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REVISITING THE TERM 'COMMUNITY' IN THE SOUTH AFRICAN CONTEXT

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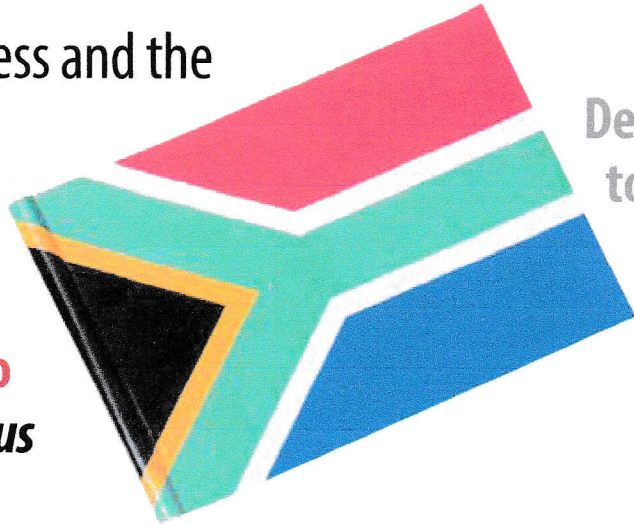

Citizenship dilemma: Denying identity numbers to children of permanent residency holders

To prove or not to prove? *Novus actus interveniens* in third-party claims

***'Mlungu' vs 'Boer'* – context is everything**

How to deal with the legal forms in a parenting plan and the Family Advocate's requirements with child participation

Is the secondary role of the NCA preventing a South African financial crisis?

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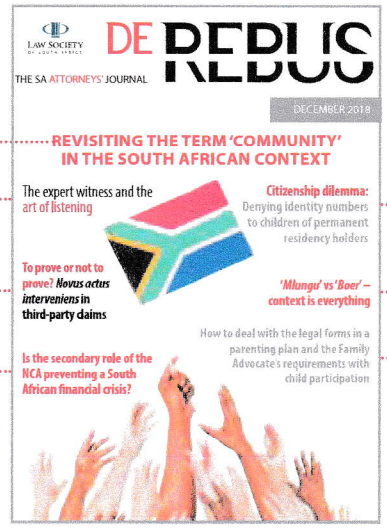

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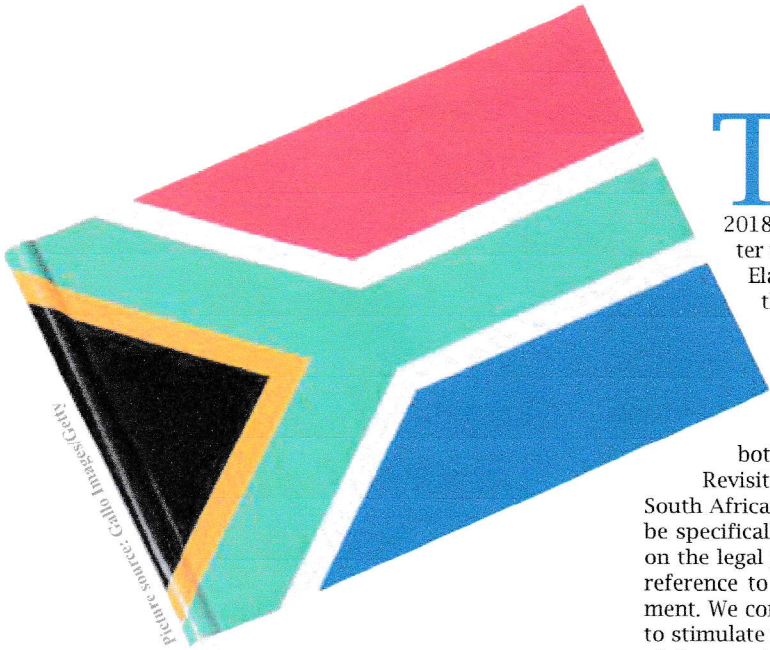
Revisiting the term 'community' in the South African context



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By
Udo Richard Averweg and Professor Marcus Leaning

The recent Land Claims Court (LCC) matter, *Elambini Community and Others v Minister of Rural Development on Land Reform and Others* (LCC) (unreported case no LCC88/2012, 30-5-2018) (Meer J) makes for interesting reading. This matter was a claim for restitution of rights in land by the Elambini Community (the plaintiff). The claim before the LCC for adjudication, was a claim in terms of s 2(1)(*d*) of the Restitution of Land Rights Act 22 of 1994 (the Act) – the section which entertains a claim of a community that was dispossessed of rights in land in South Africa (SA). Restitution of rights in land and the term 'community' are both significant topical discussion points in SA.

Revisiting and discussing the term community in the South African context is the objective of this article. It should be specifically noted that the authors do not express opinion on the legal judgment delivered. In this article, we only make reference to the term community as it appears in the judgment. We contend that such discussion of the term may serve to stimulate further debate to advance a better understanding of the actual meaning and conception of the term as used and applied in different contexts in SA. After all, conceptions of community are varied and an 'open space for a debate about normative visions of community' (G Midgley and AE Ochoa-Arias 'Visions of community for community OR' (1999) 27(2) *Omega* 259).

Background

No researcher has yet been able to present a formal methodology for the scientific study of the community. While we (UR Averweg and M Leaning 'Visions of community: Community Informatics and the contested nature of a polysemic term for a progressive discipline' (2011) 7(2) *Information Technologies & International Development* 17) have previously critically examined one of the primary terms of reference – the community – in the emerging field of community informatics, we contend that the term community has become used in an unspecific and general manner, and that this may dilute and divert the attention of practitioners in that field. In making this argument, we offered an account of the term community in Western society and argued that the term is almost always used in a positive sense.

While that research had a Western focus, we noted that there may also be a need to explore and review interpretations of community in developing countries – such as those found in Southern Africa. We subsequently did so during 2015 in UR Averweg and M Leaning 'The Use of "Community" in South Africa's 2011 Local Government Elections' (2015) 50(2) *Africa Spectrum* 101 (http://journals.sub.uni-hamburg.de, accessed 2-10-2015). We now continue with the discussion of the term community. Such discourse not only serves to illuminate a better understanding of the term, but also alerts practitioners to some of the problems of its use in different contexts.

Western concept of the term community

It is useful to chart, historically, some interpretations of the term. The term community arrived in its current use, via Old French and Middle English, from the Latin words *communitas*, meaning fellowship and *communis*, meaning common, public or shared (D Harper *Online Etymological Dictionary* (www.etymonline.com, accessed 1-8-2006)). It is no linguistic accident that 'community' and 'communication' share the Latin root *communis* (MM Webber 'The urban place and the nonplace urban realm' in MM Webber, JW Dyckman, DL Foley, AZ Guttenberg, WLC Wheaton and CB Wurster (eds) *Explorations into Urban Structure* (University of Pennsylvania Press 1964) at 108). Communities comprise of people with common interests who communicate with each other. Williams notes that community is always a positive form of association and is categorically different from other forms of collectivity (R Williams *Keywords: A Vocabulary of Culture and Society* (London: Fontana 1976)).

The distinction of community from other terms may be argued to be an inheritance from the emergent philosophical and social scientific discourse of the (especially German) enlightenment and 'modern' *weltanschauung* (worldview). Georg Hegel's differentiation of *staat* (state) and *gesellschaft* (society) fundamentally influences much European, and particularly embryonic social scientific, thought of the 19th and early 20th centuries (J Freund 'German Sociology in the Time of Max Weber' in TB Bottomore and RA Nisbet (eds) *A History of Sociological Analysis* (London: Heinemann 1978) at 150). Moreover, it draws on a romantic strand of enlightenment thought in which the 'primordial nature of the communal bond was the widely held premise' (I Schulte-Tenckhoff '*The Concept of Community in the Social Sciences and its Juridical Relevance*' (2001) Law Commission of Canada at 16 (https://dalspace.library.dal.ca, accessed 3-11-2018)). Perhaps the most influential early thinker on the topic was Ferdinand Tönnies. Tönnies' most significant work on this area, *Gemeinschaft und Gesellschaft* (Community and Society) continues Hegel's concept of distinguishing between different forms of association. Tönnies works from the first premise that there are two 'types' of 'will': The *wesenwille* – the natural or essential will – that which is an instinctive, organic or underlying energy; and the *kürwille* – the reasoned or arbitrary will – that which is instrumental, deliberative, purposive and goal-oriented. Tönnies implicitly values the associations formed around essential 'will', *gemeinschaft* (or community) above those formed around arbitrary will society seeking some instrumental goal *gesellschaft* (or society), asserting community meets the requirements of 'real and organic life' while society serves 'artificial and mechanical representation' (F Tönnies (trans Charles P Loomis) *Community and Association* (London: Routledge and Kegan Paul 1955 at 33). *Gemeinschaft* (community) should be understood as a living organism, *Gesellschaft* (society) as a mechanical aggregate and artefact.

Three distinct points need to be made with regard to the general use of the term community. Firstly, the term is currently in political fashion (including in SA). The term community has distinct political overtones in contemporary Western social discourse. The ascendancy of the term, like any term, in the discourse of social policy and political science is tied to, and implicit in, the emergence and dominance of a particular political ideology (N Fairclough *New Labour, New Language?* (London: Routledge 2000)). Secondly, the term indicates particular forms of social interaction, however, exactly what forms of association can be regarded as a community is a contentious issue. The use of the term shifts between the descriptive and the prescriptive, between the empirical analytic and idealist use of the term. A number of authors have argued that several different forms of association can be inferred by community (GP Crow and G Allan 'Community Types, Community Typologies and Community Time' (1995) 4(2) *Time & Society* 21 and P Willmott *Community Initiatives: Patterns and Prospects* (London: Policy Studies Institute 1989)).

Thirdly, it is a value-laden concept applied to these forms of interaction (D Miller, J Coleman, W Connolly and A Ryan *The Blackwell Encyclopedia of Political Thought* (Cambridge: Blackwell 1991) at 88) or even a value itself (E Frazer *The Problems of Communitarian Politics: Unity and Conflict* (Oxford: Oxford University Press 1999) at 77). Community is often used to indicate a closeness, a beneficial or a 'good' side of social interaction. It has a wealth of positive connotations. A community is 'an area of social living marked by some degree of social coherence' (RM MacIver and CH Page *Society: An Introductory Analysis* (MacMillan Co 1961) at 9). Community implies familiarity and closeness, and nearly always in a positive sense.

The term 'community' in the South African context

In SA, the term community was originally used as a euphemism for race (TE Bosch *Radio, community and identity in South Africa: A rhizomatic study of Bush Radio in Cape Town* (PhD dissertation, Athens, OH, Ohio University, 2003) at 108). However, its meaning has become increasingly vague with its rhetorical use in current politics.

In post-Apartheid SA, communities occupy a 'legitimate' space in the regulatory framework of the State. Bosch (*op cit*) at 110 notes that: 'It is "communities" that can make claims for land restitution and land distribution'. The term 'formerly disadvantaged community' refers to racial groups dispossessed of land, an entity on whose behalf a struggle was waged. There is, therefore, a need for explicit practitioner reflection on the different possible meanings of the term community – especially in the South African context. We (Averweg and Leaning (*op cit*) (2011)) contend that, contrary to what seems to be popular practice, the term community should be used carefully and specifically.

A concern lies with the manner whereby, in the literature on SA, the concept of community remains unproblematised and unmindful of the history of the term. Critical engagement and analysis of the term and its implications are therefore required. One analysis of the use of the term community by Averweg and Leaning (2015) (*op cit*) was during the South African 2011 Local Government elections. In that research we noted at p 108 that:

'[I]n the study of political communication within a South African setting, "community" [can] be recognised not as a universal good but as a locally contingent position in possibly much wider debates taking place in society. Invoking "community" in the practice of a particular activity will situate that activity in opposition to activities that are not "community"-orientated. This positioning is often locally and politically determined – to be pro community is not an absolute value but one tied to a position in a conflict or debate'.

Community, then, is a term used to positively locate a group or formation in political opposition to a larger and less appealing formation. It serves to portray ones' interests as the underdog opposed to the dominant forces and as such

serves as a powerful rhetorical device. However, such understanding of the term is contrasted with how the term is understood in particular legal contexts.

We now focus our attention on the term community as it appears in the context of South African law with specific focus on the Act. The term community is defined in this Act as:

'[A]ny group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group'.

The *Elambini* judgment cites this definition. While this matter was being heard by the LCC, there was contention by the Elambini Community that 'their constituting a community focused on their farming, social, cultural and religious interactions', however, the LCC found that it did not subscribe to 'shared rules regulating access to land' (para 146). Thus, even with a constant refrain (by the plaintiff) of living as a community, intermarrying, performing rituals and visiting family graves, the LCC found that this did not constitute a community as defined in the Act. While it is possible that a social community may previously have been formed, it was not viewed as a community in terms of the Act.

The court also cites at para 137 that:

'[T]here must be a community in existence at the time of the [land] claim', and cites context to the definition of community at para 139 with:

'There is no justification in seeking to limit the meaning of the word "community" in s 2(1)(*d*) by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy … what must be kept in mind is that the legislation has set a low threshold as to what constitutes a "community" or any "part of a community". It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a community'.

This means that the idea of community deployed in the Act seems to draw on the idea that community is a prior existing formation. Community is formulated in the sense that it refers to an existing group or shared collectivity drawing from their historic possession of and access to land. As such, it is a different interpretation from a community one joins with or ascribes to by choice – as a group with shared interests and conscious articulation of such interests.

Accordingly, the use of the term community in the South African legal context draws heavily on a conception that community refers to a bounded group determined by historical links.

Concluding remarks

Such interpretation is certainly more precise than that often found in more popular parlance. However, in being precise it draws on and reiterates a particular interpretation of what constitutes legitimate forms of association (or at least those forms deemed legitimate enough to be ascribed land rights). As such, while the particularity of the legal definition assists in the arbitration of legal cases, it also serves to embed particular impactful understandings in both legal processes and popular understanding. By using and enacting legal decisions with this interpretation of community, other interpretations of community are reduced and accordingly the social lives of those who live within these unrecognised communities are diminished.

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