lack access to basic services. They have not been idle in the face of this injustice, however. Protests have been staged by people demanding that Pilane and his traditional council be held accountable to their autocratic management of its plentiful resources. As researchers at the *Society, Work and Development Institute* at the University of Witwatersrand have demonstrated, these kind of protests are increasing in number across the country and do not fit the mold of past uprisings (Mnwana and Capps 2015).

Pilane and his traditional council have been very active in undermining and de-legitimizing the protests of local peoples. He has been active in asserting the territory of his traditional leadership. He has been embroiled in court battles as he tries to argue that no one in his area has the right to congregate for meetings without his prior consent. Some peoples who have been partnered as communal property associations, which constitute legal entities legislated through the land restitution program to define groups of people to whom land has been transferred, have been challenged by Pilane who argues that his traditional leadership trumps the rights of communal property associations, despite the fact that they have been made the legal owners of land through the land restitution program. These battles have been fought in court. Pilane argues that he is promoting mining to in turn fund development projects, this is despite the fact that over 3 billion rand in mining revenues is unaccounted for in the communal account, an issue subject of an investigation of a judicial commission. He promotes development in a way that parallels the work that corporations are becoming more adept and strategic to participate in.

The participation of mining companies in social and economic development has emerged through a growing awareness internationally that businesses need to be held accountable for the environmental destruction and human rights abuses they are responsible for. The United Nations Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights, authored by Harvard Law professor John Ruggie, in 2011. What is now known as the Ruggie Framework for Business and Human Rights, it has provided an authoritative foundation for the ongoing multiplication of norms, standards, and voluntary guidelines in transnational extractive industry regulation. The Ruggie framework is just one set of voluntary guidelines along with many others, such as the Global Reporting Initiative, the United Nations Global Compact, and Others. This is the stuff of neoliberal transnational regulation - whereby the state, at best, takes on the role of regulator, as corporations are governed by laws and regulations developed transnationally. These laws of course are non-binding, but promote voluntary standards and leave the work of human rights reporting and social development to the very institutions that are committing social and environmental destruction. There is now a rich body of work in anthropology and geography illuminating that transnational forms of voluntary regulation, continue to fail to hold big business, including mining companies, accountable.

On the website for the Bakgatla traditional territory we find a design and layout that closely matches the websites of some of the world's largest mining companies. We are quickly directed to an investors guide and a 'Master Plan' for the development of the territory. The Bakgatla is clearly positioned as open for business. Of course, comparing websites is much too simplistic for a real analysis. We can complicate the picture more by focusing on one aspect of their work - the promotion of cultural heritage.

Cultural heritage, and the re-valuation of culture, has been a characteristic of the neoliberal moment. Class politics have fallen to the wayside, and claims to meaningful difference have gained, and continue to gain, new currency. This is true in international case studies from Latin America (Coombe 2011), as well as in South Africa (Oomen 2005, Comaroff and Comaroff 2009). Culture is re-valued in market terms. The Bakgatla traditional council understands the value of culture.

One of their prize developments has been the Moureleng cultural center. The Cultural centre takes center stage in their promotion and advertising and is on the home page of their website. Pilane has been very active in supporting heritage in a way that is legible to a transnational audience. They state in the Bakgatla Corporate Brochure:

> "The newly developed Moruleng Cultural Precinct is also expected to become a hub for cultural activities and will integrate the development of other heritage sites throughout BBK's 32 villages. A brand new digital archive and library will be developed at the current Bakgatla Primary School. Here the community and visitors will explore Bakgatla's proud heritage and also discover the tribe's historical story. The breadth and depth of the project is unusual for a traditional community and may serve as a model for others." (BBK Corporate Brochure)

It is not random that Anglo American - one of the main mining companies in the region - chose to focus its funding on the Department of Art and Culture in the BBK traditional territory, an investment it boasts about in its 2015 annual report (pg 38).

As Derek Peterson and his collaborating authors demonstrate in the book "The Politics of Heritage in Africa", the promotion of cultural heritage across Africa has historically been the work of elites who leverage culture to promote their own interests. Peterson argues of the contemporary moment; "The re-articulation of royalism has gone hand-in-hand with the commoditisation of ethnic heritage. The practice of heritage has allowed certain entrepreneurs to trademark culture, claim it as their exclusive property, naturalize behavioral norms, and sideline minorities, dissidents, and other non-conformists" (Peterson 2015: 19). Not unlike Mahmood Mamdani's discussion of the strategy of 'define and rule', whereby colonial powers defined certain aspects of African life as traditional, as customary, for the purpose of making them legible to colonial institutions, the contemporary cultural heritage industry in BBK makes particular representations of tradition legible. In effect dissenting practices are easily framed as delinquent, outsiders, out of order. Returning again to Peterson, "Conceived as the distinctive property of a particular, unique people, heritage renders political or cultural dissent illegitimate. Heritage work is in many parts of contemporary Africa an instrument of dictatorship" (Peterson 2015: 28). One of the ways that Pilane has delegitimated the protests of communities is by claiming that he is the sole custodian of the BBK culture and the only one who can call a meeting among community members. A claim that has been overturned in court.

The website of the Bakgatla traditional council demonstrates how the authority of the traditional leader over his territory is reinforced. Here we get no indication of the pressing poverty and social unrest that characterizes the traditional area. Rather, we learn about Pilane's 'commitment' to his community. We see that he has invested in a cultural centre. We see that he is spearheading development programs. We see that he is seeking partnerships with mining companies. This website, and the traditional council's corporate brochure, is more than just a smokescreen for the corruption that plagues its governance. It is an appeal to an arena of transnational governance that is developing through the emerging international regime of heritage management and the international regulation of mining companies working in countries around the world. It is a field of governance wherein general claims to collective identity are made. These claims serve the establishment of Pilane and his traditional council and their assertions of 'self-determination'.

Xolobeni: Self-Determination, Free Prior and Informed Consent

A struggle against a mining licence granted in the Amadiba territory of the Eastern Cape province clearly demonstrates some of the contested dynamics of self-determination in South Africa. Within the Amadiba territory is the Umgungungdlovu area that covers five different villages. These are the villages that will be impacted by the mining. Xolobeni, the community at the centre of the struggle, has been resisting attempts to mine their land for decades. In disregard for ongoing community protests, a mining license was granted in 2007 to Transworld Energy and Mineral Resources (TEM), a subsidiary of the Australian owned Mineral Commodities ltd. (MRC). A company set up under a black economic empowerment scheme called the Xolobeni Empowerment Company (XolCo) is a partner in the investment. The license covers a portion of land 22 km long and 1.5 km wide along the Eastern Cape coastline, constituting 2867 hectares. The intention of TEM is open-cast mining on roughly 900 hectares of land within the mining area. As highlighted in court papers filed by Dudizele Beleni, "with stockpiles, dumps, treatment plants, pipelines, powerlines, access roads, offices, stores, vehicle parks, accommodation, workshops and other infrastructure taken into account, the physical area that will be disturbed by mining will be much greater than 900 hectares" (Baleni 2016, para 28). Due to the ongoing activism of the community members, as well as the ongoing violence in the proposed mining area, culminating in the assassination of a leader in the opposition to the mine in March 2016, MRC divested from the project with the intention to sell its shares to Keyesha investments, which is owned by XolCo, although at the time of writing the sale had not take place. On 15 September 2016 an intention to impose an 18 month moratorium on mining was declared by the Minister of Mineral Resources, Mosebenzi Zwane, and the moratorium was officially imposed in June 2017. XolCo continues to advocate for the legitimacy of their licence to mine and the struggle in Xolobeni continues.

While it is acknowledged that the mining will displace households, there have been no official reports from TEM that outline which homesteads will have to be displaced should the mining go forward, nor is there any indication of the compensation that will be given to those impacted by the mining. Studies conducted by the community itself estimates that 70 to 75 households, comprising more than 600 individuals and who live within 1.5 KM of the coast, will likely be forced from their land (Baleni 2016, para 47).

In Amadiba there are disagreements about the authority of Chief Lunga Baleni. This struggle reveals ongoing contestation over jurisdiction, territory, and the right to self-determination. Under the Traditional Leadership Act (the Federal Act regulating traditional leadership structure in post-apartheid South Africa) the governing body of the Umgungundlovu community is the Amadiba Traditional Council, and Chief Lunga Baleni is the chairperson of the Amadiba Traditional Council and the iNkosi (headman) of the Umgungundlovu Traditional Community. According to 'official' records, Duduzile Baleni, while the acting iNkosana (headwoman) of the Umgungundlovu Traditional Community, reports to Chief Lunga Baleni, and therefore cannot act on behalf of the Umgungungdlovu community. The Australian mining company TEM, for example, claims that the only body that has the authority to launch an application to challenge the mining rights application is the wider Amadiba Traditional Council (within which the Umgungungundlovu community exists) and Chief Lunga Baleni. Thus putting Chief Lunga Baleni in a higher status than Duduzile Baleni. However, in a press statement one of the community leaders, Nonhle Mbuthuma, states that "[t]he government categorizes the Umgungundlovu community as part of the Amadiba tribal authority or traditional council under chief Lunga, but the Umgungundlovu community rejects the leadership of chief Lunga insofar as chief Lunga supports the establishment of the titanium mine on the community land of the Umgungundlovu people" (Mbuthuma, 11 February 2016). According to Mbuthuma and members of the Amadiba Crisis Committee (ACC), they reserve the right to choose their leader. Mbuthuma further argues that "the community defines itself as such [Umgungundlovu] and members share the same social values, similar economic interests and aspirations. We are governed by our own customary law" (Mbuthuma 2016). One of the strategies used to further legitimate these claims is

through drawing on the right of free, prior and informed consent (FPIC), a strategy that needs to be understood in the wider context of contested notions of 'custom' and 'indigeneity' in the South African context.
These dynamics are present in claims to community consent through the international standard of FPIC. The first recognized assertion of FPIC was in the International Labour Organization's Convention 169. Today it is most often cited in reference to the United Nations Declaration on the Rights of Indigenous Peoples where in Article 32 it maintains that States must consult with indigenous peoples, through their own chosen institutions, in order to "obtain their free and informed consent prior to the approval of any project affecting their land or territories and other resources, particularly in connection with the development, utilization and exploitation of mineral, water or other resources". Advocates in South Africa first began discussing the applicability of FPIC in 2002 in negotiations over mining legislation, however it is in more recent years that the principle has picked up momentum in the country.

In the Amadiba struggle the people are demanding that the process for seeking and attaining community consent be determined by the peoples themselves (Baleni 2016). Their demands reflect assertions made in UN negotiations over FPIC. As stated in the Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent (E/C.19/2005/3), endorsed by the United Nations Permanent Forum on Indigenous Issues in 2005, the process of gaining consent must be directed by indigenous peoples themselves: "procedures concerning free, prior and informed consent should recognize indigenous customary law where it is relevant, and address the issue of who represents indigenous peoples" (UNESC 2005, Paragraph 15). It was further highlighted by the ILO that according to ILO No. 169 "the elements of good faith, representativity, and decision-making through indigenous peoples' own methodologies were essential to free, prior and informed consent" (UNESC 2005, Paragraph 24). Finally, it was concluded that "[a]s an important methodology, free, prior and informed consent is an evolving principle and its further development should be adaptable to different realities" (UNESC, Paragraph 42). Considering these assertions it is crucial to highlight indigenous and rural peoples own assertions of FPIC, how they use the policy space opened by it to negotiate the terms of their self-determination. This is a step towards "reclaiming FPIC" from institutional embeddedness (Franco 2015). Their claims to consent, and FPIC, as a principle of customary law amounts to resistance against the colonial forms of power and subjectivity imposed by the state through legal means. It amounts to an alternative vision of territorial jurisdiction against the history of imposed territory and the authority of state-backed traditional leaders.

Another way that the people of Ungungundlovu, as well as their advocates, have resisted efforts to mine their land, is by actively promoting the integrity and legitimacy of their local institutions and customary practices, including livelihood practices. For example, they consistently articulate the importance of their territory for the maintenance of their networked social relations sustained through meetings at the sacred meeting place, or Konkhulu, and the relationship to customary law: "Our customary law builds from our dearly held meanings of our shared history, culture, individual and collective interests, together with our shared responsibility to sustain the life of our community" (Baleni 2016, para 68). Moreover they state the importance of their land to their ongoing survival as a community: "The households in the area engage in exchange relationships around food and food production. This sharing of resources includes the sharing of crops, sea harvests and animal products. The reciprocity also extends to food production and exchange of manure used for fertilizer, cattle used for ploughing of fields, and other similar activities. These inter-linkages are important for community cohesion and would be nearly impossible to reproduce if the community were to be relocated" (LRC and Richard Spoor Inc. 2016, para 23). The community clearly describes in their court papers that this collective work is itself an expression of their customary law. These multiple community based practices are all means to challenge state endorsed forms of territorialization and subjectification. Rather than succumbing to apartheid-era territorializations that are being re-produced in post-apartheid legislation, the powerful lobbying of traditional leaders, and transnational mining capital, they are demanding that their own practices are recognized as authoritative for the marking of jurisdiction.

6 Conclusion

In this paper I have explored the concept, politics and practices of self-determination in South Africa. I have argued that the politics of self-determination need to be understood outside of a general framework focused on the state and a broad definition of 'peoples' to consider the many actors and layers of jurisdiction and social relationships that characterize rural livelihoods as well as political and economic conditions characteristic of neoliberalism. I used two case studies to show how first, traditional leaders assert their authority to define 'cultural' collectivities by leveraging transnational discourses to protect heritage and tradition and second, how 'local' assertions of self-determination are inter-twined with claims to the right to FPIC and the respect for customary law and institutions. The implications of this research are that self-determination must be understood in a transnational context where different actors have the variable degrees of resources and ability to define themselves in relation to forms of global governance. The ongoing resistance in Xolobeni illustrates that self-determination is not simply an identity-based claim based on forms of ethnic essentialism, but is a claim to a collective way of life defined by their customary practices of decision-making, agricultural production, and resource use. Their struggle can provide inspiration for those seeking ways to support further collective claims to self-determination and autonomy in conditions where states, traditional leaders, and transnational capital are working to undermine their rights and de-legitimate their existence.

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