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Articulations of transnational law and policy in the context of land reform and agro-extractivism in South Africa: Insights from socio-legal studies

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1 Introduction

What can the discipline of socio-legal studies contribute to the study of agrarian change? In conditions of neoliberal globalization agrarian movements have gained a transnational character as peasants, indigenous peoples, activists and engaged scholars, among others, connect through global networks as they work to secure justice in the areas of land, food sovereignty, natural resource rights, and labour rights. In these conditions law is certainly a dynamic and convoluted topic. On the one hand the belief in law as a form of regulation towards just outcomes attracts considerable amounts of resources from advocates. Indigenous peoples rights, efforts to secure the collective tenure rights of rural communities, and the recent introduction of the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) by the Food and Agricultural Organization (not to mention the ongoing efforts to introduce a Peasants Rights Declaration through the UN), are examples of how transnational law and governance plays an important role in struggles rural struggles. Yet, law also serves to obscure relations of domination and make invisible vast inequalities in resources under the dream of 'equal justice'. The participation of transnational corporations in the design and implementation of legal regimes in the context of land struggles is a case in point (via Campesina 2015). As Joel Bakan argues, the regime known as corporate social responsibility fundamentally favors corporations by drawing communities into relationships of 'shared value' rather than providing a means to resist and stop corporate extraction (Bakan 2016). Here the claim that law is blind to inequalities and protects rights of the vulnerable quickly fades to the reality of stark disparities in resources and expertise. Yet law and human rights maintain their authority in the pursuit of justice.

Contemporary socio-legal scholarship can provide theoretical insights into these contested politics. The area of scholarship broadly defined as socio-legal studies began as an attempt by lawyers and legal academics to use the social sciences to inform legal education and policy decisions. These attempts were steeped in a legal realist perspective, an approach that considered both law and society as separate and distinct fields. They approached law as a tool that can be fine-tuned to serve specific functions in society. Importantly, these authors exposed law and judges as unavoidably political (Tushnet 1991). Contemporary socio-legal scholarship remains committed to uncovering the social and political dimensions of law but challenges the distinction between 'law' and 'society' and interrogates their co-constitutive relationship. It is this approach that can illuminate the socio-legal aspects of contemporary struggles for agrarian justice.

Socio-legal scholarship on transnational law, in particular, can make important contributions to how we frame the role of law in the context of agrarian change. Rather than ascribing to the dominant view of international law, one that understands it simply as law that exists between nations and the rules and obligations that govern international legal subjects, which are exclusively nation states (Currie 2008), socio-legal scholarship accounts for the interplay of laws, standards, and law-like norms in a dynamic network of transnational legal pluralism (Berman 2012; Szablowski 2007). In this field of scholarship 'law' is not understood as a tool to be implemented vertically in an instrumental fashion, but rather it is approaches as a norm generating force that is articulated in specific local contexts. Distinctions between the 'local' and the 'global' are challenged as we look to specific sites where law is either transnationalized or localized. Interest is focused on how law emerges through the actions of non-state actors, including local advocates, NGOs, and corporations, thus challenging the historical centrality of nation-states in the establishment and enforcement of international and national law (Darian-Smith 2013). This perspective is

particularly is essential when exploring emerging norms in the context of international customary law as it relates to land and resource rights (Tobin 2014), as well as indigenous rights (Anaya 2004).

Considering the ways that transnational agrarian movements are now engaging with transnational law, it is critical that we engage with the reality of legal pluralism. I am interested not in individual laws, but rather the processes and practices through which they interact with one another. The key is to look at laws in plural relations and the norms emerging through their articulation, rather than analyzing specific laws as if they exist on their own and assert a kind of top-down, vertical power.

2 Socio-legal Studies/Critical Agrarian Studies/Political Ecology

While the fields of socio-legal studies, critical agrarian studies, and critical political ecology are rarely put in direct conversation, finding points of productive interaction is not difficult. This is partly due to the very interdisciplinary character of each field. The fields share a commitment to rigorous local analysis that are positioned within the context of larger structural conditions, be they political economies or legal regimes. In their overview of the development of the 'agrarian question', for example, Akram-Lodhi and Kay assert that there is a fundamental need to explore "actually-existing agrarian questions", a direction that "requires uncovering the tendencies and processes by which rural relations of domination and subordination are being transformed" (Akram-Lodhi and Kay (part 1) 2010, 196). In his overview of critical agrarian studies, Jun Borras highlights the need for rigorous research methodologies, and states that one of the key messages of recent work in the field is "that the interplay between structures, institutions and actors… is a key unit of analysis in critical inquiry into agrarian change" (Borras 2009, 22). Socio-legal scholarship, particularly from the field of legal anthropology, similarly focuses on the constitutive relationships between actors and institutions and further examines these interconnections at different scales, jurisdictions, and territories (von Benda Beckmann and Griffiths 2012, Darian-Smith 2013).

Early Marxist socio-legal scholarship has unique insights for the study of agrarian change. Marxist structuralists in socio-legal studies primarily focus on how law reproduces structural inequalities that characterize capitalist relations (Hunt 1993). For these authors law is understood as a tool for the expansion and maintenance of capitalist relations of production, "including functions of repression and violence, the legitimation of the existing order, organization of the dominant classes, fragmentation of the subordinate classes, de-politicization of social movements, institutionalization of class relations, individuation of collective struggles, etc" (Fine 2002, 109). While remaining committed to a Marxist political economy, historian EP Thompson introduces a humanist perspective to the role of law in agrarian change. Writing about agrarian change in 19th C England, Thompson finds that law was not simply a glue in the capitalist superstructure, but an actual part of agrarian practice. Thompson argues law "was deeply imbricated within the very basis of productive relations, which would have been inoperable without this law. And, in the second place, this law, as definition or as rules (imperfectly enforceable through institutional legal forms), was endorsed by norms, tenaciously transmitted through the community" (261). Curiously, law served both the powerful propertied classes while remaining legitimate to rural peoples, even those dispossessed. He argues "If law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just" (Thompson, 1975: 263). Thompson finds that peoples repressed and disenfranchised through capitalist structures of inequality engage with law in creative and counter-hegemonic ways to challenge and hold accountable those in positions of power (Thompson 1975; Hay et al 1975 [2011]). In a similar vein Lazarus-Black and Hirsch write that "law is simultaneously a maker of hegemony and a means of resistance" (9). Studies of law focus on this tension within the politics

of development - in one moment it might represent a tool of the powerful to protect their interests, while in the other it might represent the collective efforts of peoples resisting land grabs and extraction around the globe.

Struggles to protect land rights, uphold food sovereignty, and secure rights to resources have gained momentum transnationally in recent years (Edelman and Borras 2016, Borras et al. 2008). Transnational agrarian movements exist in conditions that involve overlapping laws, from local customary or informal law, national and international law, as well as transnational voluntary standards. Processes of neoliberal globalization make these conditions even more dynamic as how law is expressed, and how it is embedded in relations of domination and resistance, have multiplied. Socio-legal approaches to law and human rights and their constitutive relationship with social relations are particularly helpful in this regard and can illuminate some of the dynamics of transnational agrarian movements.

3 Human Rights

Socio-legal scholars have developed a distinct approach to understanding law and human rights. Rather than studying human rights legislation as something that is imposed vertically on populations to reform practices via law, socio-legal scholars look at the constitutive nature of the relationship between law and society (Hunt 1993). By taking less of an interest in whether human rights are good, bad, applicable or inapplicable, legal anthropologists have defined a perspective of human rights that decentres a focus on legislation, moves beyond the nation-state, and considers instead local articulations and the performance of rights claims in transnational contexts (Wilson and Mitchell 2003; Goodale and Merry 2007; Merry 2009). They explore struggles for rights as a practice and discourse. By interrogating how international legal instruments are used in diverse, local contexts, they can demonstrate that human rights can be mobilized in ways unforeseen and unimagined by lawyers and policy-makers who toil over the drafting of UN human rights frameworks. They explore, for example, how international norms influence local identity and subjectivity, and vice versa, particularly in the context of neoliberal globalization and the proliferation of NGOs participating in international struggles (Speed, 2008). What emerges in these contexts is a rise of “transnational normative pluralism” as the institutions, ideas, and frameworks associated with human rights are practiced in different institutional and social fields and in effect challenge the very basis of the framework through which human rights have been traditionally understood (Goodale, 2007:3-4).

Through my case studies I demonstrate that analysis of new frameworks in the ‘land governance rush’ must move beyond an analysis of frameworks in isolation (the VGGT, for example) and attend to how frameworks and legal norms articulate together through the advocacy and struggles of peoples asserting their land rights. This kind of analysis focuses on how norms are emergent, as well as attends our focus to how different actors - including both corporate and community actors, for example - use emergent norms to their own advantage. I focus on how studies of law draw attention to how particular authorities are legitimated and deemed authoritative to control natural resources. I engage with the co-constitutive relationship between law, agrarian change, and agrarian social movements. Bringing sociolegal studies and critical agrarian studies into conversation is just the kind of theoretical and disciplinary eclecticism that is welcome in critical agrarian studies (Kay 2015, 80).

4 Law and Governance in the Context of BRICS

The BRICS organization drives home a point that many writing about transnational agrarian movements already highlight - rural agrarian politics do not take place in isolated, localized contexts, but are situated within transnational regimes of capital. There is surprisingly little on the role of law and its role in global governance in literature on BRICS. However in the literature that exists a particular theme can be identified. Bohler-Muller studied the summit declarations published after each meeting of BRICS countries and found that the importance of UN institutions and the rule of law has always been emphasized and there is a marked increase in references to law and human rights (2015). She states that "[t]he BRICS grouping's understanding of the rule of law is not clearly spelt out, but one could assume, based on their foregrounding of the United Nations, that the definition accepted by the UN is the one accepted by BRICS" (2015). Importantly, the author highlights a central and puzzling contradiction with BRICS: while these nations emphasize "the need for a democratic and just world order based on the rule of international law… there has simultaneously been a call for the reform of institutions of global governance" (Bohler-Muller, 1, 2015). This contradiction can be productive, according to Abdenur et al. They suggest that BRICS countries develop a two-pronged approach whereby BRICS countries simultaneously work within the system while also acting outside of it (2014). The authors argue, "[t]his dual strategy will allow these states to maximize their dynamic roles within the emerging flexible multilateralism… relying upon the interlocking webs of coalitions, groups, and organizations to press for change through formal as well as informal diplomatic channels." (57-58). The tension between a call for respect for the rule of law and the reform of institutions of global governance remains within BRICS countries and demands continued analysis.

Another study on the role of law in BRICS finds that the general legal framework governing bilateral trade agreements used across the globe is fundamentally reproduced between BRICS countries, thus international trade law reinforces imperial relations of investment and extraction in and between BRICS countries. Rather than BRICS countries representing institutional and legal laboratories for testing new legal rules, BRICS-South BITs replicated the BRICS-north BITs in wording, fundamentally re-producing forms of imperialism established in north-south relations (Ferrando 2015, 11). This argument has parallels with those by Patrick Bond and his collaborating authors on BRICS as a form of sub-imperialism (Bond 2015; Bond and Garcia 2015).

RICS has been notably soft on its approach to human rights. There are no official documents explaining their commitment to human rights, and references to human rights are often vague and overly broad as they relate to the UN institutions in general. In the declaration of the 5th BRICS summit in Durban (2013), they state at point 23 that the BRICS countries collectively "agree to explore cooperation in the field of human rights". South Africa proclaimed what seems to be a deeper commitment. A South African delegate explained: "South Africa's role in the global stage is shaped by our liberation history and informed by our constitutional values. As South Africa, we continue our struggle for freedom, equality and respect for human rights in the global arena" (9).

BRICS does assert its commitment to recognizing the legitimacy of the FAO VGGT. In the 'Joint Declaration of the 5th Meeting of the BRICS Ministers of Agriculture and Agrarian Development' they "note efforts by countries and international organizations in promoting the implementation of the Voluntary Guidelines on the Responsible Governance of the Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) endorsed by the CFS in 2012" (paragraph 17). They commit to coordination with FAO, including the "elaboration of joint initiatives on food security and agriculture for the Organization. The Ambassadors have emphasized that BRICS coordination at FAO would play an important "bridging role" to consolidate the membership positions across the regions" (http://www.fao.org/members-gateway/news/detail/en/c/281613/). They are thus venturing into the issues of the rights of indigenous and rural communities.

5 Neoliberalism

Critical scholarship on BRICS argues that it is an allied force in conditions of neoliberalism, moving with incredible energy and strength. While neoliberal economic and social policy rolls forward, where and how it impacts is far from consistent, however. The diverse forms of neoliberalism have given rise to different theoretical perspectives and commitments. David Harvey (2005) lays out the history of neoliberalism through a Marxist lens and focuses on neoliberalisms force as a market ideology. The political economy of neoliberalism is widely applied in literature on South Africa and on BRICS more broadly. A familiar critique regarding post-apartheid South Africa is, crudely put, that the legal infrastructure of apartheid has been replaced by a form of economic apartheid facilitated by neoliberal economic policies. This argument focuses on the political economy of neoliberalism as a model trade liberalization, financialization, and capital accumulation (Ashman, Fine, and Newman 2011). The critique has been elaborated to argue that these institutional conditions have contributed to re-calibrated forms of citizenship as affirmative action programs converge with neoliberalism to create new forms of social differentiation and entrench (albeit reconfigured) structures of inequality inherited from apartheid (Erasmus 2015). However, as Marxist geographer Gillian Hart (2008) argues, the practices and processes of neoliberalism operate in contexts that always exceed them, thus the theoretical tool box must be used creatively.

Literature on neoliberalism illuminates a fundamental characteristic, however, by focusing on the force at which it carves out new paths and establishes new relations between networks of actors that in relation coordinate forms of extraction and capital accumulation. BRICS is a powerful example of neoliberal networking. Abdenur et al approach and analyze BRICS as "a flexible coalition within an emerging configuration of international relations; a decentered network of multiple, overlapping platforms for cooperation, marked by varying degrees of institutionalization" (Abdenur et al, 53). Ferrando (2015) argues that rather than seeing states as monolithic entities, we need to understand them as nodes in a network, organizing towards the regulation and accumulation of capital. Such a description has clear resemblances to characterizations of transnational governance in conditions of neoliberal globalization highlighted by political geographers and anthropologists. These authors understand neoliberalism as the fragmentation and re-regulation of the nation state towards the facilitation of capital flows. Neoliberalization processes have a verigated character, meaning that inherent in them is a "*systemic* production of geoinstitutional differentation" (Brenner, Peck and Theodore 2010). Further, the authors argue, "across all contexts in which they have been mobilized, neoliberalization processes have facilitated marketization and commodification while simultaneously *intensifying* the uneven development of regulatory forms across places, territories, and scales" (Brenner, Peck and Theodore 2010, 184). Finally, Neoliberalisation "displays a lurching dynamic, marked by serial policy failure and improvised adaptation, and by combative encounters with obstacles and counter-movements. It has carved a path, therefore, not of manifest destiny but one shaped by opportunistic moments, workarounds and on-the-hoof recalibrations, which in practice often bear little resemblance to the lofty ideals expressed in neoliberal theory." (Peck and Theodore 2012, 178-179).

In their work on the "government of poverty and the arts of survival" at the margins of the South African economy, Andries du Toit and David Neves take a similar approach to neoliberalism. They state: "Our purpose is not to come up with an authoritative counter-narrative about 'the logic' of 'neoliberalism' or 'capitalism' as such, but rather to illustrate the ambiguous and contradictory nature of the struggles that are taking place, and to allow more nuanced judgements about similarities and differences between late capitalist agrarian landscapes in South Africa and elsewhere" (2014, 837). In a discipline where the study of neoliberalism has taken centre stage (Akram-Lodhi et al 2009), such nuanced analysis' are needed.

What to make of law in this complexity? BRICS represents in a very real way what many studying transnational law from a sociolegal perspective have been arguing in recent years - that transnational law is best not understood as sets of rules imposed to bring order and justice, but as a space of contention, flexibility, norm generation, and scale shifting (Darian-Smith 2013). The role of transnational law in BRICS countries will likely not be determined by states, but by local actors, social movements, and corporate actors, all coming into conflict in conditions of agro-extraction. By focusing in on a few case studies in South Africa we can see that the articulation of law and policy contributes to the generation of new norms towards the protection of land and resource rights. Understanding how these laws overlap, come into contact, and what kind of norms emerge from their articulation, defines the critical point of analysis.

6 Case Studies from South Africa

Social movements seeking to protect land and resources are drawing on diverse legal authorities to make their claims. My dissertation research has focused on law, policy, reports and publications by several different NGOs in South Africa, as well as analysis of Parliamentary public consultations. This paper expresses some of the observations and findings from this work, which fundamentally reveals a very dynamic field of law and legalities. The extent to which these fields are being influenced by BRICS is yet to be seen. How transnational norms are articulated in this context provides signposts for the further development of local resistance in the context of BRICS, however.

7 Property Issues: Land/Authority/Subjectivity

The human right to land and resources often falls on the 'hard ground' of property whereby clear decisions need to be made about who owns what and how collectivities are defined as property owners (James 2007). At stake is the question of authority. As work on property in political ecology demonstrates, authority is not an uncontested position but rather authorities are legitimated in social, political, and legal contexts (Sikor and Lund 2010). The context of the global land grab has further intensified and multiplied the authorities that intervene to control access to land (Peluso and Lund 2011). Law has a contested relationship to the issue of authority. Lauren Royston et al write that while "although conventional thinking about tenure tends to privilege the law as a source of authority in a way that does not help us to see what is going on locally, or in local practice", as authority and legitimacy are socially derived (Royston et al. 2015, 6). While indeed local relations of authority are socially derived, Aninka Claassens argues that although property functions at the local level through processes and interactions involving local actors, "Nevertheless, national institutions and laws have a major local effect in bolstering the authority of certain groups and in providing alternative avenues for the legitimation of property" (Claassens 2011, 12). The approach taken in this paper is that appeals to law - local, national, transnational - are one means by which authority is legitimated.

A further layer of complexity is added by the fact that land and its uses and meanings are also far from uniform. Writing about global land governance Borras and Franco argue that the multidimensional character of land makes it very difficult to capture the diversity of effectiveness and impacts of land policies. They write that "important gaps remain in our understanding of how the different dimensions of land interact in reality and influence the effectiveness and sustainability of pro-poor land policies." (2010, 4). They further write that "The complex range of key actors in the global land policy scene today is also reflected in the complexity of meanings accorded to land policies and 'land governance' between and within these groups." (Borras and Franco 2010). How actors use law towards defining, stabilizing, and

legitimating particular approaches to land governance is thus a key issue. Through agro-extractivism in BRICS powerful transnational corporate actors encounter local peoples, consequently national, and now transnational, forms of law and governance come into play. In this context, indigenous and local communities are required to articulate their tenure relationships in a way that mirrors transnational governance standards and it is precisely in these conditions that we need to explore how these standards either reflect and reproduce existing social inequalities or if they offer an opportunity to challenge the further solidification of inequalities.

The following examples demonstrate how living customary law, indigenous rights, and the FAO VGGT guidelines articulate together, contributing to the emergence of new forms of authority in land rights struggles. These authorities are legitimated in part through claims to both local and transnational law.

Identifying links between Aboriginal Title, Indigenous Rights, Living Customary law, and Agrarian Change

Claims to living customary law have been increasing in South Africa in recent years. These claims have been made in the context of a failing land reform program (Cousins and Walker 2015) and the failure of South African agricultural policy to circumvent "natural, simply, capitalism" and transform the opportunities for marginalized farmers after apartheid (Bernstien 2013). Very few rural South Africans participate in the agricultural economy today, a reality that demands a close consideration of the relevance of the 'agrarian question' and the idea of the 'peasant' in rural South Africa (Bernstein 2006) and of the uses of land beyond production (Ferguson 2013). Large scale land acquisitions bring another dynamic into this context and have accentuated urgency to understand the complexity of processes of agrarian change and their impact on collective land holdings in sub-Saharan Africa (Alden-Wily 2011, Hall et al 2015).

It is in this agrarian political economy that claims to customary law emerge. Customary law is not pre-political, but is articulated in political and economic context (Chanock 1998, 2001, Mamdani 1996). It historically emerged out of the struggles of colonial subjects to demand that their land and economies were recognized in colonial courts; The language of 'customary law' was a way for rural peoples to articulate and represent themselves to the colonial state in South Africa (Chanock 2001). It thus provides an important avenue to explore the local dynamics of the agrarian question, and perhaps to re-focus it from the agrarian question of capital to the local dynamics of changes in the countryside. For example, focusing on customary law is one means to account for changing gender dynamics in landholding (Claassens 2013), a focus that remains out of scope of most work on agrarian change (O'Laughlin 2013). Indeed an ethnographic focus on collective landholdings and changing property relations has revealed the subtle and violent dynamics of capital expansion elsewhere (Li 2014). While the work of early legal pluralists explores the impacts of Western, colonial laws on 'local' law in colonized contexts (see Merry 1988), more recent scholarship departs significantly from this perspective by focusing on the global spread of norms, particularly in the field of human rights (Tamanaha 2012). This perspective is crucial as customary law is being forged through transnational activities, such as transnational policy on land tenure (from the Food and Agricultural Organization, for example), and the work and advocacy of international NGOs (Chanock 2005: 361). Customary law draws its legitimacy through layers of authorities in complex and changing social environments (Boon 2015; Obarrio 2014; Peters 2009).

This perspective is relevant in South Africa. Contemporary resistance in this field has largely been characterized by an appeal to national laws and judicial precedent, highlighting the character of customary law as 'living'. This understanding of customary law emphasizes how it historically changes in unsettled social contexts. While national legislation is often appealed to in local demands for accountability, a deeper reading of judgments and public education and activism promoting living customary law reveals that it is developing in articulation with international legal norms, particularly in relation to the doctrine of Aboriginal title.

The doctrine of Aboriginal title was introduced into the South African legal system through the Richtersveld decisions. In Constitutional Court judgement (CC) *Alexkor v. Richtersveld and others (Richtersveld),* Aboriginal title was recognized and affirmed in South Africa, marking the first time that international common law developments in Aboriginal title were applied in court to protect indigenous rights on the African continent. The decision, which involved judgements in the Land Claims Court, the Supreme Court of Appeal, and the Constitutional Court, is widely regarded as a landmark case (Barume 2014; Chan 2004; Fairweather 2006; Lehmann 2007; Mostert 2010).

The CC argued that the community had rights to land and that these rights were determined by reference to indigenous law. The CC, taking inspiration from principles defining Aboriginal title, determined that the land was owned communally, that the community has been historically defined in part by its exclusion of others, that they had exclusive rights to the subject land, and that their rights included prospecting, mining, and using minerals. The CC found that the right to land in question amounted to "indigenous law ownership", which is akin to common law ownership. The CC used the opportunity to make bold statements about the role of indigenous law and the state of legal pluralism in South Africa:

> While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution… It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system… In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law (CC 2003 [51]).

The court did not debate whether the claimants constituted an indigenous community and instead elaborated on indigenous law and its evolving nature: "It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life" (CC 2003 [51]). The CC argued that legal pluralism must now be taken seriously in South Africa (CC 2003 [45-51]).

While many celebrated the judgement, others approached it critically by questioning the applicability of Aboriginal title and indigenous peoples' rights more broadly in an African context where the settler population is a minority to the majority African population (Kuper, 2003; Lehmann, 2004). Prominent scholar of Aboriginal title Paul McHugh (2011) argues that Aboriginal title fundamentally did not contribute to further jurisprudential development in the country, and others argue that they judgement was simply symbolic and will do little to advance the rights of indigenous peoples (Knafla, 2010: 25; see also Fairweather, 2006: 116). Interestingly, the *Richtersveld* judgment has not been used in cases dealing with indigenous peoples, however it is cited repeatedly in key CC judgments on the development of living customary law and its application in the communal areas of the former bantustans (reserves) in South Africa (see Bhe 2005; Shilubana 2009; Cala 2015; for an analysis of Bhe and Shilubana see Claassens 2011). These cases reference the now famous citation from Richtersveld above, affirming the importance of customary law as an integral part of South African law and as an independent source of norms, thus enshrining a commitment to respecting legal pluralism in the South African legal system (Bhe 2004, [43], Cala 2015 [31], Shilubana 2008 [43]). In other words, a judgment that used international common law to give content to what the Court called 'indigenous law' is applied to give content to 'living customary law' for peoples who do not identify as indigenous. The widespread application in and outside of the courts demands that we confront what many would find confusing: indigenous law in the South African context powerfully resonates with, and is claimed by, rural peoples who are often identified as 'customary communities' and who do not identify as indigenous. It is on this point that we begin to see the significance of the fact that indigenous rights articulate with living customary law in South Africa, a perspective that is illuminated through socio-legal analysis.

The actual reach of the judgement has exceeded the imaginary of many of those who critiqued it. Here we see how Aboriginal title is introduced into the South African courts to re-enforce the validity of living customary law, a concept that is now articulating with other emergent norms in land and tenure rights, as indicated through the activities of NGOs and advocates who give weight to living customary law through the Richtersveld judgement.

Advocates continue to use creative means to affirm the right to land and tenure in relation to the legitimacy of living customary law. One such way is by appealing to the Interim Protection of Informal Land Rights Act (IPILRA). The failure to pass an Act that protects the rights of peoples living in the communal areas of South Africa has created a significant hole in the land reform program. The Communal Land Rights Act, which was originally meant to legislate the rights of peoples in communal areas, was struck down in the Constitutional Court in 2010 on procedural grounds. However, the critiques mounted against it focused on the fact that the CLRA would have transferred land rights to traditional leaders and effectively undermined the rights of rural peoples, especially women, to make their own decisions regarding land and access (Claassens and Cousins 2008). There remains no legislation to protect their tenure rights in communal areas. In the interim, advocates have been using the 'Interim protection of Informal Land Rights Act', a short, four-page piece of legislation originally drafted to last a single year but has been re-introduced every year since 1996 (check) until a permanent bill is signed into law. IPILRA is weak in content and claims to it demand appeals to other legislation and judicial precedent, including emerging norms regarding living customary law. In the ongoing struggles against mining by the Xolobeni community, IPILRA is being leveraged in conversation with claims to living customary law, a legal move that likely would not have the same traction if it were not for the growing understanding of living customary law as it has emerged after Richtersveld.

Critiques and hesitations about the Richtersveld judgement have affinities to a deep skepticism of 'indigenous' subjectivity in critical agrarian studies. As Michael Watts argues, "[t]here is within the indigenous movements a local and global discursive creativity; what Tania Li (2007) calls the occupation of the 'tribal slot'. Whether this stands in opposition to the material and discursive sense of being a peasant is, however, another question entirely" (Watts 2009, 282). This statement hinges on a distinction that has long characterized approaches to peasant and indigenous identity. 'Peasant' has historically been understood as an identity related to a political economy, while indigenous has been imagined to appeal to something essential. In her work on the Zapatista movement in Mexico, political theorist Courtney Jung (2008) uses a constructivist approach to identity which challenges the distinction between 'worker' or 'class' as 'political identities', and 'race', 'ethnicity' as 'identities'; given, prior to politics (54). Jung argues "peasant or indigenous are more fruitfully conceived as political rather than personal identities" (18). She argues that we look to the structural conditions through which 'ethnic', 'racial' or 'cultural' claims are used, stating succinctly "[i]dentity is not only the source of politics; it is also an effect of politics" (37). This approach focuses on the agency of peoples to make claims for their rights in specific political and economic contexts. Similarly, customary law must be understood in the context of the political economy of land reform and agrarian change, both nationally and internationally, and must pay close attention to the creative ways that peoples are leveraging law to secure their rights. The introduction of the voluntary guidelines by the Food and Agricultural Organization has been one such development that has bolstered and facilitated new articulations of customary law. The introduction of the Voluntary Guidelines on Tenure Security by the FAO has brought a new transnational norm into articulation in South Africa.

8 Voluntary Guidelines on Tenure Security

There is now a wide body of work, from both NGOs and academics, on the VGGT. Some significant critiques have been leveled against the Guidelines, while others have suspended their critique for exploring the potential of the guidelines to contribute to the ongoing land and resource struggles of indigenous and local communities. Interestingly, these critiques focus exclusively on the guidelines themselves, in isolation, perpetuating a common perspective on law as disembodied and separate from society; a tool to be instrumentally applied towards specific ends. This is odd considering that the guidelines declare that they are one iteration of land and tenure rights in the context of many overlapping and developing national and transnational laws. The guidelines consistently re-iterate that they need to be read and understood in the context of existing national and international laws. In terms of international law, specific reference is made to ILO 169, UNDRIP, and the CBD, for example (paragraph). The fact that multiple laws exist governing land rights is not the end point of the discussion but rather the beginning of what needs to be the focus of the debate: how different laws work in relation to one another, and what is produced through their intersection? These questions can only be explored by examining locally specific engagements with law and what is accomplished through these case studies of legal activism.

South Africa is a good place to explore this question. Initiatives have started across the continent to strengthen implementation of the guidelines and to strengthen links between the guidelines and the Africa Land Policy Initiative (LPI) Framework and Guidelines on Land Policy in Africa (F&G). (FAO 2016, putting VGGT into action). A workshop was held in Cape Town in May 2016 to explore the applicability and potential use of the guidelines in the South African context. This gathering resulted in the establishment of five priority areas to further mobilize the guidelines towards the strengthening of land rights in the country (AFRA). There is already momentum towards articulating the guidelines with existing law and policy.

The FAO recognizes the need to study the interplay of laws in other areas, as well. For example, the FAO recognizes that FPIC involves the interplay of many different laws, international, national, and local indigenous and customary laws. In their 2014 technical guide on the implementation of FPIC it is explained that to determine the rights of indigenous and local communities a consultant must review existing national legal, institutional and policy frameworks in national and geographical contexts. They highlight the need to consider different jurisdictional rights between national or provincial authorities or specialized government agencies such as the ministry of environment, for example (FAO technical guide, 2014, 20). The FAO insists that two processes are completed, one identifying rights holders, and the other identifying the legal status of land and tenure arrangements practiced, and that potential contradictions between the legal status and the traditional practiced are identified (21).

A Technical Guide on FPIC published by FAO clearly states that international governance norms concerning human rights and FPIC have been developing beyond the practice to restrict consent to indigenous peoples, even though FPIC has its origins in the ILO 169 and later the UNDRIP. The FAO affirms: "Understood as an expression of the right to self-determination, FPIC can fairly be interpreted as applying to all self-identified peoples who maintain customary relationships with their lands and natural resources, implying it is enjoyed widely in rural Africa and Asia, and by many rural Afro-American societies." (Technical guide 2014, 9). What is most promising about this development is that they have similarities with how approaches to customary law and indigenous rights are emerging in South Africa in the sense that the subjectivity of indigenous and peasant, long distinct subjects in international law, are emerging together.

An example from the South African NGO Masifundisi further illustrates this point. Masifundise has linked the VGGT to the small-scale fisheries guidelines to reject proposed regulations of Marian Protected Areas of the Department of Environmental Affairs. Further, Masifundisi also used the VGGT to "*build a court*

case with the support of the Legal Resources Centre and in partnership with research institutions, which resulted in the legal recognition, for the first time, that the declaration of MPAs does not extinguish the exercise of the customary rights of coastal fishing communities to access their marine resources in an area, thus also vindicating many similar fisher communities who have claimed the same recognition for years. The Tenure Guidelines as well as the Smallscale Fisheries Guidelines were used as references in expert statements submitted by research institutions to support the case." (CSM 2016, 20). The success of these activities and the court case is in the way that the guidelines articulated with the developing norm of living customary law, which is underpinned by international common law Aboriginal title. Here we see new, creative, and strengthened claims to living customary law by small scale fishers.

There is clearly interest and motivation to engage with the FAO guidelines by BRICS and by advocates in South Africa. The kind of response that it demands is one that figures the VGGT within multiple governance frameworks, voluntary standards, declarations, and international law. The questions that can be asked are not centred on whether the VGGT are equipped on their own to uphold the tenure rights of rural peoples, but how the VGGT, in articulation with local contexts, customary and national law, can be one element in affirming collective rights to land. The VGGT does not exist on its own, neither is it applied in contexts without prior histories and laws, rather it becomes one normative framework coming into an already articulating network of tenure rights frameworks. By positioning the VGGT in this way we must also resist the inclination to suggest that they represent a finalization of an emergent land rights regime nor do they represent a single authoritative voice on land and tenure rights. Indigenous peoples and peoples who live by customary law will continue to authoritatively challenge existing frameworks and stretch how land and resource rights are understood.

Drawing from insights from socio-legal studies we need to study how the guidelines are co-constituted through movements to protect tenure rights - how they serve to frame rights, and how their framing is in turn resisted. There is a threat in assuming the VGGT constitutes an authoritative assertion of the state of tenure rights against the continued, and perhaps more creative, assertions of indigenous and local communities who continue to demand land rights in ways that may not be recognized/legible to international law.

9 Conclusion

Writing about the emergent doctrine of FPIC in global land governance Jennifer Franco argues that "it's worth considering whether and how the actual process might generate enough 'friction' to disrupt the status quo in ways that could be exploited by those seeking social justice" (Franco 2014, 15). She further elaborates that working in this tension of law - between hegemony and resistance - we need to look for the specific spaces and instances where law can be leveraged and expanded (Franco 2014, 17). Indeed, as her paper demonstrates, FPIC is already being applied in ways not foreseen even a decade ago by the drafters of the UNDRIP. Furthermore, in relation to the emergence of living customary law, "It is the very contestation itself that provides the emancipatory potential for living law, in conversation with the framework provided by the Bill of Rights and other human rights instruments, to create adaptive, robust systems of rules and associated actions that aspire to achieve the principles of good governance." (Sunde et al, 136).

I have argued that changes in living customary law are happening at the intersection of many different transnational normative orders, including Aboriginal title, indigenous rights, and now, the FAO guidelines on tenure security. Considering such normative pluralism, the goal to achieve a single land governance framework will forever be unproductive. Rather as activists and engaged scholars we need to be critically aware of how, in the neoliberal and global political economy of BRICS wherein multiple actors are

brought into relation, different legal regimes are articulating together towards the creation of new norms of land tenure, including for example, living customary law. We need an analysis of what articulations are productive towards our goals, and what articulations reproduce or further strengthen the power of transnational corporations or historical and oppressive forms of authority. Questions that might frame this research include: What is the political economy through which law is mobilized and when do legal challenges assume political and social clout? What legal and normative frameworks are articulating in specific localized struggles? In relation to specific land struggles, is transnational law appealed to while national law is assumed to be paramount, or vice versa? What property relations, including what kinds of authority and legitimacy, emerge through the articulation of multiple laws and normative frameworks? What space exists for indigenous and rural communities to continue to assert their own conceptions of land, property and resource use at the intersection of local, national, and transnational normative frameworks? In what ways do these laws obscure relations of power and domination, and how do they enable counter-hegemonic movements for land justice? To what extent does law determine the recognition of peoples and communities as 'peasant' or 'indigenous'? Finally, does the introduction of ever more international standards create a burden for communities that may not have the resources to study and mobilize around them, rather than providing a viable means to assert authority over their lands and resources?

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