



Extractives vs development sovereignty: building living consent rights for African women

The WoMin collective [1]

This article focuses on the right of consent for women and their communities in respect of extractives and large-scale (or ‘mega’) infrastructure projects that affect their access to, and control over land and natural resources indispensable to their lives and livelihoods. As we point out, the right of consent is determined by prevailing deeply unequal power structures. Poor women confront a double exclusion from power and decision-making about land and resource use – on the basis of both their class and gender. The political economy of power and vested interest surrounding these projects at all levels from the community to the international spheres mean that communities, and women within them, rarely enjoy the right of consent on a free, prior, informed and ongoing basis. In addition, women are locked out of rights of land ownership in communities living under common property and this, combined with other patriarchal power relations in family and community, inhibits their voice and influence in community decision-making. This is the second exclusion they suffer this time on the basis of their gender. Consent, even if legislated or institutionalised in policy and systems of state, corporate or multilateral body is rarely granted but rather won through struggle and demand. The article will present an inspiring case in the South African context where unequal power has been inverted and a unique community, with women playing a leading role, has claimed the right of consent in practice through struggle. It concludes with some suggestions for the work needed to strengthen women’s rights of consent in respect of mega ‘development’ projects in Africa.

Key words: resource extraction, land, rights, women, gender, inequality, consent, development, exclusion, social struggle

ENGLISH





Introduction

We believe that we know who we are because of the land. We believe that once you have lost the land, you have lost your identity. We also believe that it is our right to live in a healthy environment, an environment which is not harmful to us, that has clean air with no air pollution, no pollution of the land and no contamination of the water. To make all these things happen, we believe that women must be a part of decision making. There should be no discrimination in terms of gender. If we do that, we are going to build a healthy nation (Nonhle Mbuthuma, member of the Amadiba Crisis Committee and Resident of Xolobeni sharing her views on development for this article).

This article focuses on the constraints to free and informed consent of communities - and the women and girls, men and boys within them - who live in the locations earmarked for resource extraction and associated infrastructure development by states and transnational corporations. In the last fifteen years, the extractives industries have gained ascendancy in many countries across sub-Saharan Africa, on the back of increased demand from the global North and emerging parts of the global South, such as China, India, South Africa and Brazil.

Resource extraction has come to be characterised as the development pathway out of poverty and dependency for Africa. See the African Union *Agenda 2063* (African Union Commission 2015), formed at the Organisation of African Unity/African Union in May 2013; the *African Mining Vision* (African Union 2009), adopted by the Heads of African States at the February 2009 AU summit; and the World Bank's *Strategy for African Mining* (World Bank 1992). This vision of an 'Africa Rising' through resource extraction has been given impetus through the Green Revolution in Africa (AGRA), the African Mining Vision (AMV) action plan and the Programme for Infrastructure Development in Africa (PIDA), to name a few.

The decision to proceed with large-scale (or 'mega') extractive projects is already 'given' under this development logic, hence regulatory processes, including consent, are often reduced to rubber-stamping exercises to enable projects already politically agreed to proceed without hindrance.

Our perspective in WoMin is that consent - and even the weaker rights of consultation and participation of communities in decision-making - cannot be separated from the dominant neo-liberal thinking that frames development and development choices by governments in Africa and elsewhere in the world.





WoMin is an African gender and extractives alliance based in Johannesburg, South Africa, working with more than 50 allies in 13 countries in East, West and Southern Africa. Our mission is to support the building of women's movements to challenge destructive extractivism and to propose development alternatives that respond to the majority of African women's needs.

As activists working in the global South, we are of the view that many of the development perspectives of African states arise from the dominant discourse, policies and programmes of multilateral bodies and financial institutions such as the development banks, all substantively influenced by powerful transnational corporations. In the Sustainable Development Goals (SDGs) and 2030 vision for development, there is a considerable role envisaged for the private sector to deliver development hand-in-hand with states and international institutions (Esquivel 2016). This article contests corporate power by highlighting the dangers that arise when corporates and states collude with the elite in local communities to undermine community struggles for development sovereignty, that is their rights to pursue their own ideas about development.

In this article, we illustrate our analysis by focusing on the community of Xolobeni, home to Nonhle Mbuthuma whose words are quoted above, and who is one of the co-authors. We also draw from a wide range of literature addressing the many themes of this article, and are informed by more than five years of dedicated work with allies on the gender and extractives question across the African region.

Our perspective on extractivism and consent

Extractivism is a term used to refer to an economic development model organised around the large-scale removal (or 'extraction') of non-renewable – and increasingly scarce – natural resources from locations which are often considered peripheral or 'unproductive' (Transnational Institute, 2013). These natural resources, the basis of life and livelihood for indigenous and peasant populations across the global South are exported, usually in raw form, to the centres of industry and power in the global North, in the process reinforcing and deepening poverty and inequality within and across countries and regions of the world (eNCA, 2013).

The concept of extractivism applies to traditional extractives activities, such as mining, oil and gas, and also refers to other areas of extraction, such as industrial forestry, megaenergy (including renewable energy projects related to solar and hydro) and industrial agriculture (Acosta 2012,62).





Extractivism's logic requires easy pathways to profit for transnational corporations. And this is assured in the distant rural contexts where the minerals, forests and water bodies are to be found. Here, populations generally live on lands owned and managed under common property systems, where traditional leaders and distant state actors hold excessive power to take decisions which greatly disadvantage local owners. This unequal power is exacerbated further by national legislation in most countries in Africa which privilege mineral rights and the extraction thereof over land rights and related livelihoods activities. The grave injustice which results from these significant power inequalities is that the land and natural resource rights of communities held sometimes over centuries, and absolutely indispensable to their livelihoods and well-being can be signed over to multinational corporations through 'legal' means.

In the section to follow, we offer an example of extractivism in action, in the Xolobeni community in South Africa's Eastern Cape Province. The case study is divided into two parts, with an exploration of concepts and questions in the interceding sections.

The story of the Xolobeni community and their struggle for consent: Part 1

In early 1996, Mineral Resource Commodities (MRC), an Australian mining company, began to show interest in mining titanium in the Xolobeni community. MRC began by consulting the Umgungundlovu Tribal Authority, the governance structure which administers the affairs of the community in accordance with tradition and custom. The Tribal Authority introduced MRC to the Amadiba community living in the area and gave the company an opportunity to explain their mining interests at a community meeting. Nonhle Mbuthuma's account of this meeting is that most members of the community were not agreeable. People were worried about their grazing land, the amounts of water that would be consumed, the impact on livestock and livelihoods, the destruction of medicinal plants, and the interference with ancestors' graves.

In 2002, MRC made its first application to prospect the proposed mining area to the Department of Minerals and Energy (now the Department of Mineral Resources (DMR) and referred to as such throughout this article). MRC was applying for the right to start mining in 2007. In 2007, the Amadiba Crisis Committee (ACC) was founded by members of the community who were opposed to mining, to respond to





the increased mining interest and ongoing pressure on the community (Bennie 2010 ,146). Nonhle Mbuthuma is one of the founding members of the ACC.

In July 2008, the DMR took a decision to grant the mining rights to MRC's South African subsidiary, Transworld Energy and Minerals (TEM) which owns the Xolobeni Mineral Sands project. ACC's legal representatives lodged an appeal to the Minister against the granting of the mining license. The operation of the license was halted until 2011 when the Minister wrote a letter to ACC's lawyer indicating that the right would be withdrawn due to outstanding environmental issues. This victory for ACC was widely reported in the media (Mail and Guardian, 2011).

Nonhle Mbuthuma attended all of the meetings between TEM and the Xolobeni community which continued in 2012 and 2013. No agreements were reached about the proposed mining project. In 2015, the Chief Lunga Baleni was appointed to the TEM board as a director. In the same year, TEM withdrew its prospecting application, and filed a second mining license application (Centre for Environmental Rights, 2016). In light of the previous experience, the community resolved to block the 'environmental impact assessment' required for mining to proceed. This blockade led to escalated violence and repression against the community (Duvenage 2016). In 2015, Nonhle Mbuthuma, the secretary of the ACC, lodged a complaint to the South African Services (SAPS) and the Eastern Cape Human Rights Commission about police bias and their failure to investigate incidents of violence.

On 22 February 2016, planned drilling on the dunes was blocked by mass mobilisation. Shortly thereafter, Bazooka Radebe, chairman of the ACC, was assassinated by two hitmen in front of his son on 22 March 2016 (Schneider 2016). The murder came in the wake of many incidents of violence related to mining activity in the community (Washanyira 2016).

In April 2016, the South African Human Rights commission issued a statement condemning the murder of Mr Radebe and the ongoing violence related to mining in the Xolobeni community. The SAHRC acknowledged that the persistent attacks on members of the Amadiba Crisis Committee were related to their refusal to accept the mining project of TEM/ MRC (SAHRC statement, 2016)

In July 2016, several government ministers including the Deputy Minister of Police attended a meeting with Xolobeni residents but were unable to give any concrete answers to the allegations of police bias or ongoing violence (Dasnois 2016). And in September 2016, the Mining Minister Mosebenzi Zwane declared his "intention" to decide an 18-month moratorium on mining in Xolobeni until he was satisfied that



the community conflict had been resolved. The moratorium was announced on 6 June 2017. This moratorium has been firmly rejected by the ACC who have called for Minister Zwane to heed their decision to oppose the mining. They contend that this 18 month moratorium is not for the community but for the state to demobilise resistance in the community and ‘strategise’ how best to lay the ground for the titanium mining to proceed (Davis 2017).

Xolobeni, power, and activism

When WoMin started to conceptualise its work on consent, we brought the question of power to centre stage. As a collective of feminists seeking to bring the voice and development interests of rural and peasant women to the centre of decision-making processes related to the extractives sector, power was an unavoidable question we had to contend with. In the last eighteen months, we have been simultaneously grappling with two interrelated dimensions of power and what we call ‘counter-power’ around consent. These are women’s power to counter patriarchal exclusion from discussions and decisions about resource extraction; and the power of excluded rural and peasant communities to counter a capitalist extractivist development agenda that is seeking to push them off their lands and open up their territories to exploitation.

We have come to the inescapable conclusion that even where consent is legislated, a rarity in Africa, it lives and breathes in struggle. And this is why we have brought the Xolobeni community into sharp focus in this article. Xolobeni is emblematic of communities in the global South who struggle to claim their development sovereignty against corporates and States which fail to stand with communities. In the case of Xolobeni, the state has, instead, aligned itself with a development trajectory of economic growth based on extractivism. This is antithetical to the interests of this community, and also those of many thousands of communities in South Africa and elsewhere in Africa who live on and off the land, forests, and natural water bodies.

The Xolobeni example reminds us that the prevailing economic system - patriarchal extractivist capitalism - is founded on the maximum exploitation of cheap labour and natural resources to engender profits enjoyed by corporates and their beneficiaries. Under this system, we witness the commodification of land and other natural resources and a proliferation of large-scale extractive projects, as well as large infrastructure projects, accompanied by foreign direct investment. These developments remove the possibility of communities most affected being able to



give true consent to resource extraction and industrial development of the natural resources and land they depend on for their economic survival and social and cultural identity.

Consent: the concept, its history and background

WoMin's thinking and action around consent has built on the principle of Free, Prior and Informed Consent (FPIC), that was first formally laid out by the International Labour Organisation (ILO) in its 1989 Convention on Indigenous and Tribal Peoples. FPIC does not have a universally accepted definition, but has emerged as a principle of international law that derives from the collective rights of indigenous peoples to self-determination. Later in this article, we explore the concept of FPIC in more depth.

FPIC's aim is to ensure that States fully consult with indigenous peoples about matters that affect their development, land and resources. (ILO Convention No 169, Article 6, 7 and 15) Some international financial institutions – notably the World Bank Group in their Extractive Industry Review in 2003/2004 – have concluded that all potentially affected communities, indigenous or not, have the right to FPIC (World Bank 2004).

If conducted in good faith and with due regard for local decision-making procedures and rules, FPIC empowers communities to assert their rights to self-determination and self-governance in decisions about projects that concern their lives and resources. As a collective right, FPIC fundamentally entails the exercise of choice by peoples regarding their social, cultural and economic development path. It has the potential to guarantee a collective decision-making process of the concerned community through their legitimate customary and agreed process of decision making.

International recognition of the principle of FPIC has continued to develop [2]. In 2007, the principle was reinforced by the United Nations Declaration on the Rights of Indigenous People (UNDRIP 2007). The African Commission of Human and Peoples' Rights recognised FPIC in its 2012 Resolution on a Human-Based Approach to Natural Resources Governance. FPIC is also recognised in the Economic Community of West African States (ECOWAS) 2009 Directive on the Harmonisation of Guiding Principles and Policies in the mining sector.





In Africa, the application of FPIC has not been limited to indigenous communities, but applied more broadly to affected communities. Provisions for public consultation (and not FPIC) are provided for in the 2011 Action Plan of the Africa Mining Vision (adopted by heads of state in 2009 at an African Union summit). In January 2012 at its Sixth Ordinary Session, the Pan-African Parliament called on States to *'ensure effective consultations with local communities and various people affected by investment projects and ensure that any investment is approved through free, prior and informed consent of affected communities'* (Pan-African Parliament, 2012)

Despite these global, regional, and sub-regional provisions and commitments regarding consent, mining and other investment projects currently still generally proceed without consent or even the watered down provisions for consultation and participation.

WoMin's analysis here is that the dominant power interests – corporates, states, ruling party elites, local councillors and traditional leaders, usually male - at play in extractives and mega infrastructure projects undermine rights of communities, and especially women within them, to participate in decision-making and give or withhold consent. Complex and intersecting inequalities of class, race and gender across households, communities, states and regions are challenged by the notion of FPIC, which gives power to individuals and communities to claim their right to development on their terms.

Extractivism, development, and intersecting inequalities

Firstly, FPIC gives power and authority to local communities to say 'no' to extractives or mega infrastructure projects that affect their economic, social or political well-being, or to determine fair and just conditions governing resource exploitation, should consent be given for a mega project.

The idea of consent dislodges the dominant extractivist model of development, because it locates decision-making at the local level in poor rural and peasant communities. This is truly radical, since these communities are usually without voice and quite powerless to determine policies in the wider national and international system. When communities are empowered to participate fully and equally in policy fora, or claim the right of consent, this takes power and authority from the state, and places it in the hands of local people.



This shift in power, from state level to local level, is revolutionary in states that may claim the mantle of democracy, but in fact operate as authoritarian, controlling and disconnected from the majority of their citizens and their development aspirations. Why would most governments legislate and support consent provisions that undermine their power?

Secondly, the development aspirations of local rural and peasant communities usually contradict an extractivist development model. This is because in rural areas in particular, lives and livelihoods are deeply intertwined with land, forests, sea, and other water bodies. Because these communities live in harmony with nature, 'natural resources' are not seen as inputs to a process of production nor as goods which can be traded and sold in a distant market, but rather as resources essential to their livelihoods, health, cultural heritage and well-being. Rural and peasant communities need land for subsistence cropping; safe drinking water; forests which are a source of fuel, food and medicinal plants; and sacred sites linking them to their ancestors. Peasant and indigenous women enjoy a relationship with nature that is close and symbiotic because they are responsible for the subsistence economy and play a primary caring role in their families and communities.

Ecofeminist thinkers such as Maria Mies and Vandana Shiva (1993) have argued that women's concept and lived practice of 'development' - as human development emphasizing sustainability, dignity and well-being of people and the planet - stands in direct contrast to and in conflict with hegemonic ideas about development. From our perspective as feminist activists in Africa, the concept of consent for women in the global South gives credence and space to lived development alternatives at the local level, affirming people's sovereignty over their own development.

Women's consent over land use is a challenge that has been researched extensively and been the focus of feminist struggles in many parts of the world. The struggle over consent to extractives and mega projects intersects with struggles over agriculture, land titling, and urban development. In South Africa and other sub-Saharan African countries, land remains the ultimate symbol of male power (Kameri-Mbote 2013, 11). Despite various international legal provisions promoting women's rights to land through obligations placed on the State (the 1979 Convention on the Elimination of all Forms of Discrimination





against Women (CEDAW), the 1995 Beijing Declaration, the UN Sustainable Development Goals, and the 2003 Maputo Protocol addressing the rights of women), women continue to be marginalised and excluded from owning, inheriting and making decisions about land in patrilineal systems.

In patrilineal kinship systems, an individual's family membership derives from and is recorded through his or her father's lineage. Property, rights, names and titles are given through the male line. Women in patrilineal systems join the kinship system of their husbands but do not obtain kinship rights which are mediated through her husband and male offspring. On separation or divorce, women are generally expected to return to their kin. Under patrilineal systems, women have the status of outsiders which prevents them owning and inheriting land, or making decisions about land use and land development.

In custom and customary laws, women typically only have use rights to the land they farm, derived from either the husband or another male relative (Meer 2013, 13). National laws also reflect similar biases. In many countries in sub-Saharan Africa, national constitutions are non-discriminatory, but laws which promote patriarchy have not always been revised.

When mining and investment companies negotiate for (or grab) land, women as the primary users are not consulted, and rarely compensated for their use rights to land. And this is because they are not seen as the legitimate 'owners' of land. In community conversations with the state and mining companies, men are often considered the legitimate representatives of community views and the community itself is conceptualised as a unit, rather than a site of different, contested and complex views where women as well as men have the right to speak and be heard.

But – to ask this question again - why would African governments, operating under an extractivist capitalist logic, legislate and give support to consent rights that empower women, or their wider communities, to advance their own development agenda? Consent is radical, if not revolutionary, and this means that it will be stillborn in most African, and indeed, other national contexts globally.

Our view is that in extractives and other mega infrastructure projects, consent (as well as fair contracting and taxation, the regulation and enforcement of laws related to environment, citizen safety, local benefit and other dimensions of just process) will be blocked, weakened, undermined and, of course, also assimilated, if it undermines the driving logic of the system: profit for capital and its ally - the political elite.



In the next section we provide information on South Africa's policies addressing the macro-economy and the mining sector, before we return to the Xolobeni community's struggle for the right of consent.

Mining, 'development', and consent in South Africa

The extractives sector lies at the very heart of the South African economy, shaping the political system and social relations. Mining's history began with the 'discovery' of diamonds in Kimberley in the 1860s and gold in the 1880s. In the decades to follow, a small number of first national and later multinational corporations in the mining, finance and energy sectors dominated the economy. The deep connections between minerals and energy, necessary for mining, minerals processing and transportation, have produced a highly skewed industrialisation pattern in South Africa which Fine and Rustomjee describe as the Minerals-Energy Complex (MEC) (Fine and Rustomjee 1996).

In South Africa as elsewhere, in the 1990s, processes of economic globalisation took place and major domestic corporations were increasingly internationalised, including mining companies. This process brought major corporations under the control of global financial institutions and the 'shareholder value movement' (Brennan 2008) in countries of the Global North, which critics have pointed out were more interested in short-term profiteering than long term wealth creation. These interests led to capital investment in MEC sectors where high profits could be generated over nominally short periods of time. Ben Fine, a key academic researcher focusing on the MEC argues that, in the last decade, there has been a resurgence of state led investment in core MEC sectors *"with continuing disregard for broader economic and social development other than as a fortunate spin-off or unfortunate constraint."* (Fine 2008, 11)

The centrality of mining to the national agenda is recorded very clearly in the 2012 National Development Plan (NDP), which aims to eliminate poverty and reduce inequality by 2030. In so doing it aims for an average economic growth rate of more than 5% annually which will be achieved by increasing exports in the areas in which South Africa has comparative advantage, one of these being mining (NDP, overview). The imperative is for "South Africa to exploit its mineral resources to create employment and generate foreign exchange and tax revenue." (NDP, Chapter 3 Economy and Employment, 146). South Africa should cultivate niche markets, using its expertise to manufacture goods and provide services to the mining industry



and promote ‘lateral linkages’ into uses such as water purification, electronics and robotics. Mineral beneficiation should be promoted where there is appropriate capacity, and/or where downstream manufacturing can be supported (ibid and Chapter 3, Economy and Employment). Resource rents should be employed “to drive an accelerated development agenda for skills development and sustainable job creation” (Chapter 3, Economy and Employment, 140) .

The centrality of mining to national development is reinforced by the South African government’s 2012 National Infrastructure Plan (NIP) with its 18 strategic infrastructure projects (SIPs) and 645 infrastructure projects. All five of the geographic SIPs are principally addressed to ‘unlocking’ and supporting minerals, oil and gas extraction and the infrastructures (principally energy and water) required for extraction; extractive metallurgy, processing and beneficiation; and rail and port infrastructure for the transportation of raw or partially processed minerals and metals.

South African communities wanting to challenge mining and infrastructure projects planned on and near their land have limited options. Mining is regulated by the Minerals and Petroleum Resources Development Act (MPRDA) 28, of 2002. The legislation requires that mining companies consult all affected parties, but does not empower communities with the right to give or withhold consent from mining or prospecting. Currently, the Department of Mineral Resources (DMR) and the Minister do not have to consult with the affected community before granting a prospecting or mining right, the legal ‘go-ahead’ to begin developing the mine. Any consultations that do take place are managed by the mining companies, who report the outcome of these processes to the DMR before a mining right can be issued. The community has no right to see the report, which is often in dispute (Centre of Environmental Rights and Lawyers for Human Rights, 2013)

The MPRDA contradicts the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), which recognises and protects informal land rights, typical in most rural communities. Informal land rights include access to land granted in terms of tribal, indigenous or customary law. The MPRDA ignores customary decision-making processes which outline how a traditional community makes decisions on development matters, including the alienation of common property to outsiders.

Since 2013, the DMR has attempted to amend the existing mining legislation by removing community participation from the conditions the government can impose on applications for mining rights in some cases. This will further weaken the power of communities to challenge mining and mega projects that affect them.



The story of Xolobeni and its struggle for consent: Part 2

Xolobeni's struggle outlined earlier is noteworthy. In the absence of enabling legislation and in stark opposition to the dominant development agenda, this community is claiming the most robust interpretation of consent: saying no to the proposed titanium mining.

The women and men of this community have paid the price for this refusal. In an important legal challenge, they are grounding their right to consent in the rights granted and protected by IPILRA – the 1996 legislation referred to at the end of the last section, which provides that a community must consent to the deprivation of an informal land right. Furthermore, such deprivation may only occur in accordance with the custom and usage of that community. This is the latest battle in an ongoing war of resistance against mining.

The people of Pondoland [3], where the Xolobeni community is located, have a long history of defending their land. During the Pondoland revolt of the 1960s, Pondo men and women stood up against the so-called 'betterment schemes' (Kepe and Ntsebeza (ed), 2012) which proposed resettling communities into residential villages, separated from arable and grazing land. The community rejected the programme as anathetical to their culture, and took up arms to say no. This spirit of resistance has continued to fuel the community's current struggle to retain control over their land (de Wet in Kepe and Ntsebeza, 2012).

In Pondoland, women are empowered to participate fully in community meetings and they also have the right to be members of traditional councils. They lead and they speak at meetings just like men [4]. One of the important tasks of traditional courts is to allocate and govern land. These customary laws provide for unmarried women to have title to land, while unmarried men do not have these rights. The founder of the Pondo nation is reported to have asked 'Where can a woman give birth if she doesn't have land?'. Women in the community have been particularly concerned about the future of their children, and the long term sustainability of life on the land should the mining project go ahead.

One of MRC's strategies, which is commonplace in large development projects, is to foment division by securing the buy in (and often the corruption) of traditional leadership. After the first community meeting with MRC, the company tried to bypass the community by directly contacting the king Mpondombini Sigcau (Faku). The king, whose role is one of custodianship, indicated to MRC that he did not



have the authority to make a decision contrary to the wishes of his community (as reported to Nonhle Mbuthuma). Recall also that in 2015, the local Chief Lunga Baleni was appointed to the Transworld Energy and Mineral Resources (TEM) board, MRCs South African subsidiary, as a director.

The 2002 South African Mining Charter negotiated between government, the three main unions at that time, and industry provides a framework for the transformation of the mining and minerals sector. To increase black ownership in the mining industry, the Charter requires that transnational and white dominated mining companies secure a black economic empowerment (BEE) partner. In 2003, one year after MRC's first application to prospect, the Xolobeni Empowerment Company (XOLCO), a local entity which claimed to represent the community, was formed without the knowledge of most people in Xolobeni. This company had a 26 per cent stake in the Xolobeni Mineral Sands project and stands as the black empowerment partner.

Although TEM and XOLCO have claimed that XOLCO is a community organisation representing the people of Amadiba, it was formed without the knowledge or participation of the community (Bennie 2010). The lack of consultation, information and involvement of the community formed part of the ACC complaint lodged with the Eastern Cape Human Rights Commission (Human Rights Commission Report 2007).

At the time of writing in July 2017, the plans for the mining project have now deeply divided the community. As indicated above, those opposed to the mining have organised into the Amadiba Crisis Committee (ACC). The Xolobeni community is currently fighting for legal recognition of their right to consent through their communal land rights. They are seeking a declaratory order that the community has a right to give or withhold consent before activities such as mining can occur on the land. The parties are still exchanging pleadings and no date has been set for a hearing. The ACC has publicly condemned the 18 month moratorium, announced by the Mining Minister in September 2016, as an attempt by the state to demobilise resistance and build a state led strategy to ensure that Xolobeni is successfully turned over to titanium mining.

Thinking about Xolobeni: the issues it raises for us

The ACC's subsequent - and ongoing - resistance to the mining was described at the start of this article. It has been shaped by the centrality of land to the Pondo culture. In its struggles, the Xolobeni community is carving out a space to defend its development agenda, countering the shortcomings of the mineral rights legislative



framework and going against the dominant development paradigm. Through the collective efforts of both men and women, a respect for the experience of the elders and an insistence on their developmental sovereignty, they continue to struggle.

The opponents of mining have their own idea of what development means:

“ Uphuhliso yinto ezokwenza impilo zabantu zibengcono. Kona luza kanjani uphuhliso ebantwini? Uphuhliso lufunwa ngabo abantu ngoba ngabo abazazi kakhulu ukuba yintoni ebalungeleyo futhi bafuna ntloboni yophuhlisa.

Kuyenzeka abanye abantu beze sele beluphetha, ingabe apho kuthiwani?

Kufuneka abantu lunikwe ithuba lokucinga nokuthatha isigqibo esibafaneleyo. Ngoba xa sithetha ngophuhliso asijongi nje apha kufushane, sijonga nengemso ukuba isizukulwana esilandeleyo sizokwazi na ukuphila okanye ukuziphilisa. Ukunti xa sithetha ngophuhliso imvelo siyibeka phambili ngoba thina bantu ngeke sikwazi ukuphila ngaphandle kwayo kanti yona ingakwazi ukuphila ngaphandle komntu.

Thina bantu abasha ingaba izithethe namasika siyajizonga na xa kuthethwa ngophuhliso? Kuzofuneka sizibuze umbuzo, othi kungani zibalulekile? Ukanti imfundo esiyifunda esikolweni kungani yehlukile kunemfundo esiyifyunde emakhaya?”

(‘Development should improve people’s lives. It should come from the people because they know what type of development they want. People should be given time to take decisions and think about their development because these are not short-term considerations. They affect future generations. We put nature first in understanding development. Nature can live without us but we can’t live without it. As to the youth, there are questions we have to keep asking ourselves: Do we consider our customs when we think about development? Why does our formal education differ so much from what we learn at home about our survival?’)

We can learn much about consent, how it is understood and claimed, and the challenges thereto from the Xolobeni community:

- Xolobeni is a powerful example of a community which is claiming consent through customary and not civil law, and refusing a mining project proposal on the grounds of their development sovereignty, that is their right to determine their own development pathway. This position has been won and defended



through powerful local organising, substantially led by women, over more than a decade. Local organising has combined with legal strategy, political sovereignty, and the reinforcement of local livelihoods, through tourism, to successfully oppose the mining.

- In asserting their interests, this community has challenged the dominant development paradigm, which asserts that mining is needed for ‘development’ to occur. They have had to face the power of the state and the corporate, which has led to severe repression, including the assassination of a leading activist.
- Rooting consent in customary law processes of a community is powerful. Customary law is the single strongest source of substantive rights for rural communities. It provides for rights and decision making processes that cannot always be understood through a common law lens.
- In Xolobeni, women have played a central role in community decision-making about development, which is quite atypical in the South African context. Women’s power has been bolstered by their right to occupy land independently of men. They are therefore seen as full citizens of their communities from which stems their right to be fully involved in decision-making. Their voice and interests in the protection of land, sea, forests and water, including for future generations, have been firmly asserted and deeply shape thinking about development in the Xolobeni community.
- This experience reinforces the need for women to be involved in community decision-making processes if development is to be just and fair. This is a deep problem in most patriarchal traditional communities and so at the core of decision making/ consent processes must lie a strategy of support to women’s organising (and not just ‘representation”) so that they can assert their development interests and perspectives.

The Xolobeni case study informs us that each context is unique and that we should not make assumptions about gender roles and relations. The marginalisation of women from decision-making and participation is a feature of the current development model, and this again makes it alien to Pondoland culture where women have comparatively greater voice.



Conclusion

Xolobeni brings power very centrally into the equation, illustrating how a community that contests the dominant development paradigm - in South Africa's case the centrality of mining to the economy and thinking about development - is subject to harassment and repression when they oppose a mining project.

Even if consent is supported in law, the 'natural' order of highly unequal relations of power under patriarchal capitalism and the barriers this presents to communities, and women within them, undermines the right of communities to consent.

The Xolobeni case presents a powerful example of consent in motion, claimed through struggle and contestation. This echoes the long history of consent being defined and struggled for by collectives of excluded peoples, not only in sub-Saharan Africa but elsewhere in the world. For the women's movement globally, of course, consent is a concept that is used not only in relation to property, including natural resources, but also in respect of women's right to control their bodies: the radical idea that women's bodies 'belong' to them and are controlled by them is a basic challenge to patriarchy.

In opposition to much mainstream thinking about consent, which reduces FPIC to a legal tool for communities to claim, Xolobeni illustrates very powerfully that consent is a political process won through local organising, combined with clear ideas about local development, and political solidarity from outside of the community. Consent is a radical political commitment and process!

For authors, please see Endnote 1.



Endnotes

- [1] Contributors to this article include Samantha Hargreaves (WoMin Director) and Research Associate University of Witwatersrand, Johannesburg, South Africa; Nonhle Mbuthuma, Spokesperson for Amadiba Crisis Committee of the Xolobeni Community, Kwazulu Natal, South Africa; Georgine Kengne Djeutane, Economist, WoMin Senior Projects Coordinator; and Nomzamo Mji, legal advocate, yoga teacher and facilitator . For queries contact Samantha Hargreaves by email at Samantha.Hargreaves@womin.org.za or post to PostNet Suite 16, Private Bag X4, Braamfontein 2017 South Africa
- [2] International instruments include the Food and Agriculture Organisation of the UN (FAO) Environmental and Social Management Guidelines (2015), FAO Guidelines on FPIC (2016), the UN Programme on Reducing Emissions from Deforestation and Forest Degradation (UN-REDD) Guidelines to FPIC of 2013
- [3] Pondoland is a region of South Africa that is located in the former Transkei, an ‘independent’ homeland in the *Apartheid* period. The Amadiba t are located in an area known as the Wild Coast.
- [4] By virtue of their greater power in Pondoland, women largely escape oppressive practices, such as *Ukuthwala* (or forced marriage), which is not allowed. The woman gives her consent to marriage. She is asked by the parents if she wants to marry a man. If she says no, there will be no marriage. Rape is also an unusual occurrence in Xolobeni and if it does occur, it is punished by beating to death. Killings of women do occur, but the perpetrator will be punished by the community in the same way.

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