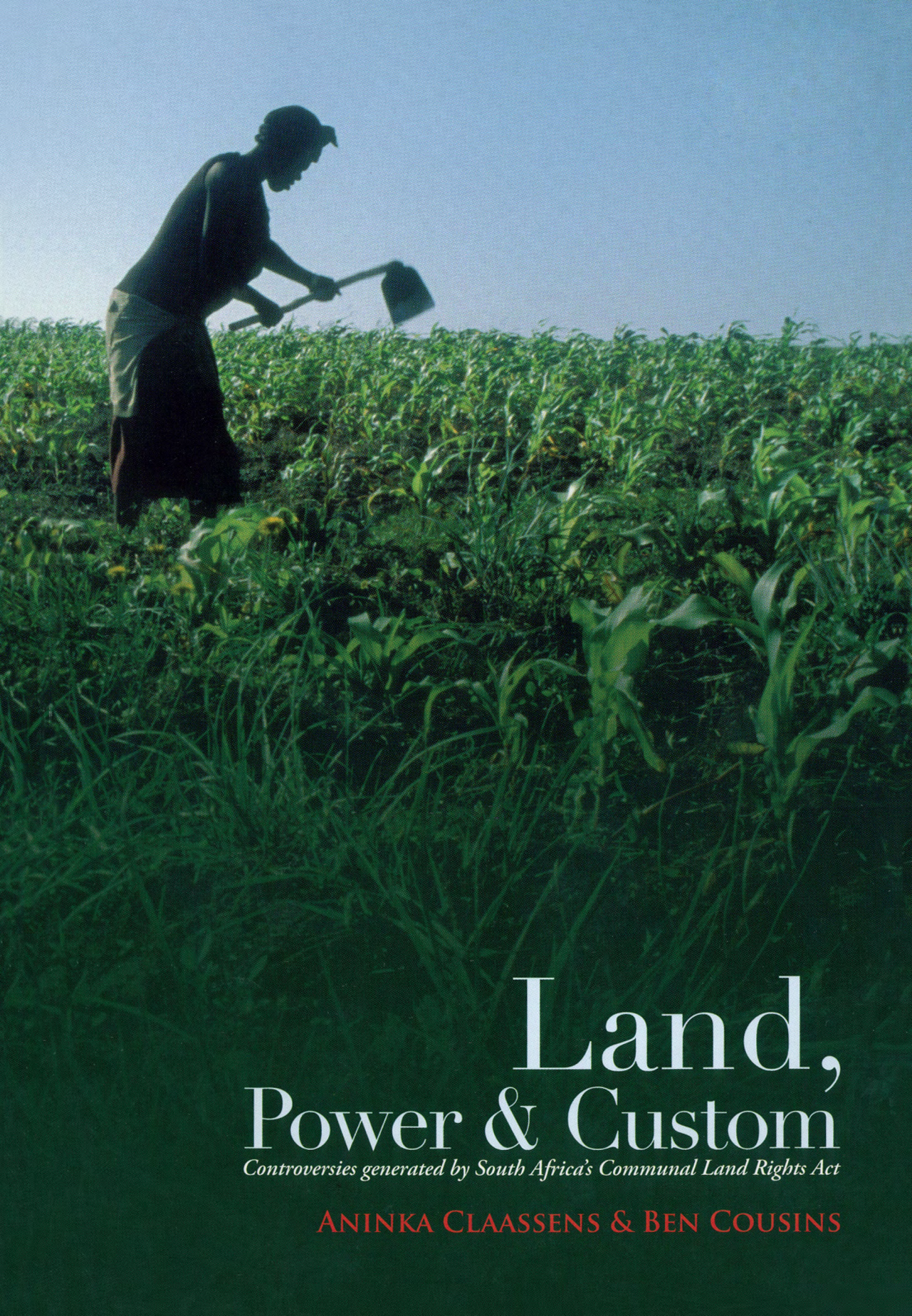

Land, Power & Custom

Controversies generated by South Africa's Communal Land Rights Act

ANINKA CLAASSENS & BEN COUSINS

Land, Power and Custom

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Henk Smith has been a lawyer in the Cape Town office of the LRC since 1991. For 19 years he was the instructing attorney for the Richtersveld community who ultimately won restitution of both land and mineral rights on the basis of proving underlying indigenous ownership.

Richard Stacey holds degrees in law and political science from the University of the Witwatersrand. He has taught political theory at the University of the Witwatersrand, and at the time of this contribution was a member of faculty in the Public Law Department at the University of Cape Town. He is currently a PhD candidate at New York University's Institute for Law and Society.

Abbreviations

African National Congress (ANC)
Communal Property Association (CPA)
Concerned South African Group (Cosag)
Congress of South African Trade Unions (Cosatu)
Congress of Traditional Leaders in South Africa (Contralesa)
Department of Land Affairs (DLA)
Doctors for Life International v Speaker of the National Assembly and others 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399 (*DFL*)
Food and Agriculture Organisation (FAO)
Inkatha Freedom Party (IFP)
Integrated Development Plan (IDP)
Legal Resources Centre (LRC)
Member of Parliament (MP)
Ministry for Provincial Affairs and Constitutional Development (MPACD)
National Council of Provinces (NCOP)
National Land Committee (NLC)
National Party (NP)
Non-governmental organisation (NGO)
Parliamentary Monitoring Group (PMG)
Permission to Occupy (PTO)
Programme for Land and Agrarian Studies (Plaas)
Reconstruction and Development Programme (RDP)
Rural Women's Movement (RWM)
South African Communist Party (SACP)
South African Development Trust (SADT)
South African National Civic Organisation (Sanco)
South African Native Trust (SANT)
South African Youth Congress (Sayco)
Transitional Representative Council (TRC)
Transkei Land Services Organisation (Tralso)
Transvaal Provincial Division (TPD)
United Democratic Front (UDF)
United Nations Development Programme (UNDP)

Note on the naming of statutes and statutory bodies

Many of the main South African laws dealing with segregation, 'native' administration and land were renamed at intervals over the years. This reflected attempts to disassociate such laws from the negative connotations they inevitably inspired, and to keep up when the apartheid state changed the term 'native' to 'Bantu' and later changed 'Bantu' to 'black'.

Thus the Native Trust and Land Act of 1936 became the Development Trust and Land Act; Bantu authorities became tribal authorities; and the Native Administration Act of 1927 became first the Bantu Administration Act and later the Black Administration Act.

These constant name changes create confusion. The authors in this book tend to refer to the name of the statute as it was during the period they describe. To assist the reader, the main statutes and the bodies they created are listed below with their subsequent names:

Bantu authorities (tribal authorities)
Bantu Authorities Act 68 of 1951 (Black Authorities Act)
Native Administration Act 38 of 1927 (Black Administration Act)
Native Trust and Land Act 18 of 1936 (Development Trust and Land Act)
Natives Land Act 27 of 1913 (Black Land Act)
South African Native Trust (South African Development Trust)

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This book is dedicated to leaders and members of the communities of Dixie, Kalkfontein, Mayaeyane and Makuleke, who are involved in the constitutional challenge to the Communal Land Rights Act 11 of 2004. The legal challenge was launched on their behalf in April 2005 by the Legal Resources Centre (LRC), a public interest law firm, and Webber Wentzel Bowens, a private law firm.

The editors of this book would like to pay tribute to the courage and steadfastness of the four communities over the past four years, and to thank them for their willingness to spend countless hours with the lawyers and researchers who visited them often and prevailed upon their hospitality. Community members have offered invaluable insights into the complex issues at stake, and their energy and commitment have been key to the process of producing this book. In particular, we are indebted to Stephen Tongoane, Phahlela Mugakula, Gibson Maluleke, Morgan Mogoelelwa, Charlotte Mokgosi and Reckson Ntimane.

We would also like to thank the rural delegates who came to Cape Town to make oral submissions to Parliament opposing the Traditional Leadership and Governance Framework Act 41 of 2003, the Communal Land Rights Act, and most recently the Traditional Courts Bill B15 of 2008. We learned a great deal from the issues raised by rural people and the dignified manner in which they attempted to explain the realities confronting them to Members of Parliament.

A wide range of other people and organisations have played key roles, directly and indirectly, in the preparation of the book manuscript. The editors would like to thank everyone involved for their support and contributions, both large and small. Special mention, however, needs to be made of some particular contributions.

This book would not have been possible without the support of donors, in this case the Southern African office of Ford Foundation, which funded much of the research on which the book is based, and the South African office of Atlantic Philanthropies, which funded the litigation. In a period of declining donor support, these two organisations stand out for their principled commitment to the interests of the poor and powerless.

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and flashes of humour he has exercised in 'laying down the law' in the face of contesting views.

A book like this contains immense amounts of detail, both in relation to the law and to complex social science theories. We are deeply indebted to our language editor, Janet Levy, for her skill in ensuring that difficult arguments are conveyed in an accessible and intelligible manner, and that key details in legal references have not been overlooked. Her contribution to this book has been invaluable. We would also like to thank the reference checkers who worked closely with Janet in ensuring completeness and accuracy, in particular Beatrice Aliba. The chapters in the book were peer reviewed by academic colleagues who must remian nameless. We are grateful for their time and useful comments on the draft chapters.

We need to warmly acknowledge the help and advice of staff at Juta, in particular James Evans, Sandy Shepherd and Marlinee Chetty. Many deadlines came and went, yet they remained remarkably patient throughout. Many thanks, too, to Paul Weinberg for his cover photograph and to John Hall for making the maps.

Aninka Claassens and Ben Cousins
Cape Town
June 2008

Foreword

This book arises out of two laws enacted in 2003 and 2004—the Communal Land Rights Act 11 of 2004 and the Traditional Leadership and Governance Framework Act 41 of 2003. The two laws affect 21 million people living in the poorest parts of South Africa. These areas made up the apartheid-era Bantustans and constituted the 13 per cent of South Africa's land surface set aside for black occupation. It was here that traditional leaders played key roles in local governance during apartheid.

Since the advent of democracy in 1994, traditional leaders have strongly objected to a system of elected local government being extended into 'their' areas. For ten years they blocked the repeal of apartheid laws that bolstered their powers, demanding that an 'acceptable' new legal framework be put in place first.

With the lives of so many people affected, and with legislation of this kind being central to questions of governance, the Legal Resources Centre (LRC) sees it as critical to widen the debate as much as possible through publication of this book.

Various authors in this collection criticise the new laws for reinforcing the controversial tribal authority boundaries that the apartheid regime overlaid on the myriad different forms of community identity and land rights in rural areas. The chapters in this book contain a critique of the new laws, suggesting that they entrench colonial and apartheid distortions that exaggerate chiefly power and undermine indigenous accountability mechanisms. The laws vest power over land in centralised 'traditional councils' and bypass all other forms and levels of authority, elected and customary, including important forums such as village councils and development committees.

This changes the fluid balance of power in rural areas and undermines processes of change, integration and contestation that have been under way for many years within and between different sectors of rural society, and are part of ensuring that customary law is 'living law'. Women's groups opposed the Communal Land Rights Bill in Parliament because they said it would make traditional leaders less susceptible to pressures for change, and enable these leaders to perpetuate patriarchal practice.

A core concern about the new laws is that they will, in practice, entrench the autocratic version of 'traditional' customary law that dominated the colonial and apartheid eras. This concern is reinforced by a statement made by the Director General of the Department of Provincial and Local Government, Lindiwe Msengana-Ndlela, in an answering affidavit in litigation challenging the constitutionality of the new laws.[1] She said: 'The traditional councils have clearly defined areas of jurisdiction. Those who find themselves in those areas must adjust to the rules and traditional practices of that area' (para 45.1).[2]

[1] *Tongoane and others v The Minister of Agriculture and Land Affairs and others* (TPD 11678/06, pending).

[2] Her affidavit can be found on the CD-Rom that accompanies this book.

This is an extraordinary statement when one considers that s 28(4) of the Traditional Leadership and Governance Framework Act deems the tribal authorities which were delineated in terms of the controversial Bantu Authorities Act 68 of 1951 to be traditional councils. In addition, the neat map of ethnically separate wall-to-wall traditional councils posited by Msengana-Ndlela's statement belies the reality of intermingled and ever-changing rural identities within which the 21 million people affected by the new laws construct their lives.

At the heart of the book are issues concerning the interpretation and development of customary law. This does not imply that people's support for customary law is at issue. In the rural litigation in which the LRC has been involved for almost 30 years, this public interest law firm has found that the lives of most rural South Africans are deeply bound up with customary values and precedents. These often form the basis of their entitlements to land and sense of identity as communities. Most struggles over land rights are not 'anti-custom': they often combine claims to equality and democracy with demands for a return to the consultative decision-making processes of 'proper' custom. The book illustrates that many rural struggles entail contestation over whose voices are heard and whose are silenced in the interpretation and making of customary law.

There was serious alarm when the Traditional Courts Bill was gazetted in April 2008, just as this book was going to print. Issues of timing of the publication dictated that the Traditional Courts Bill B15 of 2008 could not be dealt with elsewhere in this volume and so it is discussed briefly here.

The Bill ignores the customary courts and dispute resolution processes currently operating at family, clan and village level. Instead, it centralises power in officially recognised 'senior traditional leaders' whom it makes the presiding officers of traditional courts. The jurisdictional area of traditional courts is made concurrent with the 'clearly defined' traditional council boundaries to which Msengana-Ndlela refers. The Bill makes it an offence for anyone within the jurisdictional area of a traditional court to fail to attend a hearing once summoned to do so. It enables the court to order any person (including a person who has not appeared before it) to perform unpaid services 'for the benefit of the community' (s 10(2)*(g)*). It also enables the court (by the powers vested in the presiding officer) to deprive an 'accused person or defendant of any benefits that accrue in terms of customary law or custom' (s 10(2)*(i)*). Land rights are one such entitlement; community membership is another.

Space constraints permit mention of only three fundamental problems with the Bill—all of which relate closely to concerns about the Communal Land Rights Act and the Traditional Leadership and Governance Framework Act.

The first is that the traditional council jurisdictional boundaries that inform the Traditional Courts Bill are deeply controversial in many rural areas. The second fundamental problem is that the Bill rewrites customary law. Presently, custom provides a range of protections for land rights—including the fact that land rights may not be withdrawn or people evicted without the matter having first been properly debated and agreed at various levels of society. The Bill bypasses these important procedural protections and authorises the court, through the powers vested in the presiding officer, to unilaterally deprive people of customary entitlements.

The third problem relates to the procedure followed in developing and debating the Bill. The Bill ignores the 2003 recommendations of the South African Law

Commission about customary courts and law reform. The commission consulted widely with different sectors of society, including rural women, and put forward recommendations to deal with the views expressed. The most strongly stated view was that new legislation should take care to avoid entrenching the problem of customary courts discriminating against women. By contrast, the memorandum accompanying the current Bill shows that there was no consultation with ordinary rural people and states that the policy framework, and indeed the Bill, were 'drafted in consultation with the Constitutional Affairs Committee of the National House of Traditional Leaders'.[3]

As with the Communal Land Rights Bill, no attempt was made to communicate the contents of the Traditional Courts Bill to rural people before the justice portfolio committee held public hearings in Cape Town three weeks after the Bill was gazetted. Another similarity is that the Traditional Courts Bill has been tabled during the run-up to a general election—as Bills which promise power to traditional leaders always are.

The timing and the content of the Traditional Courts Bill underline the importance of the current challenge to the constitutionality of the Communal Land Rights Act and the Traditional Leadership and Governance Framework Act. There are those who have argued that the legal challenge is premature because four years after having been rushed through Parliament, the Communal Land Rights Act has not yet been brought into operation by the president. They argue that instead of an upfront challenge, rural applicants should have waited and brought separate applications on a case-by-case basis, as and when breaches of the Bill of Rights occurred.

However, this advice does not take account of the practical realities of poverty and isolation in rural areas, and the risks entailed in challenging abuse of power within the unequal power relations that are entrenched and exacerbated by the enactment of the new laws. Nor does it take into account the difficulties and expense of finding and paying for lawyers to act on a case-by-case basis—not to mention the resources entailed in proving that actual practice and 'living law' often contradict the version of tradition put forward by government officials and traditional leaders. This is a resource-hungry endeavour requiring extensive research and the involvement of suitably qualified expert witnesses who are hard to find.

This book draws significantly on work done in preparation for the legal challenge and predominantly reflects the views of one side of the dispute. Most of the chapters in the book were written before the answering papers were available. However, in order to present a full picture of the competing positions, a DVD included with this book contains the answering affidavits of the respondents and expert witnesses, as well as the other papers in the legal challenge. All of the papers from the court challenge are available on the LRC website, www.lrc.org.za. We hope that this will assist academics and members of the public to understand, and form their own views on, the laws and their implications. Obviously, the question of the constitutionality of the laws will only be determined in due course—by the courts that hear the dispute.

Finally, it may be important to reiterate that neither the LRC nor the application described in the book is motivated by opposition to the institution of traditional leadership. One of the four applicants is, in fact, a traditional leader. What we do

[3] Section 3 'Departments/Bodies/Persons Consulted'.

oppose is law imposing distorted apartheid borders and power relations on the democratic possibilities inherent in the development of a living customary law that reflects all the voices currently engaged in negotiating transformative social change in rural areas. We know of many traditional leaders who enjoy respect and support. Leaders like them do not need laws like these.

Janet Love
National Director of the Legal Resources Centre
June 2008

Part one

Introduction

1

Contextualising the controversies: dilemmas of communal tenure reform in post-apartheid South Africa

By Ben Cousins

INTRODUCTION

A key ingredient in South Africa's bitter history is land dispossession—the taking of the land of indigenous populations by a dominant white settler minority. Control over land meant not only control of productive resources but also power over people. Land policies were therefore closely intertwined with policies concerned with the supply and regulation of labour as well as those focused on political control. Dispossession meant the loss of many freedoms—and for this reason 'land' for many South Africans signifies much more than simply a productive resource: it is a potent symbol of the many oppressions of the past. It is not surprising that land reform looms so large in post-apartheid political discourse despite its tiny budget allocation.[1]

South Africa's land reform programme has three components: the restitution of land to people who were dispossessed after 1913; the redistribution of land in order to redress the skewed ownership of land along racial lines; and tenure reform, which aims to secure the land rights of people whose tenure is insecure as a result of discriminatory laws and practices. Insecurity of tenure is a significant problem for three groups in particular: farm workers and others living on privately owned land; the residents of 'coloured' rural areas; and people living in the former 'native reserves', now termed 'communal areas'. Different laws and policies apply to each of these three groups (Turner, 2002).

Controversies abound in relation to every aspect of land reform, but this book focuses only on tenure reform policies in relation to communal areas. In contrast to the other components of the land reform programme, implementation of these policies has barely begun—fourteen years after South Africa's first democratic

[1] The budget for the land reform programme has never amounted to more than one per cent of the total national Budget.

elections. Yet communal areas are home to approximately 16,5 million people,[2] or more than one third of the country's population, and many are the poorest and most vulnerable in South African society.

Tenure reform in communal areas is a particularly complex undertaking. It involves strengthening rights, in both law and practice, which have been weak and insecure for many decades. This must be done in ways that are consistent with the values enshrined in the Constitution and with rights to equality, democracy and transparency. It must clarify both the roles and powers of traditional leaders and the status of customary law in relation to land. It must seek to define land rights in ways that can underpin economic development—without inadvertently undermining the security of those rights. Tenure reform in communal areas must also be feasible to implement, by state institutions that face many challenges, including that of their own limited capacity.

The debates that have raged since 1994 over how best to reform communal tenure systems are not entirely new. Current arguments resonate strongly with those that took place in earlier decades, some as far back as the 19th century. For example, colonial officials were divided on whether to try to replace customary land tenure systems with individual freehold title (as was attempted in parts of the Cape) or to leave such systems relatively intact but in a codified and highly regulated form (as in Natal).[3] Neither are the key controversies uniquely South African. At present they are being debated across Africa as well as in other parts of the world, and sharply contrasting approaches to securing property rights in 'customary' systems are often advocated.

The specific focus of this book is the controversies generated by South Africa's Communal Land Rights Act 11 of 2004. Fierce arguments marked the law's stormy passage through Parliament and the Act is currently subject to a legal challenge[4] by members of the communities of Kalkfontein, Mayaeyane, Dixie and Makuleke. The communities argue that the Act is unconstitutional because it would render the rights of rural people even less secure than at present—the opposite of what the Bill of Rights requires of tenure reform. Whether this is so involves analysis of a complex piece of legislation, characterisation of the nature of the land rights that are currently held, and assessment of the potential impact of the Act on these rights.

Much of the material in the book draws on research conducted in support of the challenge and some authors act as expert witnesses in support of the applicant communities.[5] Though the views of experts in support of the Minister of Agriculture and Land Affairs and other state officials, the respondents to the challenge, are not presented in the book itself, the full answering affidavits of government and traditional leaders can be found on the DVD that accompanies this book, as well as the affidavits of the expert witnesses on whose evidence they

[2] This estimate is based on an analysis of the 2001 census and growth projections, and is explained in the affidavit by Debbie Budlender on the DVD accompanying this book.

[3] See chapter 9 by Peter Delius in this book.

[4] *Tongoane and others v The Minister of Agriculture and Land Affairs and others* (TPD 11678/06, pending).

[5] Their affidavits are available on the DVD included with this book.

rely. This enables readers to consider the full range of competing arguments made by the parties involved in the challenge.

A key aim of this book is to enable and promote public debate about the Communal Land Rights Act. The legal challenge to the Act will be determined by the courts in due course and will depend on an assessment of the constitutionality of the Act. However, whatever the outcome of this legal challenge, it is critical that academics and the public are made aware of disagreements and controversies regarding the appropriateness and desirability of the Act, and are able to engage in a debate in this regard. This is particularly the case given the perception that there was insufficient public debate over the Act when it was enacted.

This introductory chapter serves as the first section of the book. The second section focuses on a summary and analysis of the Act together with an assessment of the parliamentary process followed in enacting it—a key issue in the legal challenge. A third section examines the character of land rights in communal tenure regimes in contemporary South Africa, including their gendered dimensions and a chapter showing the resilience of some of the underlying principles of customary land tenure in areas nominally under freehold title. A fourth section focuses on the complex inter-connections between land rights and questions of power and authority. A fifth section contains two chapters providing case studies of the four applicant communities. The concluding chapter constitutes the sixth section of the book and relates the key issues raised by the legal challenge to wider questions about the status and role of customary law in contemporary South Africa. It also discusses alternative approaches to communal tenure reform.

This introductory chapter situates the controversies around the Communal Land Rights Act in their wider contexts. One important context constitutes the rural legacies of colonial and apartheid rule, and how these were named and identified by post-apartheid policy-makers whose analysis directly informed the framing of guiding principles for tenure reform in the 1997 White Paper on South African Land Policy. This chapter discusses a number of key policy dilemmas that emerged in the course of attempts to translate these principles into a workable law. Some of these dilemmas have arisen in relation to customary land rights and the role and powers of traditional leaders in relation to land. Their role and powers have been the focus of a contested politics of 'tradition' that has also influenced policy processes around tenure reform. The chapter also relates the South African particularities it identifies to international debates on tenure reform.

A note on terminology

The term 'communal tenure' has always been contentious in the African context because it seems to imply collective ownership and use of all land and natural resources whereas most indigenous property systems include clearly defined individual or family rights to some types of land (for example, residential areas and fields for cropping) as well as common property resources (such as grazing or woodlands) that are shared with others. On the other hand, these systems almost all involve rights of access and use on the basis of accepted group membership, and a degree of group control or supervision over how those rights are exercised. This 'relativises' individual rights to a greater degree than Western systems of private

property. To help distinguish fundamentally different systems, the term 'communal tenure' has often been used to describe African land tenure. However, these are in fact *mixed* tenure regimes comprising variable bundles of individual, family, sub-group and larger group rights and duties in relation to a variety of natural resources in what Bennett[6] usefully describes as a 'system of complementary interests held simultaneously'.

It is also important to acknowledge that the terms 'customary', 'communal' and 'traditional', which tend to be used interchangeably, do not necessarily have the same meaning. It is possible 'to have communal tenure systems that support poor people's livelihood strategies, that are not based on customary law, nor dependent on traditional institutions for their administration' (Walker, 2004: 5). The elision of these meanings in policy debates has far-reaching consequences, as is apparent from the case study chapters. For both analytical purposes and because of the policy consequences, it is important that they be seen as distinct.

THE LEGACIES OF COLONIAL AND APARTHEID RULE

Policies and laws are responses to problems in society. The matter of which problems are recognised and how these are named and understood is a key influence on policy-making. Identifying the problems to be addressed has not been straightforward in relation to the 'communal areas' of South Africa, that is, those areas set aside for occupation by Africans in the colonial era and subsequent periods. Reaching agreement on the nature of the problems to be addressed by policy is complicated by regional and local diversity arising from cultural differences as well as varied historical experience. The challenge is exacerbated by unevenness in the quantity, quality and scope of research on land, especially in recent decades.

Space does not permit a review of the large literature. All that is provided here is a brief overview of the most influential characterisations of the legacies of the past. These are usefully summarised in the White Paper (DLA, 1997: 57–66), which informs both the challenge to the Act as well as its defence by government officials.[7]

According to the White Paper, the fundamental problem that policy must confront is the second class status of black land rights in law, which provides few protections from arbitrary decisions by those wielding authority over land allocation or land use (whether government officials or traditional leaders). Underlying historical rights of occupation were not adequately recognised in South African law—and are still not acknowledged by some government departments and local government bodies. For many rural people, rights still take the form of a permit—usually a 'Permission to Occupy' or PTO certificate—to which a number of restrictive conditions are attached.

Particular problems are experienced by groups of people whose forebears had purchased farms in the late 19th and early 20th centuries as a way of securing their land rights, but were not allowed to take formal ownership because of restrictions

[6] See chapter 6 in this book.

[7] Sources which contain similar analyses include Adams *et al* (2000), Cross (1992) and Delius *et al* (1997).

on black ownership. Many of these farms were identified by the apartheid regime as 'black spots' in the 'white' countryside. Their owners were dispossessed through forced removals and these areas are now subject to restitution claims. Other farms are still occupied by their purchasers but the title deeds continue to show the Minister of Land Affairs as trustee-owner.

Some of the earlier purchasers were not dispossessed by the apartheid regime but placed under the jurisdictional authority of a chief and tribal authority. Some of these chiefs have abused this authority by, for example, allocating the purchased land to outsiders in return for payment. This problem is not identified in the White Paper, but was raised by rural groupings in their parliamentary submissions on the Communal Land Rights Bill. It is, however, central to the legal challenge.[8] Also not identified in the White Paper is the problem that many tribal authority jurisdictions have controversial and contested boundaries.

Closely linked to the weak legal status of black land rights is the overcrowding and forced overlapping of rights which resulted from South Africa's history of forced removals and evictions from farms as well as the operation of the pass laws. These practices led to massive numbers of people being dumped on land occupied by others, either in the reserves or in the few remaining areas of group-owned black land. Some of the new arrivals became tenants; others remained defined as 'squatters'. While accommodation between original residents and new arrivals in the apartheid years saw both groups enduring together the weight of oppression and resisting forced removals, tensions have arisen since the demise of apartheid. In some cases, the original occupants want their land rights to be fully restored, giving rise to the possibility that tenure reform could result in a wave of post-apartheid displacements of people with weaker claims.

Another key issue identified in the White Paper is the partial breakdown of 'group systems' of land rights (that is, communal tenure). A lack of legal recognition and administrative support for such systems has led to severe internal stresses and tensions. One manifestation of the malaise is corruption and abuse of authority by chiefs and tribal authorities, sometimes challenged by civic organisations, which can lead to a vacuum in legitimate authority. One result, according to the White Paper, is that 'many black tenure systems are characterized by endemic violence' (DLA, 1997: 32).

The White Paper identifies discrimination against women as a fundamental feature of many land tenure systems in rural South Africa, including communal tenure. PTOs, for example, were generally issued only to men. Inequities in relation to land rights are exacerbated by the exclusion of women from most decision-making structures. Not clearly identified is the high level of insecurity experienced by many rural women, particularly widows, divorcees and single women with children, and the impact on land tenure of declining rates of marriage.

Another cause of tenure insecurity named in the White Paper is the near-collapse of land administration systems that accompanied the end of apartheid. PTOs are no longer issued in some areas; in others the procedures followed are *ad hoc* and

[8] See chapter 12 in this book by Aninka Claassens and Durkje Gilfillan for a detailed description of the problem in the case of the Kalkfontein community.

unclear, and registers of rights-holders are not kept up to date. Magistrates no longer perform the key function of validating allocations of sites and fields, and there is a widespread lack of clarity as to which government bodies are responsible for land administration. In peri-urban areas that are nominally under 'traditional tenure', as well as in some densely settled rural areas, it is not uncommon to find shack lords allocating land in return for cash, and in some cases warlords have built a power base through control over land.

Lack of clarity on land rights is seen as constraining infrastructure and service provision in rural areas, and there are tensions between local government bodies and traditional authorities over the allocation of land for development projects (for example, housing, irrigation schemes, business centres and tourism infrastructure).

Adams *et al* (2000: 118) are in accord with the general thrust of the analysis contained in the White Paper. They agree that insecurity of tenure in communal areas is widespread but suggest that it is

> 'also true that in many areas people do enjoy day-to-day *de facto* tenure security and do not express great anxiety about their long term future on the land. Many existing systems, often informal in the sense that they are not recognized by law, work reasonably well.'

They also cite evidence from an analysis of the large number of tenure-related cases brought before the Department of Land Affairs in the late 1990s that 'the underlying problems emerge strongly when development planning begins or investment projects are proposed' (ibid). Adams *et al* (ibid) therefore characterise tenure insecurity as comprising:

- a relatively small number of *high profile* cases where tensions or conflict have emerged or development is clearly stalled. These are now increasing in number as local level development planning begins; and
- a chronic *low profile* condition in which lack of certainty and weak legal status constrains the land-based livelihoods of the majority.

The White Paper does not address socio-economic conditions in communal areas, but it is important to note that these are where many of the poorest people in South Africa continue to live (Seekings & Nattrass, 2006: 337) and that a disproportionate share of this group consists of women (May, 2000: 23). Deliberate under-investment and neglect in past decades has seen the long-term decline of land-based livelihoods in these areas. As a result, many of the rural poor now depend primarily on survivalist micro-enterprises and social grants such as old age pensions and child support grants.

The key legacy of the past, then, is the lack of legal recognition and hence the insecurity of land rights in communal areas. This heightens the vulnerability of people who are already very poor, and of women in particular, and constrains efforts to address their poverty through rural development programmes. An agreed objective of tenure reform in these areas, in the eyes of post-1994 policy-makers, is thus to secure land tenure rights in both law and practice in ways that will promote economic development and enhance the livelihoods of rights-holders. There is little consensus, however, on how best to go about this.

POLICY DILEMMAS

Tenure reform in South Africa is a constitutional imperative. Section 25(6) of the Bill of Rights in the 1996 Constitution states that '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.' Section 25(9) states that 'Parliament must enact the legislation referred to in s 25(6).'

In 1996 the Interim Protection of Informal Land Rights Act 31 of 1996 was passed as a 'holding measure' until the law required by the Constitution came into being. This Act aimed to secure individual and group land rights not yet recognised in law by requiring that occupiers and users of land be consulted before any disposal of land took place. It has been extended annually since then by proclamation of the minister.

The White Paper (DLA, 1997: 57–8) sets out an approach that seeks to address the problems inherited from the past and to give effect to the constitutional right to security of tenure. It lists some underlying principles that should guide the drafting of legislation and the implementation of a national programme of tenure reform:

- tenure systems must rest on well-defined rights rather than conditional permits;
- a unitary and non-discriminatory system of land rights for all must be constructed, supported by effective administrative mechanisms, including registration of rights where appropriate;
- tenure systems must allow people to choose their preferred tenure system from a variety of options (including different combinations of group and individual rights);
- tenure systems should be consistent with constitutional principles of democracy, equality and due process;
- rights-based approaches must assist in 'unpacking' overcrowded situations of overlapping rights through the provision of more land or other resources; and
- tenure policy should bring the law in line with realities on the ground (that is, recognise *de facto* rights in law).

Once the principles of tenure reform had been agreed on, a law was required to give effect to s 25(6) and (9) of the Constitution. Two attempts were made, the first between 1998 and 1999 (which resulted in a draft Land Rights Bill) and the second between 2001 and 2003 (which resulted in the Communal Land Rights Act). Debates that took place in relation to these attempts exposed a number of underlying dilemmas.

A key dilemma is *whether to secure rights in group systems through forms of private ownership or through the recognition in law of customary forms of land rights.* Given the dominance of private property in South Africa, it is not surprising that some rural people express a demand for title deeds demonstrating 'full ownership' of land rather than the conditional permits of the past. These people include members of communities whose forebears had purchased farms in the late 19th or early 20th centuries but were prevented by discriminatory laws from owning land in their own name. Such calls do not necessarily imply a desire for individual titles: group forms of private ownership, for example, by communal

property associations (CPAs)[9] or community trusts, are also a possibility. Another consideration is that private ownership is a highly developed feature of Roman–Dutch law and is supported by established institutions and procedures, both public and private in character, such as the deeds registry, the surveying and mapping profession, and conveyancing law and practice.

However, demands for a 'title deed' by rural people are often at root a desire for greater security and certainty of land rights rather than exclusive private ownership as such. Another policy option is thus to adapt, strengthen and recognise land rights based on the principles of customary law so that they are no less secure than private property. This 'adaptation' paradigm has been the option preferred by most African governments in the wake of disappointing experiences with approaches implemented across the continent after independence that involved individual titling, state leasehold and collective ownership—all premised on replacement of 'customary' forms of land tenure (Bruce, 1993). The disappointing (and often contradictory) results of the titling 'experiment' have shifted the parameters of the debate, and titling is no longer assumed to be the only option for tenure reform.

Should the option of adapting and strengthening customary land rights be chosen, a key difficulty that arises is *how to determine the content of such rights.* Challenges include a wide range of variation in the content of rights, both across and within language groups, and the fact that 'customary' practices are not static but evolve and change over time. Codified versions of 'custom' can be a highly unreliable guide to current realities. A major problem is that official versions of customary law, often drawn from ethnographies commissioned by colonial or apartheid regimes, have increasingly been questioned by both scholars and the courts on the grounds that they legitimate the many distortions resulting from policies of indirect rule and the manipulation of 'tradition' that this entailed. Women's land rights, for example, were often downgraded in the process of codifying custom (Walker, 2002). 'Living customary law' (that is, custom as currently practiced) is seen by many to be more relevant and appropriate than official versions, as when women begin to be allocated land in their own right, partly in response to changing societal values. But how can 'living custom' be determined, and what evidence is acceptable to the courts as proof of its authenticity?[10]

A dilemma for law-makers in relation to all group-based tenure systems is *where to vest rights to land and the associated powers of decision-making.* Since such systems usually involve a mix of individual and family land use as well as group use and control (for example, of common property resources), should rights be vested in the group as a whole (as a protection against individualisation and abuse of shared resources) or in the members of the group (as a protection against abuse of individual rights)? Both group and individual rights and powers are important, and checks and balances are required. The question is: which option best secures land rights?

[9] CPAs and community trusts are the most common form in which the beneficiaries of land restitution and land redistribution hold land.

[10] See chapter 6 by Tom Bennett in this book.

A key issue in any communal system is establishing the membership of the group. But land rights and resource-use decisions in most communal tenure systems in Africa are defined at different levels of social organisation, not just at one level, and there are thus different layers of 'community' to consider. Being granted rights to residential and arable land often involves agreement between families and immediate neighbours. Use of common property resources (such as grazing and woodlands) usually involves a larger group. Certain resources (for example, wildlife) may be held in common by the larger political community. The dilemma is deciding *which level of 'community' should have primary decision-making powers in relation to land*. Additional complexities arise in situations where the apartheid state placed groups of people under the jurisdictional authority of a chief ruling over a 'tribe'. This larger group can overwhelm the smaller group, which often retains a sense of its separate identity, and can threaten its land rights. Group boundaries thus play a key role in defining power relations concerning land.

Forced removals and evictions from farms to 'communal areas' have resulted in situations where rights to land are overlapping and contested. This gives rise to another policy dilemma: *how to confirm the rights of those with strong claims to land (for example, as a result of original or continuous occupation) without rendering later arrivals insecure and vulnerable?* The White Paper suggests (DLA, 1997: 60) that where tenure rights cannot be secured *in situ*, solutions are required that can take the form of additional land, acquired through the land redistribution programme, so that those with weaker rights can be accommodated elsewhere. The challenge is that negotiating solutions with a variety of interest groups is an intrinsically complex and time-consuming process, making heavy demands on a government department responsible for an ambitious and taxing land reform programme.

The White Paper of 1997 suggests that tenure reform policy should bring the law in line with realities on the ground—an approach that seeks to recognise and legally protect the *de facto* vested interests in land (such as long-term historical ownership) that have never been adequately secured by the law. Two policy dilemmas then arise. The first is finding adequate legal expression of *de facto* interests and claims. A second is that this principle is in tension with others that require the democratisation of land tenure and its administration. Clearly, the White Paper does not intend that confirmation of existing realities should mean, for example, that gendered inequalities in land rights or unaccountable decision-making by traditional leaders be written into law. Some 'realities on the ground' need to be interrogated because existing power relations and definitions of rights reflect the distortions of colonial and apartheid-era policies, and may be at odds with the underlying values of many customary systems. *How does policy go about confirming some established practices but not others?*

A linked dilemma is *how to create local land administration institutions with a strongly democratic character*. It is acknowledged in the White Paper (DLA, 1997: 67) that in some areas the administration of communal tenure by chiefs and tribal authorities is 'popular, functional and relatively democratic' while in others powers over land are abused. Policy measures should 'enable functional and popular traditional systems to continue operating, while providing a strong and guaranteed route for a majority of dissatisfied members to replace control over land by

illegitimate structures with new democratic institutions' (ibid). The exercise of choice by rights-holders (in relation to both tenure system and land administration institution) is a key principle set out in the White Paper. However, this will probably require strategic interventions to create political space for free and open discussion of alternative options. Interventions are particularly important in relation to deeply embedded inequalities in gender relations.

Given the high levels of poverty found in communal areas, a key policy issue is *how tenure reform can contribute to social and economic development.* This is an important issue in relation to the nature and content of rights, but also in relation to land administration institutions: tenure reform and land administration must be well aligned with rural development planning and implementation, which is the responsibility of government departments at both national and provincial level, and of municipalities, which are tasked with drawing up Integrated Development Plans.

Finally, a major dilemma exists in relation to the implementation dimensions of a tenure reform programme affecting the rights of millions of people. Many land tenure situations are extremely complex and potentially conflict-ridden. Addressing these complexities will require expertise on the part of implementing agencies as well as dedicated time and resources. These are often in short supply in the public service. Yet in many rural areas there is an urgent need to clarify the status of people's rights to occupation and use of land. *How can land rights be effectively secured in the short to medium term, given great complexity and limited government capacity?*

Responding to the policy dilemmas

How did policy-makers respond to the dilemmas and challenges outlined above? The initial thrust of tenure reform policy was premised on transferring ownership from the state to the *de facto* rights-holders. Rights enquiries would establish 'which forms of occupation qualify as rights of underlying ownership' (DLA, 1997: 63). When transfer took place 'the ownership of land [would] vest not with chiefs, tribal authorities, trustees or committees but in the membership of the group as co-owners of the property' (ibid).

Between 1996 and 1998, this approach shifted to one aimed at providing immediate basic legal recognition of rights derived from *de facto* occupation as well as the principles of indigenous land tenure. A draft Land Rights Bill was prepared in 1998–99,[11] creating a category of protected rights covering the majority of those occupying land in the former 'homelands'. The Minister of Land Affairs would continue to be the nominal owner of the land, but with legally reduced powers relative to the holders of protected rights.[12] Protected rights would vest in the individuals who use, occupy or have access to land, but would be relative to those shared with other members, as defined in agreed 'group rules'. Protected rights would secure occupation and use without having to first resolve disputes over the

[11] Claassens and Cousins were members of the team that drafted this Bill.

[12] For more detailed descriptions of the Land Rights Bill see Claassens (2000), Cousins (2002), Makopi (2000) and Sibanda (2000). It is also discussed by Claassens in the concluding chapter of this book.

precise nature and extent of these rights. Procedures were set out for people to choose which local institution would manage and administer land rights on their behalf. Rights-holders and local institutions would be supported by a land rights officer backed by a land rights board. The draft Bill specified procedures enabling rights-holders and groups of rights-holders to augment the content of their rights, or to take transfer of title, but only on the basis of the informed agreement of the majority of those whose rights were affected.

The draft Bill never saw the light of day. In June 1999, a new Minister of Agriculture and Land Affairs[13] decided that it was too complex and involved too much state support for rights-holders and local institutions. Between 2001 and 2003 another law was drafted. The Communal Land Rights Act of 2004 differs fundamentally from the draft Land Rights Bill, although a few elements of the latter, such as 'tenure awards' of additional land to address overlapping rights, are incorporated into its successor. In essence, the Act reverts back to the idea of a 'transfer of title' approach as the only option on offer to occupiers and users of communal land. Title of such land will be transferred from the state to a 'community', which must register its rules before it can be recognised as a 'juristic personality' legally capable of owning land. Individual members of this community are issued with a deed of communal land right, which can be upgraded to a freehold title if the community agrees.

Before transfer of ownership can occur, the boundaries of 'community' land must be surveyed and registered, and a rights enquiry must take place to investigate the nature and extent of existing rights and interests in the land (including competing and conflicting rights). Community rules to regulate the administration and use of communal land must also be drawn up. These will be enforced by a land administration committee, which will exert ownership powers on behalf of the 'community' it represents. 'Traditional councils', established under the Traditional Leadership and Governance Framework Act 41 of 2003,[14] are allowed (according to the interpretation of the Act by the Department of Land Affairs) to act as such committees. According to the applicants in the legal challenge to the Act, traditional councils, wherever they exist, will ordinarily become the land administration committee for the area.[15] In support of the latter interpretation is the fact that the Act does not set out procedures for exercising choice about which structure will act as a land administration committee.

This brief summary indicates clearly that two very different paradigms informed the Land Rights Bill and the Communal Land Rights Act. The latter is founded on the premise that security of land rights derives from the holding of an exclusive title to land, but tries to combine this with recognition of some elements of 'customary' land tenure. The Act thus provides for the transfer of ownership from the state to

[13] Thoko Didiza, now Minister of Public Works.

[14] Tribal authorities established under the Bantu Authorities Act 68 of 1951 are reconstituted as traditional councils under the Framework Act. For more detail see chapter 2 in this book by Henk Smith.

[15] This is a key controversy, discussed in more detail in chapter 2 by Smith and chapter 11 by Claassens.

rural communities, and for secondary titles, or 'deeds', for individual members, within surveyed community boundaries which demarcate not only the territory of the group but also its social boundaries. This in turn has implications for where authority to represent the 'community' is located: in the Communal Land Rights Act this is at the level of a 'tribe', or 'traditional community', represented by a traditional council. These can be large groups, comprising between 8 000 and 20 000 people but in some places up to 50 000 people.

In contrast, the Land Rights Bill was premised on securing the rights of people on communal land through statutory definition rather than titling, leaving the precise definition of the content of such rights, and of the boundaries of groups and of representative authority structures, to local processes overseen by government. The intention was to create a framework within which many of the underlying principles of customary land tenure could be expressed, without requiring their conversion to forms of private property, but within decision-making structures that would be accountable to rights-holders.

The politics of policy-making

These shifts in paradigm did not take place in a vacuum: land policy processes are always political in character whether acknowledged or not. South African debates on communal tenure reform after 1994 were influenced by an intense politics focused on the place of traditional leadership in newly democratic South Africa (Cousins & Claassens, 2004; Ntsebeza, 2006; Oomen, 2005). When the traditional leadership lobby, led by the Congress of Traditional Leaders of South Africa (Contralesa), realised that chiefs would not be accorded the central role in local government that they wanted, control over land became its key objective.

In drafting the Communal Land Rights Act, the Department of Land Affairs consulted extensively with traditional leaders, but there is little evidence that it consulted ordinary members of rural communities. Civil society organisations argued forcefully for the democratisation of land administration, often referring to the key White Paper principle that rights-holders should be free to choose which local institution should be responsible for land administration. Such organisations also assisted community representatives to present their own (often somewhat divergent) views to Parliament's Portfolio Committee on Agriculture and Land Affairs. It became clear that major differences of opinion on these issues existed among members of Parliament, particularly those from the ruling African National Congress (ANC).

In chapter 11 of this book, Claassens analyses the parliamentary processes and behind-the-scenes lobbying that took place in late 2003 when another draft law, the Traditional Leadership and Governance Framework Bill, closely linked to the Communal Land Rights Bill, was before Parliament. A last-minute amendment to the latter appeared to give control of communal land administration to chiefs. In chapter 10, Ntsebeza examines debates that took place after 1994 on the powers and functions of traditional leaders in relation to local government and shows why the chiefly lobby increasingly focused on gaining control over land. Many of the controversies examined in this book arise in the context of this contested politics of the place of 'customary authority' within a democratic order.

KEY CONTROVERSIES AND ISSUES

What are the key controversies generated by the Communal Land Rights Act? This section identifies a number of such issues, shows how they resonate with international debates (and Africa-wide debates in particular), and indicates in which chapters of this book they are discussed.

Private ownership or customary land rights?

The most common approach to tenure reform in Africa today is one based on the notion of adapting systems of customary land rights to contemporary realities and needs rather than attempting to replace them with Western forms of private ownership such as individual freehold title. As indicated, land titling programmes in developing countries have a somewhat chequered history, and in countries such as Kenya have had many negative unintended consequences such as loss of land by poor households. At the same time, many of the anticipated positive impacts of titling (such as increasing investment in land) have failed to materialise (Platteau, 2000). Even the World Bank no longer prescribes individual title as the only solution to tenure insecurity, but acknowledges that 'in many circumstances more simple measures to enhance tenure security can make a big difference at much lower cost than formal titles' (Deininger, 2003: 39). These alternatives tend to focus on the recognition in law of indigenous or 'customary' land rights, as in Mozambique's innovative 1997 land law.

Despite this emerging consensus, advocacy of land titling has made a belated come-back in recent years, often with explicit reference to the ideas of Hernando de Soto. In his influential book *The Mystery of Capital*, De Soto (2000) argues that the poor of the Third World are excluded from the modern economy and its productive potential by a continued lack of formal rights to the land, buildings and businesses. These are 'dead capital', unable to function as collateral for bank loans and to underpin the dynamic processes of capital accumulation that De Soto thinks will reduce poverty. His remedy is 'formalisation' of property rights, which effectively amounts to land titling. These proposals have been embraced by free market ideologues in South Africa as well as by policy-makers in some sectors (for example, in relation to housing) despite widespread criticism by scholars.[16]

De Soto's ideas may have influenced the drafters of the Communal Land Rights Act. As indicated in this chapter, the Act tries to combine elements of both land titling and recognition of customary land tenure. It has ended up with the worst of both worlds, however, since individual community members will hold only a secondary and poorly defined right to land, and ownership will vest in a large group (the population living under the jurisdiction of a traditional council) represented by a structure (a land administration committee) that will exercise ownership on behalf of the group. Where that committee is coterminous with a traditional council, its legitimacy will supposedly be drawn from 'custom', but mechanisms to ensure its accountability to community members are largely absent—either indigenous accountability mechanisms or those of a more democratic character.

[16] For example, see Von Benda–Beckmann (2003).

In chapter 2 of this book, Smith analyses in detail the conceptual incoherence at the heart of the Act. He summarises the Act and shows how problematic its core provisions are. One such provision is the mechanism for formalising 'old order rights' and registering them as 'new order rights', the minimum content of which is not set out in the Act. Both the minister and land administration committees are to be involved in determining the holders of new order rights, and ambiguities around this process create uncertainty in law and insecurity of tenure. Smith also shows how the Act fails to meet its objective of democratising land administration and suggests that it is 'preoccupied with centralisation of control' over land.

In chapter 4, Okoth–Ogendo discusses the roots of this conceptual incoherence and shows how it manifests within the Communal Land Rights Act. Across Africa, colonial law-makers were ambivalent about the applicability of indigenous law in general and of land law in particular. Okoth–Ogendo identifies five 'legal fallacies' that informed this ambivalence, including the view that indigenous law does not involve a system of property worthy of recognition, and that indigenous social and governance institutions are incapable of managing land and resolving land disputes. These fallacies were ideological in nature, and were used to justify appropriation of land by both colonial and post-colonial elites as well as programmes for the conversion of indigenous rights into private property. Okoth–Ogendo argues that despite the lack of legal recognition for indigenous values and norms in relation to land, these have remained resilient and robust, and in practice state law is often ignored. These norms and values provide a more appropriate basis for tenure reform policy than the private property paradigm.

Kingwill's case study (chapter 8) of freehold title in two communities in the Eastern Cape, Rabula and Fingo Village, illustrates the persistence of customary norms and practices within a nominally private property regime over a period of 150 years. Properties were surveyed and registered in the mid-19th century, but the legal provisions of the deeds registration system (which provides for only one registered owner, often a male descendant) are only sporadically observed and instead a system of family property is in operation. A key role can be played by a female family member who is regarded as the 'responsible person', or custodian, and manages the property on behalf of all its (informal) co-owners. Kingwill describes this as a 'hybrid form of ownership, borrowing from both customary practices and Western legal concepts'. The severe mismatch between this local reality and the formal registration system creates many uncertainties. Tensions have arisen over disposal of land and the provision of services and infrastructure. Female members of the family are vulnerable to loss of their rights when male descendants claim registered ownership. This mismatch calls into question the wisdom of maintaining a system of individual private property in such situations, and points to the need for a different conceptual and legal model drawing on customary meanings of 'ownership'.

The nature and content of 'customary' land rights

The memorandum on the objects of the Communal Land Rights Bill 67 of 2003 states that it seeks to 'legally recognise and formalise the African traditional system of communally held land within the framework provided by the Constitution'

(2003: 19). Key controversies have arisen in South Africa about the nature and content of 'traditional systems', as they have in the rest of Africa.

The context for such debates is the wave of tenure reforms initiated across Africa from the 1990s onward. These involved commissions of enquiry in Tanzania, Zimbabwe and Malawi; national conferences in Namibia and Niger; new tenure laws in Uganda, Lesotho, Mozambique, Tanzania, Namibia and South Africa; and land commissions, public consultations or pilot programmes in South Africa, Ivory Coast, Mali, Madagascar, Niger and Swaziland (Palmer, 2000). Most of these reforms have been based on an adaptation rather than a replacement paradigm. The adaptation paradigm involves

> 'explicit recognition of indigenous tenure rules, legal protection for land held under them, strengthening of local institutions which administer those rules, and recognition or provision of mechanisms for resolving disputes' (Bruce, 1998: 46).

But what are these 'indigenous tenure rules' and are they still in existence given decades of rapid social change? Some scholars question the usefulness of idealised models of communal tenure (Daley & Hobley, 2005). Other researchers remark on the increasing prevalence of market transactions—including purchase, rental and sharecropping—that lead to the individualisation, and in some cases the effective privatisation, of land rights (Daley, 2005; Chimhowu & Woodhouse, 2006).

Cotula & Toulmin (2007) assess evidence from across Africa on the cause, extent and effects of changes in 'customary' land tenure regimes in the context of profound structural transformation. The impacts of social transformation vary substantially because of the diversity of local contexts. The assumption that population growth leads inevitably to individualisation does not hold in all cases: in some it is associated with the 'rediscovery' of collective dimensions of land tenure (Cotula & Toulmin, 2007: 105). This echoes the view of Peters (2004: 302) that processes of change are uneven and contradictory in character and often lead to the reassertion of customary claims to land. Alongside change, then, there is often continuity in how land relations are organised.

Cotula & Toulmin (2007) emphasise that the dynamic and adaptive character of 'customary systems' is nothing new—far from being static, such systems have always been reinterpreted to fit changing circumstances. In their view, the 'customary' and the 'statutory' are now intertwined in 'complex mosaics' of resource tenure, and the line between the 'formal' and the 'informal' is increasingly blurred (Cotula & Toulmin, 2007: 109). Determining who has rights to which resources is far from straightforward given that land access typically involves multiple and overlapping rights over the same resource, and that claims evolve and are continuously renegotiated. A further complication is that customary systems can be highly inequitable in relation to status, age and gender, and that local elites are often able to steer processes of social change in their own interests. The challenge is to

> '"square the circle" of recognizing and securing local land rights ... while avoiding entrenching inequitable power relations and unaccountable local institutions' (Cotula & Toulmin, 2007: 111).

A number of chapters in this book explore issues related to this challenge. In doing so, they discuss the distinctive nature of indigenous systems of land rights in Africa

and point out the difficulty of describing these rights using European legal concepts such as 'ownership'. The authors go on to suggest that the Communal Land Rights Act is based, for the most part, on a distorting and overly 'rule-bound' interpretation of the actual dynamics of existing 'customary' systems.

In chapter 4, Okoth–Ogendo suggests that indigenous social orders create a set of reciprocal rights and obligations that bind together and vest power over land in community members. He distinguishes *access* to land (a function of membership in the family, lineage or community) from the mechanisms through which land resources are *controlled and managed*. The latter are typically exercised by political authorities, but these are not monolithic, being segmented both vertically and horizontally in order to supervise functions at different levels of society. Thus authority is exerted over residence and cultivation at the level of the family; over grazing, hunting or redistribution of resources at the level of the clan or lineage unit; and over cross-cutting functions such as territorial expansion or defence at the level of the community or nation. The main purpose of this structure of control is to guarantee the rights of individuals to access land resources by virtue of their membership at any of these levels. Land law must reflect these basic norms and values if it is to confer tenure security—but the Communal Land Rights Act fails to do this, for a number of reasons, including its bypassing of family and community processes and structures of land administration.

In chapter 6, Bennett distinguishes between 'official' customary law, that version created by the state and the legal profession, and 'living customary law', those social practices considered obligatory and actually observed by the people living within its ambit. He points to a wide gap between the two: the living law is flexible and open-ended, which facilitates adaptive change, but courts find these qualities very difficult to work with. They have always preferred codified and rule-based versions which are written in English and Afrikaans rather than the vernacular, make use of common law constructs such as ownership, and when first recorded were generally highly selective. (As Bennett remarks, 'many of the rules . . . owed less to ancient practice than to the interests of officialdom'.)

Recent Constitutional Court judgments question the legitimacy of the official versions created under colonial and apartheid rule, and indicate a preference for the living law. This creates new problems, still unresolved, as to what evidence courts will accept as adequate proof of a 'living custom'. Bennett then discusses the inadequacy of common law concepts such as 'ownership' and 'trusteeship', and terms such as 'communal'. He suggests instead that concepts such as 'interest', 'power' and 'right', as well as the distinction between 'benefit' and 'control',[17] are more useful for understanding customary land tenure. Bennett argues that both rights-holders and authorities are bound by powerful obligations and responsibilities, in a system of 'complementary interests held simultaneously'.

In chapter 5, Cousins makes use of Okoth–Ogendo's conceptual schema in characterising 'communal' systems of land tenure in contemporary South Africa. Cousins draws on ethnographic and historical accounts as well as recent research

[17] This is similar to the distinction between 'access' and 'control' in Okoth–Ogendo's chapter; its intellectual genealogy can be traced back to Sheddick (1954).

findings in order to ground his generalisations in the empirical evidence. He points to a pattern of both continuity with the past (what Okoth–Ogendo refers to as 'resilience') and profound change. This situation is a result of state interventions, resistance and a variety of local adaptations. While a great deal of diversity is evident, underlying features that often emerge include the social embeddedness of land rights, the nested character of social units and of different levels of authority, and the flexible and negotiable nature of boundaries. Cousins argues that laws such as the Communal Land Rights Act that do not adequately acknowledge the layered character of land administration but focus instead on only one level, the chieftaincy, are likely to reinforce the centralised powers conferred on chiefs by colonial powers and the apartheid state, generate conflicts over boundaries and resource use, and undermine the downward accountability of land administrators. He suggests that there is a poor fit between the Act's 'transfer of title' approach (and the private ownership paradigm upon which it is based) and the nested character of land rights in most communal tenure regimes.

Transforming gender inequalities

Gendered inequalities in the strength and security of land rights are a feature of many customary tenure systems, and tenure reform in South Africa and elsewhere on the continent has grappled with the problem of how to address these inequalities. In practice, this has proved to be one of the most difficult objectives to achieve, probably because it involves a range of other social identities and relationships, such as kinship and marriage, which are core features of social organisation and embody strongly held cultural values. In chapter 7, Claassens & Ngubane pose the challenges in the following manner: can law alter deeply embedded kinship and family structures, and how does law articulate with processes of social change? What mechanisms of enforcement, oversight and support are needed for laws to achieve their objectives? How can unintended consequences be avoided?

Wider debates offer some useful pointers. Whitehead & Tsikata (2003) suggest that social embeddedness is central to understanding the gendered character of access to land in Africa, since men and women have 'differentiated positions within the kinship systems that are the primary organising order for land access' (Whitehead & Tsikata, 2003: 77). They cite research findings that women in some societies have been given access to land by the husband's kin groups rather than simply the husband, and not only through marriage, but also through residual claims within their own kin groups, or by loans and gifts through other social ties.[18] For this reason, Whitehead & Tsikata contest the widely accepted notion of the 'secondary' nature of women's land rights. They acknowledge, however, that women's rights are often weakened in the course of economic and political transformations.

Cotula & Toulmin (2007) describe how women have been rendered vulnerable by changes in intra-family land relations in recent decades as demographic shifts, urbanisation and the commodification of land have pushed land management

[18] See Yngstrom (2002) for the Tanzanian example.

decisions away from the extended family group and towards households and individuals. They report that where there is increased pressure for land, men sometimes reinterpret customary rules in ways that weaken women's land rights.

Disquiet over such manipulation of notions of the customary by men lead Whitehead & Tsikata (2003: 103) to suggest that since the term often upholds inequality, there are 'too many hostages to fortune in the language of the customary'. But women tend not to benefit from individual land titling either. As Mackenzie (1993: 213) shows for the Kenyan context, men have generally had the upper hand in contests over claims to land through both customary and statutory law. It is not clear that either the granting to women of independent rights to land, or joint vesting of titles in husbands or wives, are effective solutions on their own (Walker, 2003: 143).

The chapter by Claassens & Ngubane describes the problems faced by women in the communal areas of South Africa and assesses the likely impacts of the Communal Land Rights Act. In their view, amendments to the Act—made in the course of parliamentary debates and which provide for joint vesting of land rights in all spouses—do not go far enough. The rights of single women and female members of households who are not spouses are not addressed because the Act fails to engage with the prevalence of family-based systems. The result is to formalise rights deriving from discriminatory laws and distorted versions of custom. Unequal power relations within decision-making forums help to reinforce tenure insecurity, and these are not adequately addressed.

Claassens & Ngubane argue that law and policy should seek to articulate with the struggles in which women engage, and with uneven processes of social change that result in some single women now being allocated land in their own right. An alternative approach to that adopted in the Communal Land Rights Act could involve defining and securing use rights, often exercised by women within family and kinship networks, and thus strengthening the position of women within social relationships and community structures. To be effective, however, such measures would have to be backed by oversight and support.

Land rights, authority and accountability

Perhaps the most controversial issue raised by the Communal Land Rights Act has been the role of traditional leaders in relation to land. Together with the issue of the land rights of women, this was the major focus of public debates when the draft law was discussed in Parliament in late 2003 and early 2004, and many of the submissions to Parliament by civil society and community groups emphasised these issues. As already mentioned, the Traditional Leadership and Governance Framework Act was also before Parliament at this time and the two laws are closely linked. At the centre of these debates is the question of democratic governance. Three chapters in this book—chapter 9 by Delius, chapter 10 by Ntsebeza and chapter 11 by Claassens—analyse past and present political dynamics around the institution of traditional leadership and assess the potential impact of the two Acts on the security of tenure of residents of communal areas.

South African debates resonate strongly with those taking place elsewhere on the continent. A central issue across Africa is which local institutions should have

authority over land matters. Given ongoing policy debates and struggles over the democratisation of the post-colonial state, the powers and functions of traditional authorities in relation to land are often controversial. Authority is always a key dimension in land tenure because 'struggles over property are as much about the scope and constitution of authority as about access to resources' (Lund, 2002: 11).

A shared historical context is the legacy of indirect rule, through which British colonialism in particular reduced some of the costs of empire. In the early colonial period, many traditional leaders were co-opted or coerced into forming the lowest rung of the administrative apparatus, and became upwardly accountable to the state (Mamdani, 1996). Land tenure formed a key part of this emerging institutional order. Chanock (1991: 64) suggests that

> '[t]here is a profound connection between the use of the chieftaincy as an institution of colonial government and the development of the customary law of land tenure . . . the chiefs were seen as the holders of land with rights of administration and allocation. Rights in land were seen as flowing downward.'

This 'feudal' model fitted well with British ways of thinking about states and societies. It linked British land law and colonial contexts, and served the interests of administrations seeking to acquire land for settlers. It had a major influence in framing the official version of customary law and shaped the evolution of structures of 'traditional' authority as well as conceptions of land rights in 'customary' systems. Co-option by the colonial state tended to undermine the legitimacy of traditional authority, but not everywhere to the same degree. Some chiefs resisted dispossession and rejected collusion with the state, and sometimes there was a degree of survival of elements of pre-colonial systems that provided for a measure of downward accountability, such as competition between different levels of authority. This unevenness of experience contributes to disagreements on the nature of governance in traditional polities, and how 'democratic' it was.

Structures of traditional leadership are not disappearing as a result of continuing processes of socio-political change in contemporary Africa, but these processes do shape their further evolution. Lavigne Delville (2007: 45–50) and Cotula & Toulmin (2007: 105–6) describe how institutions such as the chieftaincy have been able to adapt to and capture the benefits of processes such as agricultural intensification. Some maintain or even extend their powers through strategic alliances with central government, capturing local government or securing control over land revenues. In other cases, the strength of customary authorities is eroded, for example, by the influx of large numbers of newcomers. A third outcome is the breakdown of accountability mechanisms and the privatisation of communal resources through land sales or rentals. Less powerful interest groups (such as commoners, women, youth and migrants) are seeing their security of tenure undermined as more powerful actors, including chiefs, direct processes of change in their own interests. Power relations, accountability and transparency within land regulation frameworks are thus key issues for effective tenure reform in Africa.

In chapter 9, Delius focuses on how the nature and basis of chiefly power in South Africa changed over time, as did its role in land tenure systems. In pre-colonial society there were important checks on chiefly abuse of power—such as the need to consult with gatherings of adult men on contentious issues, and the ability

of disaffected followers to move between chiefdoms. The matter of who acceded to high office was determined by competitive political processes as much as by rules of succession. Delius shows how colonial subordination eroded these elements of consultation and competition. There were important differences between the ways in which chiefs were enmeshed in bureaucratic authority in the Transkeian and Natal systems, but after Union in 1910 a more uniform system of 'native administration' was created, based on highly authoritarian models of chiefly rule. This process of incorporation was less systematic in practice than in theory, and many chiefs straddled the colonial apparatus and a local system informed by pre-colonial values.

Delius describes how, from the 1930s onwards, chiefs came under pressure from the state to enforce unpopular soil conservation measures as well as decisions on land allocation made by white officials under the auspices of the South African Native Trust. Under the apartheid government, new measures such as the Bantu Authorities Act[19] decisively swung the balance of power away from popular support for chiefs and towards bureaucratic control from above. This allowed chiefs and tribal authorities to make increasing demands on their subjects for labour and cash levies. Tribal boundaries were demarcated, but groups who accepted the new system were often allocated land claimed by those who resisted tribal authorities. Chiefs also asserted greater control over land allocation, the powers of lower levels of political authority were diminished, and the security of tenure of commoners was weakened. Delius concludes that many of the core assumptions of the Communal Land Rights Act (for example, that traditional authorities are coterminous with communities) are highly problematic and do not take adequate account of the impacts of this history of state intervention.

Ntsebeza's chapter explores the relationship between the chiefs and the ruling ANC, with a particular focus on the complex negotiations over local government policy that preceded the promulgation of the Traditional Leadership and Governance Framework Act in 2003 and the Communal Land Rights Act in 2004. He describes the longstanding ambivalence of the ANC towards the chiefs—from the date of the ANC's establishment in 1912 through to its accession to power in 1994 and beyond. A common theme has been the desire to woo the support of chiefs as a powerful political constituency. This took precedence, in Ntsebeza's view, over mobilisation and organisation of rural people around the formation of alternative democratic structures. This perspective informed the ANC's attitude towards Contralesa when it was formed in 1987, and in negotiations over a new constitution after 1990. Key concessions were made to the Inkatha Freedom Party, which had high levels of support from chiefs in KwaZulu–Natal, to secure its participation in the 1994 elections in what Ntsebeza describes as a decision based on political expediency. As a result, traditional authorities were recognised in the interim Constitution.

Ntsebeza analyses the continued ambivalence of the ANC towards chiefs after 1994 within policy processes around a new local government dispensation. In the end, chiefs' demands that they form a primary level of local government were

[19] Subsequently the Black Authorities Act.

rejected. They appear to have accepted the Traditional Leadership and Governance Framework Act because of the control over land offered to traditional councils by the Communal Land Rights Act. Ntsebeza concludes that the current government's recognition of the institution of traditional leadership is the result of alliance-building between elites, influenced by the need for political reconciliation rather than by political realities on the ground among ordinary rural people

In chapter 11, Claassens focuses on the dynamics of ongoing contestations in rural areas over the content of land rights, authority and 'custom'. Three case studies illustrate how rural people are contesting apartheid-era constructs of land rights and chiefly power even though the law functions to privilege these. A focus of the chapter is to show how different levels of authority and decision-making within rural settings articulate with one another, a central issue in the legal challenge. Claassens discusses disputes over land ownership and allocation, the sale of land allocations, and contested authority between chiefs and headmen. She argues that the demarcation of tribal authorities under apartheid gave chiefs powers over people living within their 'jurisdictional' boundaries whether or not those people supported them. This undermined a key accountability mechanism—the opportunity for people to ally themselves with a challenger to chiefly authority.

Claassens argues that the Communal Land Rights Act, together with the Traditional Leadership and Governance Framework Act, centralises power at the level of traditional councils and makes no provision for localised decision-making and control over land—at the level of the family, the user group, the village and the clan. The laws thus entrench apartheid-era distortions and undermine indigenous accountability mechanisms that require leaders to actively win the support of community members in order to protect and extend their sphere of authority. In particular, the laws undercut the mediation of power between multi-layered levels of authority and through contestation over boundaries. This problem is compounded by disputed tribal authority boundaries becoming 'default' community boundaries, and by the false assumption that these boundaries enclose discrete, homogenous 'tribes'.

A central issue in the litigation is whether land rights derived from custom and practice are secured or undermined by the powers given to land administration committees by the Act. Linked to this is whether or not traditional councils can justify the exercise of their powers by reference to the Constitution's recognition of the role of traditional leaders in customary law. According to Claassens, a 'living law' interpretation of custom would open up the determination of its content to the whole range of people who apply it in practice in local settings, thereby challenging the veracity of official and rule-based versions. This could open up the process of rule formation to include the multiple actors engaged in negotiating, challenging and changing property and power relations in everyday struggles in rural areas.

The complex interplay between land rights, authority and accountability, and the everyday struggles that take place around them, are clearly illustrated in case studies of the four rural groupings challenging the Communal Land Rights Act. Chapter 12 by Claassens & Gilfillan focuses on Kalkfontein, where a group of co-owners are the descendants of ethnically mixed people who clubbed together in the 1920s to buy several farms north of Pretoria. In the 1970s, the apartheid government

imposed a brutal tribal authority on Kalkfontein with the chief acting as though the farms were his private property. The farm owners resisted fiercely, and ultimately a commission of enquiry resulted in the newly created 'chief' being deposed and the powers of his successor curtailed. Nevertheless, the Pungutsha Tribal Authority remains deeply controversial, and residents cannot receive identity documents or social grants unless their tribal levies are fully paid.

Opposition by the Kalkfontein group to the authoritarian actions of traditional leaders is not based on a rejection of indigenous institutions and values: for over 80 years residents have defined land rights and administered them in accordance with such norms and values. For example, each family is entitled to residential and arable land, and all co-purchasers and their heirs have shared access to grazing and other natural resources. At first, only the male heirs of the initial purchasers were entitled to residential sites and fields once they established their own families, but over time practice has changed to include daughters. An elected council or *kgotla* of respected men hears and helps resolve internal disputes, and balances the rights of individual heirs and their families against the interests of the wider group.

The Kalkfontein co-owners have brought the court application against the Act because they fear that it will reverse their efforts to constrain abuses of power by the tribal authority and undermine their goal of exercising independent ownership rights to their land. Claassens & Gilfillan argue that the tribal authority is likely to attempt to reassert its control over the Kalkfontein farms, but if the Communal Land Rights Act is implemented in its present form the Kalkfontein co-owners will have fewer legal remedies at their disposal than they did under apartheid. The Kalkfontein case clearly demonstrates how difficult it is to dislodge a tribal authority or constrain its abuse even when abundant evidence exists as to its artificial construction and its imposition on reluctant landowners. It also shows the deep-rooted nature of vested interests, elite alliances and bureaucratic arrangements in former 'homeland' areas.

Case studies of the other three rural groupings challenging the Act are contained in chapter 13 by Claassens (with Moray Hathorn). They are located in Dixie village in the south-east corner of Limpopo Province; in the farming area of Mayaeyane which falls within the broader Makgobistad area in North West Province; and in Makuleke in the far north-east of South Africa, adjacent to the Kruger National Park. In Dixie and Mayaeyane, the key issue is the strength of people's land rights relative to chiefly power. In Mayaeyane, the focus of local contestation is the status and strength of individual and family rights to residential sites and fields. In Dixie, the focus is on decision-making power at the level of the village relative to the power of the much larger Mnisi Traditional Council. Threats to residents' tenure security as a result of centralised power over land are clearly illustrated by a dispute around the traditional council's dealings with unscrupulous investors in anticipation of a land restitution award.

In Makuleke, contestation is focused on the question of a separate Makuleke identity relative to the claims by Chief Mhinga that the Makuleke are nothing but a subordinate clan under his authority, with the implication that they are not entitled to hold independent land rights. The previous Mhinga chief played a central role in the forced removal in 1969 that placed the Makuleke within the jurisdictional

boundaries of the Mhinga Traditional Council. After 1994, the Makuleke lodged a land restitution claim to land within the Pafuri section of the Kruger National Park from which they had been removed. Their claim was recognised in 1998. The settlement agreement restricted their right to return to the land, but they are allowed to operate a lucrative tourism enterprise in the park. The agreement also promises them tenure security in the resettlement area. Makuleke community members fear that the Communal Land Rights Act undermines the status and security of their land rights and could enable Mhinga to renew his claims and threats against their land rights.

Claassens shows how in all three areas the ownership and control of restitution land is a key issue. Is such land owned by the people who were actually removed, or by the larger 'tribes' who claim power and jurisdiction over them? This is an explosive issue for many land claimants—in part because tribal authority boundaries were delineated during the 1950s and 1960s as an integral component of Bantustan consolidation, as were forced removals. Chiefs who co-operated with the apartheid government were often rewarded with Cabinet posts in the newly created Bantustans and also with expanded tribal authority areas to rule over. Few did anything to oppose forced removals. Now these men, or their sons, are asserting that restitution awards should be made directly to the traditional councils they head, rather than to CPAs and trusts established by those who were removed. Together with sale of land allocations by headmen and traditional leaders, the restitution issue illustrates the consequences of entrenching apartheid-era tribal boundaries and the high economic stakes attached to competing versions of customary law.

Claassens emphasises that the struggles taking place in these three areas, as in Kalkfontein, are not 'anti-custom' in character. Land sales and the dubious forms of 'development' that are occurring are seen by local people as threatening to subvert the bedrock of indigenous property systems, that is, conserving the land base for the benefit of all those entitled to a share in it, including generations to come. Rural people are thus challenging the authoritarian actions of traditional councils because they are seen to be in conflict with custom and undermine customary entitlements to land.

Processual or rule-bound versions of 'customary' law

As discussed, recent Constitutional Court judgments emphasise that customary law derives its validity and legitimacy from the Constitution and must be interpreted to give effect to the Bill of Rights. These judgments reject official versions of customary law as tending to distort the underlying values that inform the 'living law', which constantly adapts to changing social practice. As Claassens argues in the concluding chapter to this book, 'living law' interpretations of custom are potentially a way of avoiding the danger that customary law will be used to subject some South Africans to an authoritarian legal regime that undermines the realisation of the rights enjoyed by other South Africans. This debate is relevant to controversies over how to secure land rights in communal tenure systems—through rule-based or processual approaches, or a combination of the two.

Anthropologists argue that rules are in any case an unreliable guide to how land

tenure systems work in practice, and that power relations and culturally defined meanings are often more important (Peters, 2002). Moore (1978) says that rules, whether formal or informal, do not determine behaviour but are a context for strategic action. She refers (1978: 6) to the 'continuous making and reiterating of social and symbolic order . . . as an active process . . . . [E]xisting orders are endlessly vulnerable to being unmade, remade and transformed'. For Berry (1994: 35), security of tenure is obtained not through law and administration but through open-ended, ongoing processes of negotiation, adjudication and political manoeuvre.

Suggestions for what such perspectives might mean for tenure reform policies include Moore's (1998: 47) stress on 'practical institutional possibilities' because 'rights without remedies are ephemeral'. The need is to 'create an appropriate space where legitimate claims [can] be acknowledged and acted upon' (ibid). Berry, cited in Bruce & Migot–Adholla (1994: 262) makes a similar proposal:

> 'Rather than rewrite the laws governing property rights . . . governments should focus on strengthening institutions for the mediation of what, in changing and unstable economies, will continue to be conflicting interests . . . .'

Courts (including traditional courts), local dispute resolution forums and land administration committees are potentially relevant institutional contexts for mediation processes of this kind. How could participants in such forums go about determining the content of the living customary law of land rights?

Claassens explores this question in the concluding chapter. She describes the evidentiary difficulties associated with the construct of 'living law'[20] and the challenges inherent in incorporating a 'living customary law' perspective into South Africa's formal court system. On the basis of a recent high profile court case about male primogeniture and chiefly succession, she suggests that unless the living law interpretation can be given practical effect, there is a danger that distorted, rule-bound versions of customary law will close down processes of transformative social change that attempt to integrate traditional and democratic values.

This danger is heightened by laws such as the Communal Land Rights Act and the Traditional Leadership and Governance Framework Act which, Claassens argues, entrench apartheid versions of unaccountable chiefly power. A key purpose of the new laws may be to protect chiefly hegemony from the 'threat' of countervailing authority over land and create a realm of sovereign authority for traditional councils. Even if transfers of title from the state to 'communities' do not take place, the new laws will have a far-reaching impact in rural areas by entrenching the jurisdictional boundaries of traditional councils and bolstering their legal powers to unilaterally determine the content of customary law. The laws will make it more difficult to challenge corrupt decisions by traditional leaders in relation to land sales, and abuse of their power in relation to mining deals, development projects, restitution claims and tourism ventures.

Claassens also suggests that the new laws embody a compromise arrangement between the state and traditional leaders in respect of power in former homeland areas. Because traditional leaders' demands in relation to local government status

[20] Also discussed by Bennett in chapter 6 of this book.

cannot be met within the framework of the Constitution, it seems that government has offered them control over rural land, augmented by legal powers that bolster their ability to define and enforce authoritarian versions of customary law that suit their interests. She discusses the example of recent provincial legislation in Limpopo enabling traditional leaders to again demand and enforce the multiple levies of the Bantustan years. She points to the impact of the new laws on the balance of power in rural areas, and argues that they undermine the ability of rural people to participate in the development of a 'living law' that reflects the multiple voices engaged in making and contesting the content of custom.

Finally, Claassens explores an alternative approach to tenure reform to that embodied in the Communal Land Rights Act, one based on underlying dynamics of indigenous land rights systems that have proven remarkably resilient over time, in South Africa as elsewhere on the continent. She proposes a model in which the entitlements of individuals within family and group systems are secured; flexible and concurrent decision-making boundaries for different types of issues and decisions are retained; and the flow of authority is 'upwards' from rural citizens, exercising customary entitlements through a range of interlocking and self-mediating decision-making forums.

Was the appropriate procedure followed in enacting the Communal Land Rights Act?

The challengers of the Communal Land Rights Act argue that the incorrect procedure was followed in enacting the law, which is, therefore, invalid. A legal controversy erupted in 2003 about the 'tagging' of the Communal Land Rights Bill: should it be dealt with in terms of s 75 of the Constitution (which sets out a procedure for Bills not affecting provinces) or s 76 (for those which do affect provinces)? Section 75 enables a relatively short parliamentary process while s 76 requires a longer one involving consultation with the provinces. State law advisers decided that it should be tagged a s 75 Bill on the basis that 'the pith and substance' of the Bill dealt with land, a matter reserved for national government only, and not with issues of customary law and traditional leadership, which the Constitution lists as issues over which both national and provincial spheres of government may legislate (and therefore have 'concurrent powers').

Murray & Stacey consider this question in chapter 3. The authors argue that the Canadian 'pith and substance' test currently used by parliamentary law advisers is not appropriate in the context of the South African constitutional framework. They argue that the provisions of the Communal Land Rights Act directly affect customary law and traditional leadership in a number of ways, and that, therefore, it should have been tagged a s 76 Bill and followed the longer parliamentary procedure.

Murray & Stacey then consider another question: did Parliament, and the National Council of Provinces (NCOP) in particular, facilitate the involvement of the public in the passage of the Act as required by the Constitution? This is necessary whether or not a Bill is tagged a s 76 Bill. Given the Communal Land Rights Act's direct and fundamental impact on customary law and traditional leadership, reasonable involvement of the public should have included hearings in

the provinces when the Bill was before the NCOP. However, no hearings were held and no submissions from the public were called for or received. The NCOP did not even take a decision as to how the involvement of the public should be facilitated. The authors conclude that the procedures to enact the Communal Land Rights Act were fatally flawed as a result of its incorrect tagging and the NCOP's disregard for its obligations in relation to public consultation.

CONCLUSION

The land rights of millions of South Africans will be affected by the Communal Land Rights Act and the Traditional Leadership and Governance Framework Act. Most of the authors in this book are critical of the core provisions of these laws, and suggest that they are likely to exacerbate, rather than reduce, tenure insecurity. This is deeply ironic given that the enactment of a law to enhance tenure security and address past racial discrimination is a constitutional imperative.

It appears that the laws are likely to have far-reaching consequences regardless of whether or not any communal land is transferred from the state to rural communities. Claassens argues that the deal between government and traditional leaders enables traditional councils to enforce authoritarian versions of customary law and 'tax' their subjects within the boundaries of jurisdictional areas derived from the apartheid past. If she is right, then some of the fundamentals of post-apartheid democracy are at stake. Ethnically delineated 'traditional communities' would once again become realms of semi-sovereign authority for chiefs, and only highly truncated forms of citizenship would be available to their members. These realms may now be considerably expanded through large rural land restitution claims that allow traditional leaders to enlarge the territory under their jurisdiction, often in 'strategic partnership' with powerful business interests (Hellum & Derman, 2006).

This outcome would *not* be the inevitable outcome of a tenure reform policy framework premised on the adaptation of customary land tenure systems, but rather the triumph of those vested interests that rely on a distorted apartheid version of 'custom'. As the case studies in this book demonstrate, many rural people have been engaged in challenging this version of custom for a long time. Their struggles attest to the existence of a decidedly democratic strand within customary regimes, one identified by Mamdani (1996: 299) as a counterpoint to the 'decentralised despotism' of chiefly rule in the past and present:

> '[T]he customary was never a single, non-contradictory whole . . . . For every notion of the customary defined and enforced by the state, one could find a counternotion with a subaltern currency. A democratic appreciation of the customary must reject embracing modernism or traditionalism. As a start, it needs to disentangle authoritarian from emancipatory possibilities.'

Fourteen years after South Africa's first democratic election, and with many of the problems bequeathed by an oppressive past still to be addressed, these are vital issues for South Africans to consider.

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Traditional Leadership and Governance Framework Act 41 of 2003

Part two

The Act and the legislative procedure

2

An overview of the Communal Land Rights Act 11 of 2004

By Henk Smith

INTRODUCTION

Millions of South Africans hoped the Communal Land Rights Act would give them the legal right to inhabit and use the land on which they lived. These South Africans occupy former trust areas and other communal lands defined by the Act. As a result of racially discriminatory laws or practices of the past, such people have insecure tenure of land and the Act is an attempt by government to implement the Constitution by rectifying the situation. However, the Act has serious shortcomings and is unlikely to meet its objectives; it may even render some people living on communal land less secure than before.

This chapter consists of an overview and detailed discussion of the Act. It also scrutinises some of the Act's major shortcomings. It contains an analysis of the functions of traditional councils and leaders who are granted powers in the Act to make potentially undemocratic decisions affecting the well-being of communal land inhabitants. Also highlighted are the quasi-judicial functions of the Minister of Land Affairs in determining the existence and boundaries of communal lands without fully taking into account all the nuances of communal land boundaries and rights. This chapter explains how converting 'old order rights' into 'new order rights' has resulted in problems due to the Act's failure to capture the complexities of land rights, use and control at different levels of socio-political organisation.

CONTEXT

The Act was passed in 2004 but had still not been brought into operation by the time this book was published. The stated intention of the Act is to fulfil the requirements of the Constitution, in particular s 25(6), which reads:

> 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to equitable redress.'

Section 25 deals with property rights and land reform.[1] The White Paper on South African Land Policy (DLA, 1997), which served as the basis for post-1994 land reform laws, envisaged the formulation of statutes to deal with rural land reform in the areas of land redistribution, restitution and tenure reform.

'Tenure reform' refers to the amendment or reform of particular types of land access and control. 'Land tenure' refers to a set of rights which a person or group holds in land. It concerns who can use which resources, for how long and under what conditions. 'Tenure' is the relationship, whether legally or customarily defined, among people as individuals or groups with respect to land and associated natural resources. 'Rules of tenure' define how property rights in land are to be allocated within societies.

'Security of tenure' refers to the length, breadth and certainty of the legal right.[2] A useful operational definition or description of security of tenure will include the social dimension and elements of certainty and predictability. It will have regard to the relevant power relations and the social value of recognition of rights and their legitimacy. Security of tenure is not limited to private ownership but can exist in a variety of forms such as leases on public land or user rights to communal property (Ciparisse, 2003: 76). According to *FAOfocus*, an electronic newsletter of the Food and Agriculture Organisation of the United Nations (FAO, 1999),

> '[i]f tenure is secure, the holder can reasonably expect to use the land to its best advantage in accordance with the right, reap a timely and fair return and be able to enforce the right against non-holders. Tenure enables the holder to make management decisions as to how land-based resources will be used for immediate household needs and long-term sustainable investment.'

The White Paper envisages moving away from a permits-based approach (which formed the basis of African landholding under apartheid) towards a rights-based approach. One of the points of departure of the White Paper is that tenure reform should enable choice with regard to the specific form of tenure that is appropriate for the individual or group concerned. It also makes a case for the recognition and protection of *de facto* rights.

The table below charts the chronology and breadth of legislative measures taken in relation to land reform after 1994.

[1] Section 25(5) of the Constitution deals with the state's responsibility with regard to enabling citizens to gain access to land on an equitable basis. The Memorandum on the Objects of the Communal Land Rights Bill (attached to the Bill) states that the objects of the Act are mandated by s 25(5)–(6) of the Constitution. Section 25(9) explicitly requires that the state must enact legislation to give effect to s 25(6) of the Constitution, that is, tenure security.

[2] According to Roth (2004: 393), 'land tenure security can be delineated into three dimensions: breadth of rights (including use, transfer, and exclusion rights), duration (length of time these rights are held), and assurance (certainty of rights)'. The World Bank (2003: 34) states that the 'optimum type of property rights depends on [i] the nature of the resource, [ii] its relative scarcity, [iii] the externalities that arise in its use, [iv] the cost of specifying and enforcing property rights, [v] the state's capacity to enforce property rights, [vi] the ability to minimize external effects through regulation, and [vii] the means available within a given group to delineate and enforce rights and responsibilities internally.'

Date	Title	Description
1994 no 22	Restitution of Land Rights Act	The principal statute providing for restoration of land or compensation for forced removals that took place after 1913.
1995 no 67	Development Facilitation Act	The omnibus planning statute including provisions for 'nationally uniform subdivision and development of rural land so as to promote the speedy provision and development of land for small-scale farming', as set out in its long title. The small-scale farming provisions have not been used. This Act created 'initial ownership' *prima facie* a real right, which enables use and occupation as if the user were the registered owner, but before actual registration.
1996 no 3	Land Reform (Labour Tenants) Act	This Act enables labour tenants to buy land, with a subsidy from the state, from the landowners for whom they work. It extensively regulates the terms of such forced sales. It grants labour tenants statutory rights to use and occupation of the land, which can be terminated only in accordance with the provisions of the Act. Labour tenants are also protected against arbitrary eviction.
1996 no 28	Communal Property Associations Act	Establishes landholding institutions for communities receiving land under the restitution and redistribution programmes. These institutions are called communal property associations (CPAs). The statute requires accountability of associations in relation to their members, and for the registration of constitutions for the associations. Currently there are about 1 500 institutions subject to the Act.[3]
1996 no 31	Interim Protection of Informal Land Rights Act	In anticipation of a comprehensive tenure reform law for all communal land, the Act protected individual and group land rights and interests by requiring a procedure for consent by affected persons before any dispossession or disposal.[4] The operation of the Act is extended annually by ministerial proclamation and will become permanent under the Communal Land Rights Act.

[3] The Act requires fair access to the land for the CPA members. The association and its constitution can determine and create the rights of individual members and the nature and content thereof. In practice, many CPAs fail to define and determine such rights. The CPA Act does not apply to state trust land unless the minister determines that the Act is to be used to establish an association in a particular land reform project in terms of s 2(1)*(d)* of this Act.

[4] 'The act reflects a departure from traditional private law, by curbing the landowner's power of vindication, which is traditionally regarded as a natural consequence of the supremacy of ownership. This depletes the absolute enforceability of landownership, while strengthening 'lesser' rights' (Mostert, 2003: 21).

Date	Title	Description
1996 no 34	Upgrading of Land Tenure Rights Amendment Act	Amended the principal Act[5] of 1991. It allowed for the upgrading and conversion into ownership of rural quitrents and deeds of grant. Section 20, which provides for transfer of state land to 'tribes', will be repealed when the Communal Land Rights Act comes into operation.
1998 no 26	Provision of Certain Land for Settlement Amendment Act	Amended the principal Act[6] and changed its name to the Provision of Land and Assistance Act. It constitutes the principal measure to redistribute land. It provides for land purchases by the state and allocation thereof to landless people or groups. It also provides, as stated in the Act's long title, for financial assistance for 'acquisition, development and improvement of certain land and to secure tenure rights'.
1998 no 94	Transformation of Certain Rural Areas Act	Provides for transfer of title from the state to a legal entity representing the inhabitants of each of the twenty coloured rural areas. After a rights inquiry process, the beneficiaries can choose a suitable landholding institution. The minister, as trustee, transfers the land to an appropriate institution.
2004 no 11	Communal Land Rights Act[7]	The Act was promulgated and signed by the president in July 2004. It is not yet in operation and regulations have not been published or tabled in Parliament.

Historically, dispossession and appropriation occurred by force and conquest, and racial segregation was confirmed by statute. Indigenous or customary law ownership rights were ignored and often extinguished (Klug, 1995). The infamous 1913 Natives Land Act[8] prohibited African land ownership throughout most of South Africa and regulated occupation of land by African people on white-owned farms. It confined African people's rights to reserves that made up only 13 per cent of the country and relegated their status to that of temporary occupiers in the larger part of the land of their birth.[9] Various attempts to codify indigenous law and more

[5] Upgrading of Land Tenure Rights Act 112 of 1991.

[6] Provision of Certain Land for Settlement Act 126 of 1993.

[7] The Act went through the parliamentary process during the second half of 2003 and the first half of 2004. The text that follows will refer to the Bill that preceded the Act and the three draft Bills published for public comment on 14 August 2002, 3 October 2003 and 17 October 2003. These texts are available at http://www.info.gov.za/documents/subjectdocs/subject/land.htm.

[8] Subsequently the Black Land Act 27 of 1913.

[9] In this manner, about 13 per cent of the land surface of the country was transferred to a state trust, and thus nationalised and expropriated without compensation for its indigenous community owners. Much of the remainder had by then been awarded in individual ownership to white settlers or appropriated by white squatters whose actions were legalised by the Dutch East India Company and the subsequent colonial and frontier governments that asserted sovereignty (Van der Merwe, 1989: 667).

specific attempts to impose statute law on land reserved for African occupation occurred through the Transkei Penal Code of 1886, the Natal Zulu Code of 1891, the Glen Grey Act 25 of 1894 (C), the Black Administration Act 38 of 1927,[10] the Development Trust and Land Act 18 of 1936[11] and their subsidiary regulations such as Proclamation R188[12] and its predecessor's regulatory measures.

MAIN FEATURES OF THE COMMUNAL LAND RIGHTS ACT

The core of the Act deals with the transfer of land title from the state to traditional communities; the registration of individual land rights within 'communally owned' areas; and the use of traditional council or modified tribal authority structures to administer the land and represent the 'community' as owner. Its legal effect is to transform and recast customary law and traditional councils.

The Act applies to all communal land, including the former homelands and post-1994 land reform land. An entire area of communal land may be registered in the name of a community upon determination by the Minister of Land Affairs that the requirements of the Act have been met. Current land rights of each individual on such area of communal land, called 'old order rights', are to be secured, converted or cancelled. Converted old order rights can be registered as 'new order rights'. If all or part of the area of communal land is subdivided for individual rights, then individual new order rights are registered.

The Act requires the following procedure in distinct phases prior to transfer: a land rights enquiry, a determination by the minister, the establishment of community rules, and land use planning and formalisation. Before any land is transferred to a community, it must have a land administration committee to represent it. If there is a traditional council for the area and the community, then that council will be the land administration committee for the community. The Traditional Leadership Governance and Framework Act 41 of 2003 established and recognised traditional councils. The powers and duties of a land administration committee, and the powers and duties of a traditional council in its capacity as a land administration committee, are conferred on these bodies by the Communal Land Rights Act and the community rules.[13]

The Act thus employs three broad strategies to achieve its objects:

- **corporatisation of land administration**
  Communal land is transferred to, and registered in the name of, the resident community, who must govern and administer tenure relations in terms of

[10] Previously the Native Administration Act.

[11] Previously the Native Trust and Land Act.

[12] Proclamation R188 of 1969 (Black Areas Land Regulations) promulgated in terms of Act 38 of 1927 and Act 18 of 1936.

[13] Sections 21 and 22 deal with the establishment of land administration committees and their relationship with traditional councils. There are contested interpretations about the meaning and impact of these sections, aspects of which are summarised in this chapter. Many of the issues raised in the pleadings in the matter of *Tongoane and others v The Minister of Agriculture and Land Affairs and others* (TPD 11678/06, pending) turn on the interpretation of s 21(2). (The relevant pleadings, affidavits and annexures are on the DVD included with this book.)

community rules. The rules must be adopted at a democratic meeting and comply with the requirements of the minister. The rules are binding on the community and its members.

- **individualisation of communal rights**
  Security of tenure is promoted by individualising rights, recordal and registration. Certain old order rights are defined and registered as new order rights in the names of individuals or communities in the deeds office.
- **decentralisation of public administration**
  New institutions are created to administer the new rights. At a local level, traditional councils, where they exist, carry the burden of administration of rights and community rules. If there is no traditional council, then a local land administration committee must be elected in terms of the community rules. Land administration boards oversee certain functions of the local tenure administration bodies.[14]

Scope

Communal land as defined in the Act includes all state land under communal occupation that was part of the African homelands and/or part of state trust land. The Act also applies to private communal land registered in the name of a traditional leader on behalf of a tribe, community land trust or CPA. Finally, the Act applies to other land determined by the minister.

Where the Act applies, a community living on communal land is obliged to follow the procedures of the Act including the enquiry, determination, rule-making and formalisation phases. The scope of the Act goes beyond categories of communal land. It also applies to a category of persons, namely, 'beneficiaries of communal land or land tenure rights' under land reform laws.

Enquiry and determination

The Act envisages that the first procedural phase will be a land rights enquiry instituted by the minister and executed by a person appointed by the minister. The enquirer's report must show the results of his or her investigation into the nature and extent of all relevant rights affected, and must make recommendations. The enquiry process allows for community participation. The minister's determination is based on the enquiry report and various prescribed considerations. The determination deals with the size and boundaries of the land to be transferred to a community or individual; the nature and extent of any new order rights to be transferred; and the identification and determination of the holders of new order rights. The minister may determine that comparable redress should be given to a holder of an older right if a holder applies for it or if the minister cancels an old order right. Comparable redress may take the form of monetary compensation and/or other land or a right in such other land. The protections of the Act,

[14] Pienaar (2007: 563) comments that the Act and the Department of Land Affairs focus on the privatisation and individualisation of communal land tenure, while neglecting the fiduciary duty towards communities and stronger administration to create tenure security for groups.

including the security of tenure and gender equality protections, only come into operation once the enquiry and determination processes have been completed.

Rules

The registration of community rules is a pre-condition for the transfer of any land to a community. It is also a pre-condition for the transfer of a new order right to an individual. Registration of the rules affords the community corporate status or juristic personality. The minister does not initiate the rule-making and registration process; rather, the community must initiate the process in order to become the registered owner of communal land. A community has some autonomy in formulating its rules. The Act requires that community rules must regulate the administration and use of communal land; deal with the administration and registers of transactions in respect of new order rights; and stipulate the number of land administration committee members. Further, no community rule may discriminate against any person on the basis of gender. If the community fails to adopt rules then the standard rules, as prescribed by the minister and as adapted for the particular community, will apply.

Formalisation and planning

The ministerial determination triggers a number of formalisation and planning steps. A communal general plan as required under the Land Survey Act 8 of 1997 must be prepared, approved and registered. A communal land register must be opened. Communal land must be transferred or endorsed to the community, or where applicable, new order rights must be transferred to individuals. Land uses and conditions may be stipulated and title reservations in favour of the state may be imposed. These functions are the prerogative of the minister.

Institutions

The Act establishes two institutions—a land rights board and a land administration committee. The jurisdiction of a land rights board covers a large area and the Department of Land Affairs has envisioned one board per province. The minister appoints board members who have advisory functions with respect to the minister and to communities. Board members also liaise with other spheres of government and monitor compliance with the Act and the Constitution.

Every community must have a land administration committee. The section of the Act dealing with these committees is both controversial and ambiguous. Where a traditional council (created in terms of the Traditional Leadership and Governance Framework Act) exists, this council will fulfil the functions of the land administration committee. Where there is no traditional council and a new land administration committee is established, then that committee shall consist of elected members only, none of whom may hold traditional leadership positions.

Since the passing of the Act, the Department of Land Affairs has interpreted these two provisions to mean that a community may choose between elected committee members or a traditional council to comprise the land administration committee. The problem with this interpretation is that the Act fails to set out how communities may make that choice. The drafts of 14 August 2002 and 3 October

2003 explicitly provided for elected committees with *ex officio* participation to a maximum of 25 per cent of their membership by traditional leaders. The Department of Local Government, which is responsible for the Traditional Leadership and Governance Framework Act and traditional councils, asserts that where traditional councils exist, they are the mandatory land administration committees, and that one of their areas of jurisdiction includes communal land to be transferred to the community. In terms of this Act, existing tribal authorities are deemed to be traditional councils provided that they comply with the composition requirements under that legislation. In addition, the tribe concerned is deemed to be a traditional community.[15]

The functions of the land administration committee, or the traditional council acting as the land administration committee, are set out in the Communal Land Rights Act and can be elaborated upon in the rules. Prominent among these functions are ensuring the registration of communal land and of new order rights; and promoting and safeguarding the interests of the community and its members in their land.

EXPLANATION AND ASSESSMENT OF THE ACT

The Act is organised into ten chapters. Chapter 1 contains definitions and describes the scope of the Act. Chapters 2 and 3 set out broad principles as well as conditions and formalities required for transfer. Conditions for the provision of comparable redress are set out in ch 4. Chapter 5 deals with the enquiry and determination phases and ch 6 with community rules. Chapters 7, 8 and 9 pertain, respectively, to land administration committees, land rights boards and Ingonyama Trust Land. Chapter 10 contains general provisions.

In the more detailed discussion which follows, the Act's objectives and initial two chapters are addressed first. Next the enquiry and determination process dealt with in ch 5 is examined. The transition from old order rights to new order rights is critical for an understanding of the Act and is scrutinised here. The discussion then returns to ch 3, the transfer process, and ch 6, requirements for community rules, before examining the remaining chapters chronologically.

Long title and objectives

The long title sets out the broad objective of securing tenure by transferring land to 'communities' and converting 'old order rights' to 'new order rights'. This objective is elaborated upon in the memorandum that accompanied the Bill[16] when it was considered by the legislature. The memorandum lists eight objects (para 2, page 19) which are included here because they provide a useful matrix for evaluating the Act on its own terms. The stated objects of the Bill were to:

[15] The issues of community choice, the legislative history of the provisions and the conflicting interpretations of the two departments are discussed in more detail later in this chapter.

[16] The Communal Land Rights Bill 67 of 2003 was introduced in Parliament at the end of October 2003.

- legally recognise and formalise the African traditional system of communally held land within the framework provided by the Constitution;
- legally secure land tenure rights of communities and people (including women, the disabled and the youth) within the tenure system of their choice;
- provide for the transfer and registration of communal land and rights in and to that land;
- create a uniform national registration system for all tenure rights whether held individually or communally;
- provide comparable redress where rights cannot be legally secured *in situ*;
- provide for community rules which are aligned with the Constitution and for their registration;
- 'provide for a systematic and democratic administration of communal land in which traditional leaders and local and national government actively participate and support communities in the administration of their land and tenure rights'; and
- 'extend the African people's access to land'.

Chapter 1: definitions, scope and application of the Act

Some of the definitions used in the Act are familiar from other land reform laws: the definition of 'community' was borrowed from the Restitution Act (with important changes which will be discussed below) and that of 'beneficial occupation' from the Interim Protection of Informal Land Rights Act.

The term 'community' is defined as 'a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group'. 'Communal land' is defined as the land contemplated in s 2 of the Communal Land Rights Act, that is, the section setting out the scope and application of the Act, with the added requirement that such land must be occupied or used by members of a community.[17]

There are significant differences between the definition of community in the Restitution Act and in the Communal Land Rights Act. The first is that whereas the Restitution Act includes 'part of a group' within its definition of community, the Communal Land Rights Act does not. The second is that in terms of the Restitution Act, no legal consequences flow from the assertion of community status. The commission or court is bound to first determine whether a claimant group qualifies as a community. In contrast, the Communal Land Rights Act does not provide for the investigation of the social boundaries of the community. Its existence and socio-legal boundaries are assumed.[18]

[17] Only 'communal' or occupied/used land can be transferred in terms of s 6. Section 39 makes the Act applicable to a category of persons, namely, beneficiaries on communal land. Unused or unoccupied land falling under the scope of s 2 cannot be dealt with by way of transfer. The Act does not authorise the disposal of unused or unoccupied state or other land listed in s 2.

[18] The term 'community' (and its definition in the Restitution Act) is employed for purposes of conferring legal standing on people who were dispossessed as a group and may lodge a group claim for restitution. The Restitution Act contemplates that the Land Claims Commission and the Land Claims Court consider evidence on the existence of the group, that is, the existence or

Section 2 delineates the scope of application of the Act. The Act applies to state-owned land in the former homelands and trust land. This is the land set aside for African people under colonial and apartheid laws. Thus, in effect, the Act applies only to African people.[19] Section 2 also includes surviving 'black spots' of African-owned rural land, and land awarded since 1994 to land reform beneficiary groups.

The application of the Act is defined in terms of five categories of land:

- state land which is beneficially occupied;[20]
- state land which was held by the South African Development Trust and homeland governments;
- state land in KwaZulu–Natal to which the KwaZulu–Natal Ingonyama Trust Act 3KZ of 1994 applies;
- land acquired by or for a community and occupied or used communally; and
- other land obtained under land reform.

The category of 'land acquired by or for a community' includes land purchased by African persons and syndicates, but registered in the names of white trustees or a church to avoid the prohibition on African land ownership outside the reserves. It may also include land awarded under the Restitution Act or redistributed under the Provision of Land and Assistance Act.

The last category overlaps the scope of the Communal Land Rights Act with that of the Restitution Act and the CPA Act.

Thus the starting point is to establish whether particular land falls within the ambit of the Communal Land Rights Act. It should be noted that a general provision at s 39 broadens the potential scope of the Act to a wide category of

otherwise of the shared rules governing access to land. In the matter of *Department of Land Affairs and others v Goedgelegen* 2007 (10) BCLR 1027 (CC), Moseneke DCJ considered whether the Popela community constituted a community for purposes of the Act. He commented, in paras [43] and [45], that

> 'the Land Claims Court was wrong to hold that the applicants were not a community because they did not prove an accepted tribal identity, or that they did not live under the authority of a chief designated by tribal hierarchy or that they did not occupy the land in accordance with ancient customs and traditions. None of these attributes are requirements in themselves or collectively .... The acid test remains whether the members of the Popela Community derived their possession and use of the land from common rules.'

[19] This is confirmed by the Memorandum on the Objects of the Communal Land Rights Bill which states that the Bill addresses access to land by African people.

[20] This category covers all the land occupied by persons protected under the Interim Protection of Informal Land Rights Act. Section 1 *(a)* is formatted in a manner indicating that the original intention may have been that the first and second categories were conjunctive and overlapped completely. However, the wording now creates a separate category of land occupied by persons qualifying for protection under the Interim Protection of Informal Land Rights Act, that is, beneficial occupiers who have lived on state land as if they were owners for the last fifteen years. The term 'beneficial occupation' is used in different contexts and to different effects in the Restitution Act and the Development Facilitation Act. The latter defines 'beneficial occupation' of land as an interest in land worthy of protection. Precarious occupation is not excluded. The main intention here is to give legal recognition to the factual circumstance of established peaceful occupation in the context of land reform. See Carey–Miller & Pope, 2000: 582.

people outside the listed areas, namely, 'beneficiaries of communal land or land tenure rights in terms of other land-reform laws'.

Relationship to other landholding laws

The Act, in particular s 5(2) and s 39, gives little if any guidance on how different land reform laws dealing with tenure (such as the Restitution Act and the Development Facilitation Act) and laws facilitating communal ownership (such as the Communal Property Associations Act, the Companies Act 61 of 1973, the Trust Property Control Act 57 of 1988 and the Co-operatives Act 14 of 2005) are to be reconciled with the Communal Land Rights Act.

Section 5(2) envisages that title deeds of land currently owned by trusts, CPAs and other legal entities (that is, not state land) shall be endorsed to reflect the community as the registered owner after determination by the minister.[21] In any event, 'such land remains subject to all obligations imposed on it, and remains entitled to all rights accruing to it'. Strictly speaking, all CPAs and community land trusts,[22] whether they represent the whole of a community as defined under the Communal Land Rights Act or only part of such community, must go through the procedure of enquiry, determination, rule-making and registration under the Act.

Mostert & Pienaar (2005: 11) conclude that 'the Communal Land Rights Act remains vague and nonsensical concerning the continued operation of such communal property associations'. The result is that persons and communities living in areas included within the ambit of the Act have no choice but to be governed by its provisions regardless of whether their tenure is currently secure or not. Communities and persons whose tenure is secure are subjected to a law that may make their rights uncertain in that the constituting document of a landholding company or CPA must now be read in conjunction with and subject to the Act and its regulations, the ministerial determination and community rules.

In effect, the Act applies only to Africans. Land occupied by white co-owners will not fall under the ambit of s 2. Thus, the effect is that Africans with secure tenure are now subjected to a law that may make their tenure less secure. For this reason alone, s 2 and its implementation must be scrutinised for constitutionality.

In conclusion, ch 1 deals with definitions but fails to clarify important concepts employed in the body of the Act. These include community boundaries; overlapping, shared community access rules; and smaller communities within larger communities.[23]

[21] In *Tongoane*, the Kalkfontein and Makuleke communities claim that their CPA and trust land will be endorsed over to the larger tribal authority or traditional councils claiming to represent them. The communities say that such endorsement would undermine the private property rights of their landholding entities, rights which are protected by s 25 of the Constitution.

[22] There are currently about 2 000 land reform projects involving as many associations, trusts and other communal landholding entities.

[23] In terms of s 18(2), the minister determines the extent of the land to be transferred to a community. The Act does not provide guidance on how to determine the size of a community or the size of the land on which a community exercises access rules.

Chapter 2: juristic personality and legal security of tenure

This chapter reiterates the constitutional entitlement to tenure security, and confirms the principle of gender equality and non-discrimination with regard to all legal instruments dealing with tenure and tenure security.

The Act confers legal personality and corporate status on a community once community rules have been registered. The rule-making and adoption process is subject to community scrutiny and requires a community decision at a democratic community meeting.[24] This does not necessarily mean that a community lacks legal capacity outside of the operation of the Act under customary law.[25] Also, s 19 of the Upgrading of Land Tenure Rights Amendment Act provides that a tribe has legal capacity to own property.[26]

Section 4(1) of the Communal Land Rights Act restates s 25(6) of the Constitution and confirms that the Act is indeed the legislation contemplated in s 25(6) and s 25(9) of the Constitution. Section 4(1) of the Act qualifies the entitlement to security or redress by stating that it is subject to the availability of state resources. Section 25(6) of the Constitution and the Interim Protection of Informal Land Rights Act do not contain such a qualification. Unlike s 4(2) in the Act, s 4(1) and its awards of security and redress are not immediately available or deemed to exist once the Act comes into operation. Section 14(1) provides that a s 4 right must be preceded by a land rights enquiry and, by implication, the ministerial determination.

Section 4(2) constitutes a far-reaching deeming provision. An old order right that relates to a person in a marriage relationship is deemed to be held in co-ownership or in equal undivided shares by all the spouses in the marriage. This deeming provision overrides the terms of the relevant matrimonial property regime and the legal consequences flowing from marriage under statute law or customary law. Secondly, the equal right of spouses comes into immediate effect once the Act comes into operation. The birth of the entitlement is not subject to a prior enquiry or determination.[27]

Historically, statute law restricted marriage relationships to monogamy while customary law had no such restriction. For example, an old order right may be registered in the name of the male spouse as was prescribed by law in the case of

[24] Section 19(1) read with s 17(2). Decisions must be adopted by way of a majority decision at a membership meeting of which twenty-one days' prior notice has been given.

[25] Okoth–Ogendo (2000: 21) writes that '[c]are must be taken to avoid the colonial assumption that African communities have no legal (or corporate) persona hence can only hold or administer land resources through jural entities created by Anglo–American law.'

[26] Section 19 reads: 'Legal capacity of tribe to obtain property.—(1) Any tribe shall be capable of obtaining land in ownership and, subject to subsection (2), of selling, exchanging, donating, letting, hypothecating or otherwise disposing of it.' Unlike s 20, s 19 was not repealed by the Communal Land Rights Act. Section 20 dealt with transfer of tribal land to a tribe following a tribal resolution to that effect by a majority of adult members of the tribe at a specially convened meeting.

[27] Section 14(1) cannot conceivably be interpreted as overriding the explicit language of s 4(2). In s 14, the legislature must have intended to refer to s 4(1) rather than s 4.

Permission to Occupy certificates (PTOs).[28] Under the Act, all spouses will hold the old order PTO in shares. Registration of shareholding will be effected only on confirmation or conversion of the right under s 18.

Section 4(2) also deals with the consequences of joint holding once an old order right has been confirmed or converted into a new order right under s 18(3). Such a confirmed or converted right must be registered in the names of all the spouses in the marriage, and notwithstanding the provisions of other laws, custom or practice.

Section 4(3) contains the blanket requirement of gender equality and prohibits gender discrimination in all legal instruments, including community rules, dealing with security of tenure and land rights.

Section 4(2) creates a number of problems. Firstly, the body of the Act does not create a mechanism or authority for the registration of confirmed old order rights.[29] Secondly, s 18(4)*(b)*(i) allows for the conferral of a new order right on a woman to be held jointly with her (singular) spouse who is a male holder of an old order right. This contradicts s 4(2), as will be explained in more detail.

Chapter 5: land rights enquiry and ministerial determination

This section starts with a discussion of the enquiry and determination process, and then examines the building blocks for the transfer and registration process, namely, old order rights and new order rights.

The preamble records that the first objective of the Act is to 'provide for legal security of tenure by transferring communal land . . . to communities'. Chapter 3, s 6 contains the operative provision. It obliges the state to transfer communal land to a community: 'After making a determination in terms of section 18, the Minister must . . . transfer the entire communal land determined by her or him to be the land to which a community is entitled, to such community . . . .'

For present purposes it is useful to distinguish between pre- and post-transfer implementation steps and administrative processes. The s 14 enquiry results in the s 18 ministerial determination, which in turn creates the duty to transfer land and register new rights. New order rights are created under the provisions of s 18.

Prior to the transfer of title, the conversion of old order rights to new order rights, or to the award of comparable redress,[30] the minister institutes a land rights enquiry. No old order right can be secured, converted or cancelled[31] without such a

[28] For an explanation of PTOs see fn 51.

[29] The Act is silent on the mechanism for registration of a confirmed old order right at the instance and costs of the state. The statutory powers of the land administration committee are limited to the registration of new order rights while the jurisdiction of the deeds office is limited to the registration of cancellation of old order rights, the registration of new order rights, the conversion of old order rights to full ownership and the registration of deeds of (the whole of) communal land rights.

[30] The determination of an award of comparable redress must comply with the provisions of s 18, which is in turn dependent on a consideration of a land rights enquiry report.

[31] An old order right can be cancelled with the written consent of the holder without the need for a land rights enquiry. Once there has been an enquiry, an old order right can be cancelled without the holder's consent, but then the holder would be entitled as of right to comparable redress.

land rights enquiry. The minister appoints an official or consultant to conduct the enquiry and submit a report. If the enquirer is not a state official, the salary and expenses are paid for by the state.

The enquiry must deal with:

- the nature and extent of rights, including constitutional and human rights, which are or may be affected by such enquiry (s 14(2)*(a)*);
- the interests of the state (s 14(2)*(b)*);
- the potential options for securing insecure rights (s 14(2)*(c)*);
- equity of access to land (s 14(2)*(d)*);
- spatial planning and development planning including, if necessary, a programme for de-densification (s 14(2)*(e)*);
- the type and amount of compensation required for comparable redress (s 14(2)*(f)*);
- measures required to ensure tenure security as contemplated in s 25(6) of the Constitution, to ensure registration of rights in the names of all spouses,[32] and to ensure that no law, community rule, practice or usage discriminates against women (s 14(2)*(g)* first part), and measures required to 'promote gender equality in the allocation, registration and exercise of new order rights' (s 14(2)*(g)* second part);
- any matter relevant to the minister's determination in terms of s 18 (s 14(2)*(h)*);
- any matter prescribed by regulation or instructed by the minister (s 14(2)*(i)*); and
- disputes relating to land and rights in land (s 14(2)).

The duties of the enquirer are set out in s 17. Firstly, he or she must work in an open and transparent manner, and encourage participation by affected communities and individuals (s 17(1)). The minister must give notice of the enquiry in the media and invite interested parties to participate (s 16*(a)*). Secondly, the enquirer must ensure that community decisions are 'in general ... informed and democratic ...' and made by a majority of adult members at a meeting called on at least twenty-one days' notice (s 17(2)).[33] Thirdly, the report must make recommendations on each of the matters to be determined by the minister including:

- the location and extent of the land to be transferred to the community or person, 'where applicable' (s 18(2));
- the possible partition of the communal land into a communal area, subdivided area, and/or an area reserved for the state (s 18(3)*(a)*–*(c)*);

[32] There is no provision for the registration of confirmed old order rights, unless the holder applies and pays for such registration.

[33] It is not clear what aspect of the enquiry and the enquirer's work strictly requires a community decision. The report and recommendations do not require a community endorsement or decision. The only statutory requirement in respect of community participation with regard to the enquiry report is that it must be made available for inspection and that representations will be submitted to the minister at the same time as the report is submitted. Section 19(1) requires that community rules must be adopted by way of a community decision contemplated in s 17(2).

- the confirmation, conversion or cancellation of an old order right (s 18(3)*(d)*);
- in the case of a conversion to a new order right, the nature and extent of such a right (s 18(3)*(d)*(ii));
- the identification of the holder or holders of a new order right (s 18(4)*(c)*);
- the reservation of rights to the state for public purposes and land use conditions (s 18(4)*(a)*);
- the conferring of a new order right on a woman (s 18(4)*(b)*); and
- the handling of any putative old order right (s 18(4)*(c)*).

Fourthly, the report must be made available for inspection by interested parties who must be given an opportunity to comment and make representations. Such representations must be forwarded to the minister for consideration (s 17(3)). Finally, the minister may determine further duties for the enquirer.

The enquirer's obligations do not go far enough. Critically, the identification and determination of the social boundaries of the community concerned is not mentioned as a task of the enquirer. Instead, he or she recommends the location and extent of the land to be transferred. The existence or otherwise of the 'community' is not investigated. Community restitution claims are subjected to the scrutiny of the Land Claims Court and the Land Claims Commission for compliance with the jurisdictional requirement that a community (with shared access rules) existed at the time of dispossession and at the time of lodgement of the claim.

The Act employs a similar definition of community to the Restitution Act, but there is no commensurate requirement in the Communal Land Rights Act of establishing the existence and composition of the community. The community, as defined in the Act, is a structured collectivity whose composition, structure and boundaries over time are defined by the communal system of rules, customary law or custom.[34] Instead, in the Act's operationalising mechanisms, the 'community' is assumed. All persons living on land under the jurisdiction of a traditional council or apartheid-imposed tribal authority are regarded as being part of the community for purposes of the Act. The problem is compounded as the definition of 'community' in the Communal Land Rights Act excludes the caveat contained in the Restitution Act definition that part of a group can qualify as a community.

The second shortcoming is that the enquirer is not obliged to identify all existing use rights and their characteristics, even if he or she does not regard them as old order rights. What is absent is a specific requirement for the recording of information about the duration, conditions for use and transferability of existing use

[34] The definition of 'community' implies that: *(a)* the structure and composition of the community or group are defined by the system of rules of the group, that is, its customary law or custom; *(b)* the recruitment and succession principles are derived from the same rules; and *(c)* any differentiation or sub-groups and their relation to the principal or larger group depends on the rules and custom. The Communal Land Rights Act, unlike the Restitution Act, does accommodate sub-groups with distinct property relations. Other jurisdictions also recognise that the identity of the landholding group must be ascertained by reference to customary law and customs (*Western Australia v Ward* (2002) FCA 191; 170 ALR 159 at [232]).

rights in respect of each user and holder.[35] The land rights enquirer and the minister perform a quasi-judicial function in determining old order rights, and unless there is a requirement that all existing and overlapping use and access rights are reviewed and reported on, the exercise of this function cannot be scrutinised and properly tested. Unless the length, breadth and certainty of each and every current right and interest is recorded, measures to promote tenure security cannot be properly designed and progress in attaining tenure security cannot be measured.

Determination by the minister

Based on the report of the land rights enquiry, the minister makes a determination. The ministerial determination under s 18 must deal with each of the eight recommendations of the enquirer enumerated above. The determination also takes into account all relevant laws (including law relating to spatial planning, local government and agriculture),[36] the 'old order rights of all affected right holders' (s18(1)*(c)*), the need for the promotion of gender equity (s 18(1)*(e)*) and the integrated development plan of each municipality.[37] Section 18(1) calls for balancing the needs of those who possess old order rights with the 'the need to provide access to land on an equitable basis'.

The minister's determination must cover the eight areas also dealt with in the enquirer's report, namely, the size of the land, partition, old order rights, new order rights, holders, state reservations, women's rights and putative rights. He or she determines whether all the land should be transferred to the community or whether the land should be sub-divided into portions and registered in the name of a person. The minister may also reserve part of the communal land to the state, including to the municipality. The minister may stipulate a land use, a land use condition or other condition.

Before the minister determines a reservation or land use, he or she must consult the national minister for local government, the relevant municipality and any

[35] Many of these old order rights have not been captured in records, databases or other official documents. User rights bestowed on women would be especially difficult to track down if holders did not come forward and participate in the enquiry. Pienaar (2004: 260) comments: 'It is questionable whether the minister will obtain sufficient information to determine how the land-use rights would be secured, because the overall picture of land-use rights will often be lacking . . . the mere enquiry into existing land-use rights by the land rights enquirer seems to be a piecemeal way of obtaining land information.'

[36] Existing legislation dealing with planning, local government and agriculture includes the Development Facilitation Act (soon to be replaced by new land use management legislation); provincial planning and development facilitation legislation and regional spatial planning frameworks therein; and the Municipal Systems Act 32 of 2000 and municipal integrated development plans, spatial frameworks and zoning plans framed therein. The Conservation of Agricultural Resources Act 43 of 1983 allows for the determination of stock and grazing limitations and the Subdivision of Agricultural Land Act 70 of 1970 requires a subdivision to constitute an economic unit. Any subdivision and change in land use may also be affected by the permitting requirements of the National Environmental Management Act 107 of 1998 and the National Heritage Resources Act 25 of 1999, which require impact assessments if a change is to impact significantly on environmental or heritage resources.

[37] In terms of the Municipal Systems Act.

relevant land use regulator. This may include the provincial development tribunal and the provincial environmental regulatory authorities responsible for environmental impact assessments. The Communal Land Rights Act authorises the minister to alter land use and land use conditions set down under planning laws.

Section 18(5) of the Act requires the resolution of outstanding disputes before a determination is finalised. Finally, s 16*(b)* requires the minister to publicise determinations made consequent upon a completed land rights enquiry through a notice in the media.

The minister's determination is pivotal to the procedure of the Act. It sets the scene for an irreversible land tenure and land use regime. The minister's decision is final as there is no provision for comment or internal appeal. The determination is not made public before finalisation—unlike the enquirer's report, which is made available for comment and representations that must be considered (s16(3)*(b)*). The Land Rights Board has no responsibilities or right of participation with regard to the ministerial determination. Section 18 does not contain the necessary checks and balances to ensure a legally sound outcome.

The determination process gives rise to three sets of issues: boundaries; planning and land use; and old order and new order rights.

Boundaries

The minister determines land ownership over fixed boundaries of land.[38] Where applicable, the location and extent of the land to be transferred to a community or person has to be determined by the minister.[39] This determination will be applicable when comparable redress is awarded. Section 12(2)*(a)* provides for the award of land other than the land to which the relevant old order right relates.

The question remains whether the minister must consider or reconsider the boundaries of traditional council areas (in the case of state land) and the boundaries of private communal land (CPA land, trust land or land held by a church on behalf of a community as envisaged in s 5(2)). There is no explicit requirement that such existing boundaries must be revisited by the minister or the land rights enquirer. Similarly, there is no explicit requirement that the 'community' must be identified and its social boundaries mapped out. For example, where communal church land falls within the area of jurisdiction of a traditional council, the minister may incorporate the church community into the community represented by the traditional council, and the church land into the land under the jurisdiction of the traditional council.[40]

[38] The legislation authorises this quasi-judicial administrative act. It amends the customary law principle of flexible social and physical boundaries. See chapter 5 by Ben Cousins in this book.

[39] Section 18(2). The extent of the land will not be relevant where the land concerned is already registered for the benefit of a community as contemplated in s 2(1)*(c)*–*(d)*, and s 5(2)*(a)*. The boundaries of the land will also not be contestable where a community has a recognised traditional council as envisaged in s 21(2).

[40] Section 5(2)*(a)* requires that existing obligations and rights accruing to the land and the community (including title deed conditions) would be honoured.

Tribal authority boundaries are contentious because they were demarcated in the 1950s and 1960s as a part of the implementation of apartheid.[41] The Bantu Authorities Act 68 of 1951[42] provided for the assignment of a defined area of land to a chief or headman of a tribe or community.[43] A tribal authority[44] is reconstituted as a traditional council under the Traditional Leadership and Governance Framework Act. Its area of jurisdiction remains the same unless the provincial premier decides to disestablish the tribe and community, and thereafter to re-establish it and its traditional council with a new area of jurisdiction.[45]

Where boundary disputes exist or new boundary conflicts arise as a result of the enquirer's report, such a dispute will have to be raised before the minister. He or she may then have to clarify such boundaries, and any dispute will have to be dealt with under s 18(5) of the Communal Land Rights Act.[46]

Planning and internal boundaries

The determination must specify whether: *(a)* the whole of the land should be (or remain) registered in the name of a community; *(b)* the whole of the land should be subdivided into portions registered in the name of individuals; or *(c)* part of the land should be registered in the name of the community and part subdivided and registered in the name of individuals (s 18(3)*(a)–(c)*).[47]

Section 18(3)*(c)*(ii) allows for some of the communal land to be reserved as state land. If it is private communal land as described in s 5(2), then presumably such land will have to be purchased or expropriated in terms of s 38. Public amenities can be built on such public land and public roads can be serviced.

The minister's determination also involves land use planning and zoning. The minister can set conditions and reserve rights in favour of the state. The land to be transferred may have to provide housing and public amenities associated with formal townships. These will have to be catered for before formal transfer occurs. The minister is required to have regard to all law governing spatial planning and take into account the integrated development plan. He or she must consult the

[41] See chapter 9 by Peter Delius in this book.

[42] Later renamed the Black Authorities Act.

[43] Section 2(2) of the Black Authorities Act.

[44] Tribal authorities were previously called Bantu authorities.

[45] Chapter 6 of this Act provides for the establishment and terms of reference of the Commission on Traditional Leadership Disputes and Claims. The commission may investigate and rule on the legitimacy and disestablishment of tribes, and on traditional authority boundaries. It has a five-year lifespan.

[46] The Act does not require the minister to consult the affected communities in cases where there are boundary disputes or lack of clarity. Furthermore, it is unlikely that the enquiry and determination process will happen simultaneously in all neighbouring communities. Neither does the Land Rights Board have a say about community boundary issues.

[47] It is only under the third option that part of the land can be reserved to the state for public purposes. Under the first two options, the minister can reserve a 'right' to the state and a municipality (in terms of s 18(4)), but not land.

local government minister, the municipality and each land use regulator (s 18(1)*(b)* and s 18(4)).[48]

Section 18 raises major issues relating to the planning and development process. The question is how all the spatial development planning issues can be dealt with properly in parallel with the tenure determination and implementation process. Section 18 contemplates that the development planning process will articulate with the tenure implementation process through the minister's consultation exercises with the planning agencies. What is absent is an iterative planning process with maximum public participation. For example, neither s 16 nor s 18 allows for inputs by the private sector and potential investors. The procedure in the Act limits the development options of communal land to the formalisation and privatisation of current tenure arrangements and setting aside some public land for public purposes. This happens after consultation with the statutory planning agencies, all of which are likely to have undertaken their planning exercises in other contexts and before there was a possibility of tenure reform. The subdivision of communal land and setting aside of public land is final. Any reversal may be costly because it could involve the repurchasing of what was formerly and formally a state asset.

Old order rights and new order rights

The Act envisages the conversion of certain 'old order rights' to 'new order rights'. A new order right is defined as 'a tenure right in communal or other land which has been confirmed, converted, conferred or validated by the Minister in terms of section 18'. The minister determines whether an old order right is to be confirmed, converted into ownership, converted into a comparable new order right or cancelled (s 18(3)*(d)*).

Old order rights

Holders of old order rights qualify to be considered for allocation of new order rights. The definition of old order rights in the Act is not limited to formally allocated rights or rights allocated in terms of statute law. It also includes tenure rights that are 'formal or informal' and rights that derive from 'law, including customary law, practice or usage'.[49]

[48] Land use regulators would include provincial development tribunals, provincial planning departments, municipal planning departments, and sectoral departments at national and provincial level dealing with environmental and resource exploitation regulation including agriculture, water, forests and minerals.

[49] The definition of old order rights reads as follows:

> '"**old order right**" means a tenure or other right in or to communal land which —
> *(a)* is formal or informal;
> *(b)* is registered or unregistered;
> *(c)* derives from or is recognised by law, including customary law, practice or usage; and
> *(d)* exists immediately prior to a determination by the Minister in terms of section 18,
> but does not include —
> (i) any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely of a contractual nature; and

The exercise of defining tenure rights derived from customary law is problematic. Not only is living customary law in constant flux but it is also burdened with distortions as a result of colonial codification and apartheid interpretation. Its development under the new Constitution is an ongoing process. South Africa's property law regime and preoccupation with the ownership model and associated hierarchical construction of power relations limits the capacity to specify and define the nature and content of customary tenure rights (Van der Walt, 1999: 33); Dlamini, 1991: 40).[50]

The definition of old order rights in the Communal Land Rights Act includes rights derived from custom, practice and usage. These would include the myriad of undeveloped or 'secondary' rights forming part of a bundle of rights, among them rights of cultivating, grazing and gathering. These are rights exercised exclusively, concurrently and sequentially with flexible spatial boundaries depending on land use and need. Exchanges may be subject to reversionary rights. The employment of the terms 'practice' and 'usage' and whether they refer to current or historical use and practice have important ramifications, particularly in relation to the protection of the current use rights of women. Claassens (2005: 57) argues that

> 'the Act's failure to define use rights together with the deep ambiguity about the meaning of "usage", the absence of measures to assist women to assert and defend use rights, and the titling paradigm adopted by the Act as a whole combine to create a very difficult and unequal environment within which to assert use rights against recorded rights.'

Rights derived from or recognised by statute law would include the permits under apartheid laws and the statutory rights created by, or mentioned in, the new land laws after 1991. Old order rights include PTOs.[51] Other rights recognised by statute law include the informal rights falling under the ambit of the Interim

(ii) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier.'

[50] See also chapter 6 by Tom Bennett in this book. According to Okoth–Ogendo in chapter 4 of this book, 'the nature and content of land rights under indigenous law continues to be persistently misrepresented and distorted in scholarship and public policy'.

[51] PTOs are the most common record of formally allocated individual land rights. The PTO system is a statutory form of land control regulating the occupation of unsurveyed communal land. PTOs were issued in terms of Proclamation R188 of 1969 (Black Areas Land Regulations), various irrigation scheme regulations and preceding delegated legislation under the Development Trust and Land Act and the Black Administration Act of 1927. PTOs have a long history in South African statute law and segregated land law. Historically, quitrent grants were issued in respect of surveyed allotments and PTOs in respect of unsurveyed stands. PTOs for residential and arable purposes could be granted only by native commissioners after consultation with the tribal authority, chief or headman. While headmen or tribal councils were directly involved in the land allocation process, the allocation was not valid until the commissioner issued a PTO certificate. The succession rule of male primogeniture prevailed regardless of the prior local custom. See Claassens (2005) for a description of discriminatory practices in the administration of PTOs. Budlender & Latsky (1991: 122) refer to the nationalised quality of land held under quitrent and PTO regime. The system is characterised by a large bureaucracy, wide discretion of functionaries and arbitrariness. If a right is cancelled, the land reverts to the trust.

Protection of Informal Land Rights Act, including the statutory right of 'beneficial occupation'. Existing statute law[52] already provides, albeit inadequately, for the conversion or formalisation of certain old order rights now coming under the ambit of the Communal Land Rights Act.

The definition of old order rights excludes temporary or contractual rights of occupancy,[53] labour tenancy,[54] sharecropping[55] or rights in terms of an employment contract.[56] The exceptions indicate the intention that only long-term occupiers on communal land are to be protected.

The definition of old order rights is vague—perhaps deliberately so. The definition needs to accommodate the diverse number of communal tenure arrangements which exist and are possible. The Act envisages a process whereby existing old order rights are converted to new order rights and registered. The question is whether the Act succeeds in its objective of providing effective mechanisms for the formalisation of all old order rights.

There are eight possible outcomes for an old order right:

- substitution with an award of comparable redress on application by the holder of the old order right (s 12 and s 18);
- cancellation on agreed written terms (s 13 read with s 3(1)*(d)ter*(1B) of the Deeds Registries Act 47 of 1937 and s 5(3)*(a)*);
- cancellation so determined by the minister when the holder will be entitled to comparable redress (s 18(3)*(d)*(iii) read with s 3(1)*(d)ter*(1B) of the Deeds Registries Act and s 5(3));
- confirmation (s 18(3)*(d)*(i));
- conversion into 'full' ownership with a deed of transfer (s 18(3)*(d)*(ii) read with s 3(1)*(d)ter*(1A) of the Deeds Registries Act);
- conversion into a comparable new order right, the transfer of which is evidenced by a deed of communal land right (s 18(3)*(d)*(ii) read with s 3(1)*(d)ter* of the Deeds Registries Act and s 6*(b)*(iii));
- validation if it was a 'putative' old order right acquired in good faith (s 18(4)*(c)*); and
- invalidation if it was a 'putative' old order right not acquired in good faith (s 18(4)*(c)*).

The s 18(3)*(d)*(ii) 'conversion into full ownership' category requires a short explanation. The minister is not authorised to initiate the registration of full ownership rights. The holder of an old order right wanting full ownership can apply

[52] For example, the Upgrading of Land Tenure Rights Amendment Act in respect of statutory rights such as PTOs and quitrent; and the Development Facilitation Act in respect of non-statutory *de facto* use rights.

[53] This includes instances where the basis of occupancy is purely contractual and termination can occur in accordance with the agreement. These are not long-term occupancy rights.

[54] The Land Reform (Labour Tenants) Act addresses labour tenants.

[55] Sharecropping is a form of labour tenancy, which is dealt with in the Labour Tenants Act.

[56] Employment and occupancy frequently go together. Security of tenure for these relations are dealt with in the Extension of Security of Tenure Act 62 of 1997.

for deeds office registration. The land administration committee does not have the power to register such converted old order rights. Secondly, such full ownership rights and excision from the communal area does not require community approval. Thirdly, a beneficiary of this conversion category is responsible for transfer duty, value added tax, stamp duty, 'deeds registration fees of office' as well as surveying and registration costs. In terms of ss 9–10, a conversion from an old order right to a new order right (rather than to full ownership) is exempt from these fees and costs. It should be noted that s 17(3)*(a)* requires the land rights enquirer to recommend the location and extent of the old order right to be transferred to full ownership, and the minister must make such determination under s 18(2).[57]

New order rights

The Act allows for the registration of new order rights in the name of a person. It envisages that while title will be transferred to the 'community' as a whole, within the community new order rights (which are not equivalent to ownership, but would be registered) will be vested in persons and the community. The Act attempts to create a balance between group ownership and individual rights in the form of deeds of communal land rights. However, individuals can also be issued with ownership rights and part of the original communal land can be excised and subdivided for individual ownership.

Registration of a new order right necessarily involves its individualisation.[58] The first question is whether all the use rights deserving of protection will be captured under the rubric of a registered new order right. The second question is whether the right as defined accommodates all the persons with interests in the right.[59]

The content or minimum content of new order rights is not set out in the Act. New order rights are defined in s 1 and s 18 as rights 'confirmed, converted, conferred or validated by the Minister'. The minister determines whether an old order right should be confirmed, or converted into ownership, or converted into a new order right. He or she must determine the nature and extent of a new order right.[60] The minister must also nominate and determine the holder of a new order right (s 18(4)*(c)*).

[57] The Act does not explain or motivate the differentiation between 'direct and self-help conversions' from old order rights to full ownership and the other categories of upgrade. The other categories provide for gratis subdivision and transfer, but the conversion process must be initiated and driven by the state machinery. A cynical explanation would be that the Act intentionally favours those holders of old order rights with the financial and other means to initiate transfer of full ownership without community oversight.

[58] Pienaar (2004: 263).

[59] Chapter 7 by Aninka Claassens and Sizani Ngubane in this book deals with gender discrimination and the risk that the new order right will not accommodate the rights of all the household and family members. Chapter 5 by Cousins refers to the shortcomings of the Act relating to the rights and participation of other levels of social organisation, including at family and village level.

[60] Section 18(3)*(d)*(ii) requires the minister to determine the nature and extent of a comparable new order right when the relevant comparable new order right is created as a result of a conversion of an old order right.

In terms of s 24(3) of the Act, the land administration committee or traditional council has the power to allocate new order rights; to register communal land and new order rights; and to establish and maintain registers and records of all new order rights and transactions affecting such rights. The land administration committee or traditional council 'must ... take measures toward ensuring ... the allocation [of new order rights] ... after a determination by the minister ...' (s 24(3)*(a)*(i).[61]

On the one hand, the minister must determine the holders of (new order) rights; on the other, the land administration committee is responsible for the allocation and registration of new order rights. The ambiguity does not make for certainty in law and legal security of tenure. This raises questions as to how the two processes will harmonise with one another, and how discrepancies between registers will be dealt with. In practice, because of scale and distances involved, registration is likely to be more effective at the land administration committee level.

A new order right comes into existence on the day of the minister's determination. A new order right cannot exist before that day and a further or new new order right cannot be conceived after that day. An existing new order right can be transacted if so allowed, conditioned on the minister's determination and the community rules. These transactions and new allocations must be registered in the deeds office (s 8) and the land administration committee register (s 24(3)*(b)*).

This still leaves unresolved the issue of the content of new order rights. These rights must be 'comparable' (s 18(3)*(d)*(ii)) with the relevant old order right and must comply with gender equality requirements of the Act.[62] They are registered,[63] in contrast to unregistered old order rights, whether confirmed or not. They are not (yet) ownership rights as s 9 creates a new category of statutory freehold ownership rights. They are something less than ownership and may be classified as *sui generis*.[64]

[61] The powers of the minister and the land administration committee/traditional council appear to be overlapping and incompatible.

[62] Sections 4(2), 4(3), 5(1), 18(4)*(b)* and 24(3)*(a)*(i).

[63] In terms of s 5(1), new order rights must be registered; in terms of s 6*(b)*(iii), new order rights are transferred by the minister on behalf of the community to the person entitled to the right by means of a deed of communal land right reflected in a communal land register opened in terms of the Deeds Registries Act, suitably amended by the Communal Land Rights Act.

[64] Olivier (2006: 305) describes what is transferred to individual community members as 'rights less than ownership'. The content or incidents of a new order right transferred by way of deed of communal land right are not spelt out in the Act. At least two administrative actions may impact on the content of the right. Firstly, s 17(3)*(a)* and s 18(3)*(d)*(ii) require the enquirer to report on, and the minister to determine, 'the nature and extent' of a comparable new order right so converted from an old order right. The minister's determination on 'nature and extent', insofar as it addresses content and provides a description of the right besides size in hectares and an appropriate appellation, may be reflected in the deed of communal land right. However, there is no express and specific statutory requirement in this regard. Secondly, the minister may stipulate conditions necessary to protect the land, the rights on the land, the owner and the holder of a right as part of the ministerial determination. Such conditions, set in terms of s 18(4)*(a)*(ii), may impact on the content of a new order right insofar as they are reflected in the deed of transfer of communal land to a community under s 6*(a)* .

The minister determines the nature and the extent of a new order right, and the determination must take into account the enquirer's report. Community and membership participation in defining the content of a new order right is limited to comment and presentations in respect of the initial enquiry report.

The land administration committee has no statutory powers to determine or influence the content of a new order right. In addition, community and membership participation in defining the content of a new order right is limited to comment and presentations in respect of the enquiry report. Further, the community rules cannot decide on the content of a new order right. Significantly, community rules may determine the manner in which application may be made for the conversion of a new order right to freehold ownership under s 9. A community decision, presumably made under the s 17(2) democracy and accountability requirements, may impose conditions in favour of the community on a new freehold ownership title.

Chapter 3: transfer and registration (including communal general plan and register)

After making a determination, the minister must have a communal general plan prepared, approved and registered, and a communal land register opened. He or she must also 'transfer, by means of a Deed of Communal Land Right or other appropriate deed, the new order rights to the person or persons entitled to such rights' (s 6*(b)*(iii)). The holder of a registered new order right may apply to the community for permission to upgrade his or her right into freehold ownership at the holder's cost (s 9).[65]

In terms of s 5(1), new order rights must be registered. In terms of s 6*(b)*(iii), new order rights must be transferred by the minister on behalf of the community to the person entitled to the right. The deeds of communal land right are reflected in a communal land register opened in terms of the Deeds Registries Act and kept at the deeds offices under that Act.

The registration exercise is duplicated at community level. Section 24(3)*(b)* requires that a land administration committee 'must' establish and maintain 'registers and records of all new order rights and transactions affecting such rights as may be prescribed or as may be required by the rules'.

Section 19: community rules

In terms of s 19(2) of the Act, the land administration committee/traditional council has the power to regulate the administration and use of communal land by the community, as landowner, within the framework of law governing spatial planning and local government. Community rules have minimal impact on the

[65] 'Freehold ownership' is a further new form of tenure created by the Act. Community approval, subject to the community rules, is required. A community may impose conditions or reserve any right in favour of the community, and the conditions may be registered against the title of 'freehold ownership'.

nature and content of new order rights.[66] Section 19(3) confirms that rules are binding on the community and its members. They are registered and deemed to be public knowledge.

The rule-making and community adoption processes are directed under s 19(1) and s 17(1)–(2). Persons affected by the rules are to be afforded the opportunity to participate in the rule-making process. The adoption of the rules needs to be

> 'the informed and democratic decision of the majority of the members of such community who are 18 years of age or older and are present or represented by a proxy at a community meeting of which adequate notice of not less that 21 days was given' (s 17(2)).

In the absence of the community making rules, the standard rules—issued by regulation and as applied by the minister to the particular community's circumstances—shall prevail. The Act does not state when the rules must be made and who will assist the community in this exercise. From the chronological sequence of other events in the formalisation process, the following can be gathered: the community rules must be framed after the land rights enquiry report and after the minister has made a determination deciding on the boundaries of the community's land. In the absence of this, the constituency for the rules adoption meeting would not have been determined.[67]

The community rules determine the composition of the land administration committee and it therefore follows that the committee cannot drive the rule-making process. If there is a traditional council with jurisdiction, then the council will probably write the community rules. It there is no council, then the minister's default rules will probably apply unless he or she designates a s 36 officer to assist the community.

The Act, by implication, intends that community rules shall deal with the transferability of a new order right. Section 41(2)*(a)* states that it is an offence to grant a new order right to a non-member of a community, unless the granting of that right is in compliance with community rules. It appears that the intention is that a holder of a new order right may not transact the right to an outsider without the approval of either the community or the land administration committee. This would be consistent with the requirement for community consent before a registered new order right is upgraded to freehold ownership, as provided for in s 9.

[66] The community rules cannot deal with minimum content of new order rights, precisely because the power to determine such content resides exclusively with the minister. Interestingly, the CPA Act provides for community participation in the formulation of the community's constitution, and the constitution must deal with the rights of individual members. Such rights would, of course, be of a contractual nature and would not have statutory status. All the available evidence, including survey reports of the Council for Scientific and Industrial Research (Bosch & Hirschfeldt, 2004), the Leap (Ziqubu, Cousins & Hornby, 2004) and the Legal Resources Centre (Pienaar, 2000) suggests that the great majority of the more than 2 000 CPA constitutions and community land trust deeds fail to address the issue of land rights of individual members.

[67] In chapter 4 of this book, HWO Okoth–Ogendo comments on the inadequacy of the rule-making process.

On registration of the rules by the director general, the community acquires juristic personality.[68]

Comparable redress

The holder of an old order right that cannot be legally secured may receive an award of 'comparable redress'. The award may take the form of alternative land,[69] money or a combination of the two.

This provision follows s 25(6) of the Constitution, which requires that where tenure cannot be secured, comparable redress must be provided. Interestingly, no provision is made for a combination of an award of comparable redress and conversion to a new order right. If the proposed new order right is not satisfactory, then in accepting it, the holder of the old order right cannot apply for a 'top-up' of redress.

There are three possible situations that can lead to an award of redress:

- the holder of an old order right may apply for redress and the minister may determine such award under s 12(1) and s 18;
- the holder of an old order right may agree in writing to the cancellation of the old order right and, by agreement, receive an award in terms of s 13; or
- cancellation so determined by the minister, and not necessarily with the co-operation of the holder of the old order right, when the holder will be entitled to comparable redress in terms of s 18(3)*(d)*(iii).

New institutions

The Communal Land Rights Act creates a number of new statutory institutions, including a 'community' with juristic personality;[70] a land administration committee or the empowerment of a traditional council to act as a land administration committee with administration of land affairs as its functional area of competence (s 21(4)); a land rights board; and the Ingonyama Trust Board converted into the Ingonyama Land Rights Board for KwaZulu–Natal.

Chapter 7: land administration committee

The Act creates a land administration committee for each area of communal land transferred to a community. This committee represents the community and acts as

[68] Section 3 states that once the rules are registered, a community can acquire and dispose of rights subject to the rules, the Act and any other law.

[69] Alternative land may include land acquired or expropriated for purposes of the Act under s 38. Unlike the Restitution Act, the Communal Land Rights Act does not contain an explicit provision for the acquisition of state land, vesting in the national, provincial or local government, to satisfy comparable redress awards. As already explained, vacant, unused or unoccupied state land, despite being listed in s 2, does not fall under the ambit of the Act. Such land will have to be acquired under the State Land Disposal Act 48 of 1961 or relevant provincial land administration laws.

[70] Section 3 confers juristic personality, corporate status and perpetual succession on a community once its rules have been registered.

manager and representative of the owner of the land. Its powers can be augmented in the registered community rules. The statutory powers include allocation of new order rights as well as the establishment and maintenance of a register of new order rights and a register of tenure transactions. Duties include the task of liaising with the municipality and departments with regard to services, planning and development of the land.

The composition of the committee is augmented by a number of non-voting members, that is, persons designated by each of the following: the minister, the chairperson of the relevant land rights board, the provincial Members of Executive Council for agriculture and local government, and municipalities with jurisdiction over the area where the committee functions.

The land administration committee will be the traditional council, that is, the traditional authority established for the area under the Bantu Authorities Act and reconstituted under the Traditional Leadership and Governance Framework Act, if the traditional council so elects. The council then needs to meet certain prescriptions laid out in the Communal Land Rights Act in terms of composition. The land administration committee may also be an elected body that is not the traditional council, in which case it must not comprise persons holding traditional leadership positions.

The role of traditional councils is a controversial aspect of the Act. Their role was changed in the final version of the Act, seemingly to meet the demands of traditional authorities who will retain the functions of land administration. It is important to understand the wording and sequencing in the various versions of the drafts, the presentation of the Bills to Parliament and the wording in the final Act in order to fully appreciate the relationship and power dynamic between the traditional councils and the functions of the land administration committees.[71]

[71] Communal Land Rights Draft Bill (14 August 2002), clause 33:

'(1) A community shall, subject to and in accordance with its community rules and rules governing the conduct of meetings under section 7(3) and (4) and further subject to section 2*(e)*(ii) and (iii) —

(a) appoint an administrative structure;

(b) authorize an administrative structure to represent it or manage its interests in matters relating to land and land tenure rights in the communal land; and

(c) withdraw or renew such authorization by a resolution adopted at members [*sic*] meeting convened in terms of this Act and the community rules.

(2) Where applicable, the institution of traditional leadership which is recognized by a community as being its legitimate traditional authority may participate in an administrative structure in an ex-officio capacity; provided that the ex-officio membership in the administrative structure should not exceed 25 per cent of the total composition of the structure; further provided that the ex-officio component of the administrative structure shall have no veto powers in the decision-making of the structure.'

Communal Land Rights Draft Bill (3 October 2003), clause 29:

'(1) A community must establish a land administration committee as required by its registered community rules.'

Clause 30:

'(1) A land administration committee must consist of a total number of members as determined by the applicable community rules and must comply with subsections (2) to (7).

The first draft Bill published by the Department of Land Affairs provided for elected land administration committees supplemented, if so desired by the community, by *ex officio* traditional leaders to a maximum of 25 per cent. The second draft Bill followed fourteen months later and this version provided for a compulsory *ex officio* seat for the traditional leader and, depending on the community rules, 25 per cent membership appointed by the traditional leader. Surprisingly, fourteen days later, the third draft Bill approved by Cabinet juxtaposed elected land administration committees and traditional councils. The third draft Bill and the final Bill presented to Parliament contained the following definition for a 'land administration committee':

> '*(a)* a traditional council, in respect of an area where such a council has been established and recognised; and
> *(b)* a land administration committee established in terms of section 21, in respect of any other area.'

Part *(a)* of the definition was then dropped in the course of the portfolio committee deliberations and changes proposed by the Department of Land Affairs. Section 21(2)[72] was retained without change.

Section 21(2) of the Act confers on a traditional council having jurisdiction in the area concerned the right to assume the powers of the land administration committee—if the council so elects. The only consistent interpretation of s 21(2) is that a community has no choice; if there is a traditional council[73] with jurisdiction and otherwise qualifying,[74] and the traditional council elects to exercise the

> (2)*(a)* The recognized chieftainess, chief, headwoman or headman of the community concerned or her or his nominee must be a member of the relevant land administration committee by virtue of her or his office and, if provided for in the community rules, an additional number of persons nominated by such traditional leader to represent the traditional leadership of the community may be members of such committee up to a maximum of 25 per cent of the total membership.'
>
> Communal Land Rights Draft Bill (17 October 2003), clause 22:
>
> '(1) A community must establish a land administration committee which may only be disestablished if its existence is no longer required by this Act.
> (2) If a community has a recognised traditional council, the functions and powers of the land administration committee of such community *must* be performed and exercised by such traditional council' (emphasis added).

[72] 'If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council.'

[73] The majority of incumbents of a traditional council under the Traditional Leadership and Governance Framework Act, adapted to conform with the Communal Land Rights Act, are not elected but appointed in terms of customary law. The Traditional Leadership and Governance Framework Act deems an existing traditional authority to be a traditional council if it meets composition requirements within a year. Traditional authorities exist back-to-back in nearly all former homeland areas.

[74] Any recognised traditional council will qualify if its composition of membership satisfies the requirements of the Act. This includes that at least one third of the members should be women and that one member must represent the interests of vulnerable community members. Forty per cent must be elected. A number of persons may be designated by various public officials as non-voting members of the land administration committee. See s 3 of the Traditional Leadership and Governance Framework Act.

function, then there cannot be an elected land administration committee. 'May' in the context of s 21(1) is permissive, and its purpose is to enable a statutory body under another Act, the Traditional Leadership and Governance Framework Act, to perform a function under the Communal Land Rights Act. This interpretation is consistent with the Act's silence on a mechanism to exercise choice[75] and s 22(2), which excludes a traditional leader from being elected as a member of a land administration committee.[76]

Land administration committees will exist in communal areas only if there is no traditional council with jurisdiction for such an area. Regulations issued by the minister and the community rules will determine how members of a land administration committee will be elected. One third of the members of a committee must be women.

The Department of Land Affairs, however, asserts a contrary view to this interpretation. In its *Tenure Newsletter* of July 2004, the department claims that

> 'a traditional council may or may not exercise the powers and perform the functions of a land administration committee depending on the objective social, cultural, political and legal factors on the ground, including the legitimacy of such a traditional council. For the first time *a community has the right to exercise its discretion to choose an institution*, structure or a body of persons *other than the traditional leadership* to administer its communal land. The fallibility of traditional leaders in the past should not be used to destroy the institution of traditional leadership' (2004: 17).[77]

By contrast, the Department of Provincial and Local Government, which is responsible for the Traditional Leadership and Governance Framework Act and traditional councils, asserts that where traditional councils exist, they are the

[75] In the absence of any express or implied mechanism for a community referendum to decide the issue of whether a community is to have a recognised traditional council performing the functions of a land administration committee, the correct interpretation is that the election to have a recognised traditional council acting as a land administration committee lies with the traditional council itself. The issue of an appropriate land administration institution is neither on the reporting list of the land rights enquirer, nor on the list of issues on which the minister must make recommendations. The task of the enquirer is completed well before the minister's determination, the framing of community rules and the establishment of a land administration committee. One would expect the statutory requirements for community rules to express itself on the election of the appropriate administrative authority. This would be consistent with s 23, which provides that the community rules shall determine the term of office for land administration committee members. Also, the community decision requirements of s 17(2) apply to the adoption of community rules. However, the empowering provision with respect to the framing of community rules, s 19, is silent on choice between a land administration committee or a traditional council. Nowhere in s 19 or elsewhere in the Act is a community given the power to prevent a traditional council from asserting its right in terms of s 21(2). The only substantive requirement is that community rules must comply with planning and local government law. The issue of whether choice exists is fundamental to the implementation of the Act and cannot be left to delegated legislation, ministerial regulation or community rules.

[76] See chapter 11 by Claassens in this book. This interpretation is also consistent with the attempted protection against, and constitutionality of, s 21(2) contained in s 21(4).

[77] Emphasis added.

mandatory land administration committees, and that one of their areas of jurisdiction includes communal land to be transferred to the community.[78]

Sibanda (2006: 31) supports the view that 'may' suggests discretion rather than denial of choice. He says the provision is not peremptory but permissive. He asserts that the community will exercise its discretion at a community *imbizo* or gathering. He does not explain the absence of a statutory mechanism to exercise choice. There is no support in the wording of the Act for the interpretation that a traditional council, which has jurisdiction and fulfils the composition requirements of the Traditional Leadership and Governance Framework Act, may be replaced by an elected land administration committee.[79]

The long title of the Act sets out six aims, one of which reads: 'to provide for the democratic administration of communal land by communities'. This objective is not achieved with regard to the land administration committee structure.

There is no requirement in the Act that the land administration committee/traditional council must get community consent or consult with its community before communal land is sold, leased or otherwise disposed of to third parties who are not community members. Section 41(2)*(b)* implicitly authorises the committee, council or the community to dispose of communal land to outsiders. The land administration committee/traditional council represents the landowning community (s 24(1)). The land administration committee is accountable for disposals of land to the land rights board (s 24(2)) but not to the community and its members. It appears the drafter intended that disposals of land should be dealt with by the community rules, but there is no requirement for community rules to deal with disposal of land, and there is no authority in the Act for such a power in community rules. Section 41(2) assumes that the community rules will deal with disposals to outsiders because it creates an offence where the rules are not followed. By contrast, the Interim Protection of Informal Land Rights Act[80] and the Communal Property Associations Act require community consent for the disposal of communal land.

Notably absent from the Communal Land Rights Act is financial provision to pay for the work of the land administration committee or traditional council for its functions under s 24. Neither does the Traditional Leadership and Governance Framework Act provide for funding for a traditional council acting as a land

[78] Msengana–Ndlela, Director General of the department, in her affidavit in *Tongoane* (answering affidavit: Record 1296/7 para 23; 1310 para 45.1). See the DVD included with this book.

[79] It is remotely possible that a land administration committee may be established if the relevant traditional council refuses to exercise functions under the Communal Land Rights Act. Pienaar (2004: 260) agrees that the community has a choice regarding the institution that will manage land tenure rights. It appears that the comment relates to the third draft Bill published on 17 October 2003. Badenhorst *et al* (2006: 628) are ambivalent about the interpretation of s 22 and whether it allows for choice: '[a] recognised traditional council may also fulfil these functions if the relevant community has such a council'.

[80] The Interim Protection of Informal Land Rights Act will continue to apply to certain communal land falling under the Communal Land Rights Act.

administration committee.[81] By contrast, the Minister of Land Affairs will budget and provide for the activities of a land rights board and the salaries of its members and employees. Section 36 provides for the designation of departmental officials to assist a community or person to 'give effect to the implementation' of the Communal Land Rights Act.

Chapter 8: land rights boards

These boards will be established at provincial level—and possibly regional level. Their composition is prescribed and they must include eleven members—a third of whom must be women—appointed by the minister in terms of a nomination and selection procedure to be prescribed in the regulations:

- one from 'each of the organs of State determined by the Minister';[82]
- two members nominated by the Provincial House of Traditional Leaders;
- one member from the commercial or industrial sector;
- seven members representing communities and who must include persons representing the interests of child-headed households; persons with disabilities; youth; and the interests of female-headed households.

A land rights board operates principally in an advisory capacity. The board's duties include advising the Minister of Land Affairs; advising and assisting a community generally and in particular with regard to sustainable land ownership, land use and development issues generally (while providing for access to land on an equitable basis); liaison with government and civil society; and monitoring. The board must report on the suitability of rules proposed by a community for registration of its rules (s 19(4)*(a)*), and ratify decisions made by the land administration committee for the disposal of community land or a right in communal land (s 24(2)).

A land rights board has wide powers to intervene in local affairs. It may inspect documents as well as convene and attend meetings of the community and land administration committee/traditional council. The board has legal capacity to intervene in any legal proceedings related to the Act.

Chapter 9: KwaZulu–Natal Ingonyama Trust Land

The Act preserves and incorporates KwaZulu–Natal Ingonyama Trust land.

[81] Neither the Traditional Leadership and Governance Framework Act nor the Constitution authorises a traditional council to levy taxes or charge fees for services. Any attempt by provincial traditional leadership laws to levy taxes appears to be an unconstitutional transfer of both legislative and executive power.

[82] The definition of organ of state in the Constitution art 239 includes: *(a)* any department in the national, provincial and local sphere of government; and *(b)* any public function institution. One can only speculate what organs of state will be determined by the minister but these may include land, agriculture, provincial and local government departments at national level; and provincial departments responsible for land reform, agriculture, planning, local government and local economic development departments at local level.

(Previous versions of the Bill had repealed the Ingonyama Trust Act).[83] The Act renames the Ingonyama Trust Board, which will be known as the Land Rights Board for KwaZulu–Natal, and gives it extended powers in respect of Ingonyama land (otherwise the Ingonyama Board would have found its powers cut back to the advisory function that land rights boards fulfil in other provinces).

Chapter 10: general provisions

The most interesting of the general provisions is s 37 which contains the bland statement that 'no law' must prohibit a municipality from providing services and infrastructure, and from performing its constitutional functions on communal land, however held or owned. The Act also exempts land reform beneficiaries from local taxes for five years.[84] The Act does not authorise funding for functions by municipalities in order to provide infrastructure and services to communal areas.

The Act repeals statutes which fall into two categories. Part 1 of the schedule deals with the repeal and/or amendment of certain sections of the Black Administration Act, the Deeds Registries Act, the Upgrading of Land Tenure Rights Amendment Act, the Interim Protection of Informal Land Rights Act and the Land Survey Act.

The Interim Protection of Informal Land Rights Act of 1996 is amended so that it no longer requires annual renewal. Its protective provisions will thus continue to apply to a holder of an informal right in land in the following instances:

- communal land in respect of which the holders have rights given by the Interim Protection of Informal Land Rights Act where the Communal Land Rights Act has not (yet) been implemented;
- any extant communal land after partition by the minister and transfer to any person or the community where rights of holders survive because the relevant land or rights do not fall under: *(a)* an old order right converted to ownership, *(b)* a new order right, *(c)* any reservation for the state or municipality; and
- land held by holders of confirmed old order rights under the Communal Land Rights Act.

Part 2 deals with the repeal and amendment of certain sections of the Ingonyama Trust Act. The Ingonyama must now get the consent of the community concerned before any land or right in land is disposed of. In the context of s 24(1)–(2) of the

[83] The KwaZulu–Natal Ingonyama Trust Act established the Ingonyama Trust. It commenced on 25 April 1994, one day before the first democratic elections. It excluded 1,2 million ha of land from the operation of s 229 of the 1993 Constitution and placed the jurisdictional area of the former KwaZulu in trust for the Zulu king. The Act had since been amended by the KwaZulu Ingonyama Trust Amendment Act 9 of 1997 to ensure application of overall land reform measures.

[84] Local Government: Municipal Property Rates Act 6 of 2004. In terms of s 17(1)*(g)* of this Act, a municipality may not levy a rate on a property belonging to a land reform beneficiary or his or her heirs, provided that *this exclusion lapses ten years from the date on which such beneficiary's title was registered in the office of the registrar of deeds* (author's emphasis).

Communal Land Rights Act, the community represented by a land administration committee/traditional council must consent to the Ingonyama's wish and, secondly, the consent of the committee or council must be ratified by the Ingonyama Land Rights Board for KwaZulu–Natal.

Parts 3 to 8 deal with the repeal of a number of homeland land control Acts, that is, those for Bophutatswana, Venda, Ciskei, QwaQwa, KwaNdebele and Transkei. The repeal of some of these Acts becomes effective in respect of the concerned community's communal land only on the date of registration of community rules.

CONCLUSION

The Communal Land Rights Act fails to fulfil the promise of democratic administration of communal land referred to in its preamble. The Act also fails to live up to the White Paper's promise of choice of tenure forms suitable to individuals and groups. Extensive administrative powers and ministerial discretions centralise control and decision-making, and undermine the objective of tenure form of choice and local negotiation of rights for the beneficiary.

The emerging model in prior land reform laws allowed for diversification of control and new kinds of protections. Examples include initial ownership under the Development Facilitation Act, CPAs established pursuant to restitution awards sanctioned by the Land Claims Court or the minister, determinations made in terms of the Transformation of Certain Rural Areas Act, permanent protection against eviction to certain protected occupiers under the Extension of Security of Tenure Act and the Labour Tenants Act, and protection of *de facto* occupation rights under the Interim Protection of Informal Land Rights Act.

In contrast, the Communal Land Rights Act moves away from a more profound recognition of social and property rights. It also undermines mediation and negotiation. What is not covered by administrative decree and regulations emanating from the central state falls to be determined by community rules. Where community rules are silent, standard rules apply by default. Land use planning and zoning becomes the prerogative of the minister. At the same time, the administrative burden and costs of land administration are devolved to the local level.

Most significantly, the Act impacts on customary law and the institution of traditional leadership, both of which are recognised under the Constitution. The Act extinguishes important parts of customary law on land tenure while bolstering traditional leadership. This was not necessarily envisaged under the Constitution.

The legal status and content of a new order right is determined by statute. It is derived from statute law and its content will be determined and authorised by the terms of statute law. It is embodied in a deed of a communal land right. The incidents of a new order right are enforceable under the new legal regime, namely, the Communal Land Rights Act, and not under the legal regime applicable to an old order right, namely, pre-existing statute law and customary law.

Under common law, a registered new order right has all the characteristics of a limited real right in Roman–Dutch common law. Limited real rights are defined as rights to specified uses of property belonging to another, which restrict the exercise

of the ownership entitlements by the owner thereof.[85] The statutory criteria for the registration of rights requires, broadly speaking, that the right at stake constitutes a 'subtraction from the dominium' in the sense that the obligation correlative to the right binds not only the present landowner, that is, the community getting ownership title in relation to the holder/owner of the new order right, but also all her successors-in-title.[86]

An old order right has an uncertain status in customary law when that right is derived from and recognised by customary law, and has been confirmed under s 18(3)*(d)*(i) but not converted. On the interpretation that a confirmed old order right is not deemed to be a new order right, and is not registered, such a confirmed old order right may have retained all the attributes, protection and enforceability that it had under customary law. The customary law protections would remain in force unless they had been extinguished under any of the mechanisms for extinguishment:[87] *(a)* express extinguishment by the Communal Land Rights Act; *(b)* unlawfulness under any other law; and *(c)* the grant of an alternative right where the only reasonable inference can be that the original right had been extinguished. The customary law status of this category of confirmed old order rights remains intact. The following consequences flow from the interpretation that a confirmed old order right is to be regarded as a new order right: it would be registered as a new order right; its original customary law attributes would be extinguished to the extent that they are not recorded as comparable new order attributes; and it would only have legal status under the Act.[88] On the latter interpretation, the effect of the Act is to repeal the customary law of land tenure. On both interpretations the Act fails to promote security of tenure.

The Black Areas Land Regulations, the consolidated tenure regime that governs quitrent and PTO tenure, have been described as benevolent by some commentators. Olivier (1981: 70), for example, says these regulations are 'to a very large extent a re-enactment of the indigenous (customary) law'. Current understandings of customary law and its reinterpretation under the Constitution lead to a different conclusion. This is reflected in the conclusion to the White Paper on land reform of 1997 that typified the PTO regulations as bureaucratic and imposed from above without recognition of local practice and custom.

More than ten years later, the objects of the Bill assert that the Act would 'legally recognise and formalise the African traditional system of communally-held land within the framework provided by the Constitution'. This ambitious intention is not realised. Firstly, the Communal Land Rights Act does not recognise the

[85] *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) at 616A–618E; in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para [23]: the court emphasised that informal land rights deserve appropriate recognition and protection under the law.

[86] Mostert (2003: 4).

[87] *Alexkor Ltd & another v Richtersveld Community & others* 2003 (12) BCLR 1301 (CC) in para [72].

[88] See also chapter 4 by Okoth–Ogendo in this book where he laments the 'imposition of statutory regimes designed to eradicate custom and introduce new property concepts into community land, and failure to provide a framework for the articulation of customary law'.

'traditional system of communally-held land'; it replaces it with an imposed system. Secondly, it does not formalise a traditional system; it bureaucratises a traditional system.

The benevolent and other remnants of customary law relating to land, tenure and control are done away with. The customary law of land tenure is extinguished once old order rights are cancelled and converted into new order rights and given content, or not, by ministerial decree. Remnants only may survive under the uncertain category of confirmed old order rights. The Act extinguishes some of the most valuable aspects of customary law in relation to tenure.

South African law is not yet at the stage where statute law contributes to the integration of the progressive aspects of both the common law and customary law traditions.

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3

Tagging the Bill, gagging the provinces: the Communal Land Rights Act in Parliament

By Christina Murray and Richard Stacey

INTRODUCTION

The South African Constitution sets out the procedures that Parliament must follow for a Bill to be enacted into law. If Parliament follows an incorrect procedure, the Bill concerned is invalid. This principle—that the power to legislate is constrained by the 'laws of law-making'—is clear and has a long history in South Africa. It was firmly established before South Africa became a constitutional democracy in the voting cases of the 1950s. Then, for five years, the Appellate Division resisted the attempts of the National Party government to remove coloured voters from the common voters' roll in the old Cape Province, insisting that even a sovereign parliament was bound by 'manner and form' requirements that stipulated how laws should be made.[1]

The Constitutional Court reaffirmed the principle in strong terms in 1995, saying of the provisions in the interim Constitution that set out the law-making process:

> '[T]hese provisions are not merely directory . . . . [They] are part of an entrenched and supreme Constitution. They can only be departed from where the Constitution permits this expressly . . . or by necessary implication' (*Executive Council, Western Cape Legislature, and others v President of the Republic of South Africa and others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 at para 62).

Most recently, the principle was restated in *Doctors for Life International v Speaker of the National Assembly and others* 2006 (6) SA 416 (CC), 2006 (12) BCLR 1399

[1] The Separate Representation of Voters Act 46 of 1951 was declared invalid in *Harris and others v Minister of the Interior and another* 1952 (2) SA 428 (A) for failure to conform to the legislative procedures required by the provisions of the South Africa Act of 1909. The Separate Representation of Voters Act was subsequently passed by a 'packed' Senate in 1956 (Forsyth, 1985: 63–71).

(*DFL*), which also asserted unambiguously the power of courts to hold Parliament to its constitutional obligations:

> 'Courts are required by the Constitution "to ensure that all branches of government act within the law" and fulfil their constitutional obligations. This Court "has been given the responsibility of being the ultimate guardian of the Constitution and its values." Section 167(4)*(e)*, in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations . . . . It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution' (in para [38]).[2]

But, as is so often the case, the principle is more easily stated than applied. In the case of the Communal Land Rights Act 11 of 2004, two questions arise. Firstly, did the National Council of Provinces (NCOP) follow the correct procedure when considering the Bill? Secondly, did Parliament comply with the constitutional requirement that it should facilitate the involvement of the public in the passage of the Act? The answer to both these questions seems to be 'No'.

DID PARLIAMENT USE THE CORRECT PROCEDURE TO ENACT THE COMMUNAL LAND RIGHTS ACT?[3]

The Constitution sets out three different procedures for the adoption of laws. First, s 74 prescribes how Parliament must adopt a constitutional amendment. Secondly, s 75 sets out the procedure for 'ordinary Bills not affecting provinces'. Finally, s 76 sets out the procedure for 'ordinary Bills affecting provinces'. As the Act was not a constitutional amendment, s 74 is not relevant. However, s 75 and s 76 are relevant and they set out two quite different procedures.

Every Bill passed by Parliament must be considered in each of the two Houses—the National Assembly and the NCOP. The crux of the difference between the s 75 and s 76 procedures lies in the way that the NCOP deals with Bills. Under s 76, provinces have more say in the NCOP. When a Bill that falls under s 76 is considered in the NCOP, each of the nine provincial delegations to the NCOP has a single vote which must be cast as directed by the provincial legislature. Five votes are required for the Bill to pass. When a 's 75' Bill is considered in the NCOP, each of the 90 delegates has an individual vote. A second difference between the s 75 and s 76 procedures confirms that provinces have more influence over s 76 Bills: if the NCOP rejects a s 76 Bill, it can become law only if the National Assembly passes it with a two-thirds majority whereas, if the NCOP rejects a s 75 Bill, it becomes law if the National Assembly passes it with a simple majority. These differences in procedure are encapsulated in the language that the Constitution uses to describe the role of the NCOP in each case. In describing the legislative authority of the two Houses, it says that the NCOP 'passes' s 76 Bills but merely 'considers' s 75 Bills (s 44(1)*(b)*).

[2] Referring to *President of the Republic of South Africa and others v United Democratic Movement (African Christian Democratic Party and others Intervening; Institute for Democracy in South Africa and another as Amici Curiae)* 2003 (1) SA 472 (CC), 2002 (11) BCLR 1164; and *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725.

[3] Aspects of the argument presented here are drawn from Murray & Simeon (2006).

Which Bills fall under s 76?

The critical issue is, of course, which Bills fall under s 76. Section 76 itself tells us. The list includes a number of the laws that the Constitution specifically requires the national sphere of government to enact and all laws that fall under Schedule 4 of the Constitution. It is this latter category that creates particular difficulties of interpretation.

Schedule 4 is at the centre of the division of powers between the national government and provinces. It lists 'Functional Areas of Concurrent National and Provincial Legislative Competence' including, for instance, housing, education, health services and two matters particularly relevant to this discussion, traditional leadership and customary law. These are the areas over which both the national government and provinces may legislate. The items included in the list are those that constitution-makers did not intend to be managed exclusively by the national sphere of government.[4] Instead, the Constitution suggests, governance over these matters needs to be responsive to the possibly diverse needs and interests of provinces. The prominence of concurrent rather than exclusive powers captures the essence of South Africa's particular system of multilevel government. It does not attempt to create watertight divisions between the provinces and the national government, but establishes soft boundaries with many shared responsibilities. The 'constitutional philosophy' underpinning the system is set out in ch 3 of the Constitution which is entitled 'Co-operative Government'. In essence, this chapter states that the three different spheres of government—national, provincial and local—must co-operate with one another, in 'mutual trust and good faith' (s 41(1)*(h)*).

If provincial and national legislation on a matter listed in Schedule 4 conflict, provincial legislation prevails unless the national legislation matches certain criteria set out in s 146 of the Constitution. These criteria are stated broadly, giving the national government considerable power to override provincial laws. The loss of provincial legislative power that the national override might imply is mitigated by the collective role of the provinces in the NCOP—a national law that might override a provincial law must usually be supported by at least five of the nine provinces.[5]

In a certain sense, the responsibility of the provincial delegations in the NCOP extends further than that of their colleagues in the National Assembly. They cannot merely decide whether or not they think that a Bill reflects a worthy policy. The Constitution anticipates that provinces will implement most national laws that fall under the areas listed in Schedule 4. Section 125(2)*(b)* states that the executive authority of provinces is exercised by, among other things, 'implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise'. This means that, when such Bills are considered in the NCOP, provinces need to address the

[4] The Constitution specifies the legislative powers of provinces and local government. The national Parliament has 'residual' power, which means that it can legislate on any matter not reserved exclusively for the provincial or local sphere of government.

[5] If it is not it becomes law if the National Assembly passes it with a two-thirds majority.

implications that the Bills will have for their executives.[6] Provincial delegations to the NCOP need to consider a number of important questions such as 'Does our provincial government have the capacity to implement this law? Do we have or can we set up the administrative and staffing structures necessary for the effective administration of this law? Does the law take account of the specific needs of our rural population? Are there any special circumstances in the province that the law needs to take into account?'

The provincial delegations are carefully composed to ensure that the provinces' representatives in the NCOP are qualified to answer these questions. The premier is head of the delegation (s 60(3)). Three other delegates, referred to as 'special delegates', are chosen from time to time by the provincial legislature 'with the concurrence of the Premier' (s 61(4)). The premier and three 'special delegates' constitute the core of the 10-person provincial delegation. The remaining six are 'permanent' delegates. They are based in Cape Town and are expected to manage the day-to-day business of the NCOP and to ensure that their provincial legislatures are alerted to, and adequately briefed on, matters of importance to the province such as Bills that fall under Schedule 4.[7]

The fact that provinces will implement many Schedule 4 laws also provides the most concrete explanation of why correct classification of a Bill as a s 76 matter is not a mere formality. It is only under this procedure that the provincial executives and legislatures can have a formal say in the laws they will implement and oversee. Clearly, where national legislation imposes any kind of administrative burden on provincial executives, the provinces themselves should be entitled to resist or accept that burden, or at least formally register their support of or opposition to legislation. But the general constitutional principle justifying the provinces' voice in the legislative process under s 76 extends further than this. Section 76 gives provinces similar influence over the legislative process where national legislation seeks to remove responsibilities as where it imposes them, and where it provides the framework within which future provincial legislation or policy must be developed. This is a manifestation of co-operative government.

In contrast, the s 75 procedure precludes the consideration of provincial interests in the legislative process in both a formal and a substantive sense. Firstly, delegates to the NCOP vote individually in the s 75 procedure. Although they are chosen by the provincial legislatures, each delegate acts in his or her own name (or the name of the party that nominated him or her) rather than in the name of his or her province. Thus, in a formal sense, the provincial governments are not represented in the NCOP when it votes on s 75 Bills. Secondly, where delegates to the NCOP vote as individuals, they do not vote in accordance with mandates determined by

[6] As virtually all national Bills are introduced in Parliament by the national executive, Members of Parliament (MPs) in the National Assembly are entitled to assume that the national executive has the capacity to implement these Bills, and that MPs need not turn their attention specifically to questions of the executive's capacity to implement and administer them.

[7] However, based outside the province, they are ill-equipped to deal with the substantive matters of provincial government that face the NCOP. See Murray & Simeon (1999) and Murray *et al* (2004).

their respective provincial legislatures, as the Constitution requires in the case of s 76 legislation.[8] The substantive interests of provinces are thus not reflected in the s 75 procedure—and indeed, individual delegates' votes are normally determined by the party to which they belong.

However, classification of Bills as 's 75' or 's 76' is not always easy. The Constitution says the s 76 procedure applies to 'legislation *with regard to any matter* within a functional area listed in Schedule 4' (s 44(1)*(b)*(ii)).[9] It also says '[a] Bill must be dealt with in accordance with the procedure established by [s 76] if it *falls within a functional area* listed in Schedule 4' (s 76(3)).[10]

We are left to deduce from the constitutional framework of multilevel government how to determine whether or not a particular Bill has 'regard to any matter' in Schedule 4 or 'falls within a functional area' listed in the Schedule. Some Bills are easy to classify. For instance, those that deal with defence are clearly not s 76 Bills because defence is an exclusively national matter whereas those that deal with the environment clearly are Schedule 4 Bills as 'environment' is listed under Schedule 4. However, not all Bills are susceptible to easy classification. Many include provisions that fall into both categories. A defence law might deal with the impact of a missile testing site on the environment (a Schedule 4 matter). Similarly, a law concerning the environment may also deal with water matters (water is not included in Schedule 4). The Communal Land Rights Act is no different. As its title suggests it deals with land rights, usually assumed to be a matter reserved exclusively to the national sphere of government. But it also affects the Schedule 4 matters of indigenous law and customary law, traditional leadership and, perhaps, urban and rural development.

What is the Communal Land Rights Act about? An initial description

The long title of the Act states that it provides for 'legal security of tenure by transferring communal land ... to communities'. To secure tenure, the Act provides for the transfer of land to communities and grants communities juristic personality to enable them to exercise the rights of an owner over the land. An elaborate procedure must be followed before land can be transferred to a community. A 'land rights enquiry' must be conducted to determine existing rights to the land and report on matters such as the most suitable provisions concerning access to the land in question, spatial planning and conflicting claims. The community concerned must make and register 'community rules' regulating the

[8] Section 65(2) of the Constitution requires an Act of Parliament to provide for a uniform procedure in terms of which provincial legislatures will confer authority on their delegations to cast votes on their behalf. That legislation has not yet been passed, and so the matter is governed by item 21(5) of Schedule 6 to the Constitution which allows each province to determine its own procedure for conferring authority on its delegation to cast votes on its behalf at the NCOP. The point to be noted is that the Constitution requires the provinces to determine the vote that their delegations will cast in the NCOP. Unless a province expressly grants an open-ended mandate, there is no question of a 'free vote'.

[9] Emphasis added.

[10] Emphasis added.

use of the land. The community must also establish a 'land administration committee' to manage the communal land, assist in the resolution of disputes, liaise with local authorities and so on. Land administration committees will usually be traditional councils because s 21(2) of the Act provides that, '[i]f a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council'.[11] Finally, the minister must determine whether or not the land in question should be transferred to the community. The land will then be registered in the name of the community. The Act also anticipates the establishment of 'Land Rights Boards' which have jurisdiction over a number of communities and which will apparently assist in the implementation of the Act. Much communal land in KwaZulu–Natal is currently governed by the KwaZulu–Natal Ingonyama Trust Act 3 of 1994, and the Communal Land Rights Act establishes the KwaZulu–Natal Ingonyama Trust Board as the land rights board for KwaZulu–Natal.

How Parliament 'tagged' the Communal Land Rights Bill

Parliament dubs the process of determining whether a Bill should follow the s 75 or s 76 procedure 'tagging'. Views differ on how to tag Bills. Early in 1997, shortly after the 1996 Constitution was put into operation, parliamentary law advisers were faced with a number of difficult cases. They sought independent legal advice which suggested that the Canadian 'pith and substance' test should be followed to determine whether or not a Bill is a s 76 Bill.

The 'pith and substance' test was first developed as a way to characterise legislation by the Privy Council in cases arising in Canada under the British North America Act, now known as the Constitution Act of 1867 (Blackshield & Williams, 2002: 649). The attempt in the Constitution Act to provide exclusive lists of legislative powers for the federal and provincial governments inevitably gave rise to disputes concerning whether or not particular laws fell within the legislative power of the legislature that enacted them. In many cases, challenged laws contained provisions that fell under both the federal and provincial lists. Hogg (1997: 15.8) describes the problem in the context of a provincial statute that imposes a direct tax on banks:

> 'One feature of this law is "direct taxation" which comes within a provincial class of subject . . .; but another feature of the law is banking which comes within a federal class of subject . . . . If the law is in relation to direct taxation it is good, but if it is in relation to banking it is bad.'

To resolve such jurisdictional disputes, the Privy Council sought to establish '[t]he true *nature* and *character* of the legislation . . . in order to ascertain the class of subject to which it *really* belongs' (*Russell v The Queen* (1882) 7 App Cas 829 PC at 839–40). Soon courts started using the phrase 'pith and substance' to describe what one needed to determine to establish the 'matter' of a law and thus to be able to classify it (Hogg, 1997: 15.7).[12] Once the pith and substance of a law in Canada

[11] A 'recognised traditional council' is a council established under s 3 of the Traditional Leadership and Governance Framework Act 41 of 2003.

[12] Hogg suggests that the phrase was 'first used in this context in *Union Colliery Co. v Bryden* [1899] AC 580, 587 per Lord Watson'.

is determined to fall within the jurisdiction of the enacting legislature, other matters covered by the law, which may ordinarily not fall within the legislature's jurisdiction, are considered 'incidental' and legitimately covered by the law.[13]

The South African Parliament now uses the 'pith and substance' test to determine whether or not a Bill falls under Schedule 4. On the basis of this test, the Communal Land Rights Bill was tagged as a s 75 Bill. The parliamentary legal advisers said that

> 'the dominant or most important characteristic of the Bill in question is to be found in its long title, namely, "[t]o provide for legal security of tenure by transferring communal land, . . ., to communities." Indigenous and customary law feature in the Bill, but in an indirect and incidental manner' (Legal Services Office, 2003, at para 6).

How did Parliament come to the conclusion that the pith and substance of the Bill is land rather than customary law or traditional leadership? The pith and substance test itself provides no real criteria. As Hogg (1997: 15.8) comments, referring to the banking and taxation example given above:

> 'How does the court make the crucial choice? Logic offers no solution: the law has both the relevant qualities and there is no logical basis for preferring one over the other. What the courts do in cases of this kind is to make a judgement as to which is the most important feature of the law and to characterise the law by that feature.'

Canadian scholars have pointed out that the 'judgement' that courts make in determining whether a law falls within the jurisdiction of the provinces or federal government involves both an interpretation of the ambit of the heads of power granted to the different levels of government and a characterisation of the law itself. Although these may be conceived of as two separate questions, as Laskin has commented, the process is 'an interlocking one, in which the British North America Act and the challenged legislation react on one another and fix each other's meaning' (Hogg, 1997: 15.6).[14] The final judgment depends in large part on the understanding courts have of the appropriate jurisdiction of the provinces and

[13] Hogg (1997: 15.8) comments: 'It is important to recognise that this "pith and substance" doctrine enables one level of government to enact laws with substantial impact on matters outside its jurisdiction.' In other words, the impact of the test is to broaden the competence of the legislatures substantially because, as long as the pith and substance of the law falls within the competence of the legislature, the law can legitimately deal with other matters. See also *Global Securities Corp v British Columbia (Securities Commission)*, (2000) 1 SCR 494 at paras 22–5, 37–8. Some laws will be characterised as having a 'double matter' or a 'double aspect'. The Privy Council thus announced that 'subjects which in one aspect and for one purpose fall within s 91 [listing subject areas of national legislative competence], may in another aspect and for another purpose fall within s 92 [listing subject areas of provincial legislative competence]' (*Hodge v the Queen* (1883) 9 App Cas 117 PC, 135). Hogg (1997: 15.11) points out, however, that it is not clear when the double aspect doctrine will be applied and when it is necessary to make a choice between the federal and provincial features of a law.

[14] Hogg here quotes Bora Laskin. Abel has argued that the process is actually a three-step one: 'identification of the "matter" of the statute, delineation of the scope of the competing classes, and then a determination of the class into which the challenged statute falls' (Macklem *et al*, 1997: 151) referring to Albert S Abel. See also Blackshield & Williams (2002: 648–53) where the impact of the second step on the first step is emphasised.

federal government.

When the question to be answered concerns the jurisdiction of different levels of government, it may be appropriate to rely on a court's assessment of the appropriate extent of that jurisdiction. But the context in which the test is currently used in South Africa is very different from that in Canada. Here the question is not whether or not the national government has the competence to enact the law, but merely what procedure a law that falls within the national legislative competence should follow or, in effect, how much influence provinces should have in the process of enacting the law. The way this question is answered must be informed by South Africa's particular constitutional framework of shared powers and soft boundaries between the spheres of government, the role that the Constitution allocates to provinces in relation to matters covered in a Bill, and the Constitution's emphasis on encouraging co-operation among the three spheres of government.

The *Liquor Bill* case test

In an *obiter dictum* in *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC), 2000 (1) BCLR 1 (the *Liquor Bill* case), Cameron AJ provides a starting point for determining a test that is consistent with South Africa's constitutional model. He says:

> 'This subsection [s 76(3)] requires that a Bill must be dealt with under the procedure established by either s 76(1) or s 76(2) . . . "if it falls within a functional area listed in Schedule 4". It must be borne in mind, moreover, that s 76 is headed "Ordinary Bills affecting provinces". This is, in my view, a strong textual indication that s 76(3) must be understood as requiring that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 be dealt with under s 76' (in para [27]).[15]

This passage does not use the language of the pith and substance test as it is used in Canada.[16] As shown above, in Canada, the focus is on the contested law itself and the question is 'What is the substance of that law?' An answer to that question might show that the law falls within the jurisdiction of the national government. But it does not rule out the possibility that, 'in substantial measure', provisions of the law will affect the obligations and functions of another level of government.

Instead, in the *Liquor Bill* case, Cameron AJ indicates a test that is much more attuned to our constitutional scheme. Drawing on the clue provided in the heading to s 76, he suggests that the question is not 'What is the heart (or pith and substance) of the contested law?' but 'To what extent do provisions of the law engage concurrent functions?' The shift in focus from a general assessment of the law to an assessment of the degree to which it engages (or 'affects') a Schedule 4 matter encapsulates the different concerns that faced Canadian courts in developing the pith and substance test and those that the South African Parliament confronts

[15] See also Seervai (1991: 247) who, drawing on Canadian case law, argues that a law may 'affect' a matter although it is not a law 'in relation to' or 'in respect of' that matter.

[16] Cameron AJ stated in the *Liquor Bill* case in para [61]: 'It is not necessary for the purposes of this judgment to consider the utility or applicability of the Canadian "pith and substance" cases to the development of an indigenous South African jurisprudence regarding national and provincial legislative competences.'

when it tags national laws. The 'pith and substance' test may be useful in determining whether a Bill falls within the legislative jurisdiction of a sphere of government, but it is not appropriate to the determination of whether a Bill—which is clearly within the legislative competence of the national legislature—will affect provinces once it is law.[17] What is important is the degree of its impact on a matter over which provinces share responsibility with national government.[18] This shift in focus in the *Liquor Bill* case reflects the concern of ch 3 of the Constitution that the exercise of shared powers by the national sphere of government should be accompanied by consultation, formalised in the law-making process in the NCOP, and respect for the integrity of the provinces. It also acknowledges implicitly that the power of the national sphere to make laws is not at stake here. It is the process by which they are made that matters.

Applying the *Liquor Bill* test to the Communal Land Rights Act

As we indicate above, the Communal Land Rights Act followed the s 75 procedure because Parliament concluded that its pith and substance is 'the provision of legal security of tenure by transferring communal land to communities, or by awarding comparable redress'.[19] The fact that the Act deals mainly with land under the control of traditional leaders and replaces customary methods of managing land suggests that Parliament's determination of the 'pith and substance' of the Act may simply be wrong. It is equally plausible to say that the 'heart' of the Act is to reform the customary law of land ownership and, in particular, the control that traditional leaders have over land, and the fact that the new scheme includes land other than that in the possession of traditional communities is incidental to the Act.[20]

However, this is irrelevant to the argument here which is that the pith and substance test does not provide appropriate criteria for tagging Bills. The question instead must be whether or not provisions of the law 'in substantial measure fall within a functional area listed in Schedule 4'. It is clear that they do in this case.

The Act establishes a system for transferring communal land to communities and securing legal tenure in that land. It is important to note in this respect that the Act does not create or establish communal land that did not exist before. Section 2 of the Act is quite specific in describing the land to which it applies. It applies to all communal land that was at any time vested in the government of the four former

[17] But as Australian case law shows, the test used to decide jurisdictional questions must accord with the specific constitutional framework of each federation. See, for example, *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492 at 527.

[18] This approach also means that the s 76 process is not reserved for Bills that the provinces could also pass. For instance, it may be arguable that provinces could not change the customary law matrimonial regime, but because customary law is an issue that is a responsibility of provinces under Schedule 4, provinces should participate in the passage of laws that change it.

[19] Legal opinion to the Speaker of Parliament dated 4 February 2004.

[20] It has also been argued that Bills such as this one that seek to secure specific rights fall within the exclusive competence of the national Parliament. This argument is directly contradicted by s 7(2) of the Constitution which states clearly that the state, rather than the national sphere of government on its own, 'must respect, protect, promote and fulfil the rights in the Bill of Rights'.

'homeland' states; land vested in the South Africa Development Trust (SADT) in terms of the Development Trust and Land Act 18 of 1936; and any land listed in the schedules to the Black Land Act 27 of 1913.[21] In addition, the Communal Land Rights Act applies to land to which the KwaZulu–Natal Ingonyama Trust Act applies, and to any land acquired by or for a community.

The Development Trust and Land Act and the Black Land Act had as their purpose the physical separation of black people from the rest of the population—and particularly the white population—in South Africa.[22] The similar long titles of the two Acts stated that their purpose was to control the 'acquisition', 'ownership' and 'occupation of land by Blacks'. The SADT was established in terms of s 4 of the Development Trust and Land Act.[23] Ownership of all state-owned land set aside for occupation by 'blacks' was vested in the trust (s 6).[24] Section 21 of the Act declared that all land vested in the trust or land 'released' from the trust and registered in the name of a black person was deemed to be a 'black area' for the purposes of certain legislation forming the system of grand apartheid and territorial segregation.

The Development Trust and Land Act and the Black Land Act together were the legislative Acts by which land in South Africa was reserved for black people. The apartheid state, by allowing black people to occupy, own and acquire land only in certain areas, herded them into designated areas. However, it was the coupling of this legislation with the Black Authorities Act 68 of 1951 that implemented a system of tenure and control based on traditional leadership and customary law. The Black Authorities Act cross-referred to the Development Trust and Land Act

[21] The full text of paragraph *(a)* reads:

'This Act applies to —

(a) State land which is beneficially occupied and State land which —

(i) at any time vested in a government contemplated in the Self-governing Territories Constitution Act, 1971 (Act 21 of 1971), before its repeal or of the former Republics of Transkei, Bophuthatswana, Venda or Ciskei, or in the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act 18 of 1936), but not land which vested in the former South African Development Trust and which has been disposed of in terms of the State Land Disposal Act, 1961 (Act 48 of 1961);

(ii) was listed in the schedules to the Black Land Act, 1913 (Act 27 of 1913), before its repeal or the schedule of released areas in terms of the Development Trust and Land Act, 1936 (Act 18 of 1936), before its repeal.'

[22] Section 1 of the Development Trust and Land Act provided that '[t]his Act and the Black Land Act, 1913 . . . shall be construed as if they formed one Act'.

[23] The trust was originally called the South African Native Trust and is referred to elsewhere in this book as such. Indeed, the original short title of Act 18 of 1936 was the Native Trust and Land Act. At the time of its repeal, however, the Act and the trust it created bore the titles by which they are referred to in this chapter.

[24] A 'black' for purposes of the Act generally bore the same definition given by s 1 of the Population Registration Act 30 of 1950. However, perhaps indicating the difficulties the apartheid state faced in its project of classifying a diverse population, the definition of 'black' in s 49 of the Development Trust and Land Act is tortuously long and complex, with numerous variations depending on the section of the Act in which it occurred. Different definitions were given for the purposes of ch IV of the Act and for 'the purposes of entry into or residence on land situate[d] in a scheduled Black area'.

by defining 'black areas' to include the land mentioned in s 21 of the earlier Act. The Black Authorities Act established a system of tribal, community, regional or territorial authorities in terms of which black areas were to be administered. These authorities were established and operated according to 'Black law and custom' (s 2(1)*(a)*) and were structured in a hierarchical way so as to integrate them into the state and subject them to the ultimate control of the apartheid administrators. Traditional structures of leadership were maintained and allowed to operate according to customary law as far as possible. Section 4(1)*(b)*, for example, required a tribal authority to exercise any powers and perform any functions or duties 'conferred or imposed upon its chief or headman under any law, as are in accordance with any applicable Black law or custom'. As Delius points out in this book,[25] one of the functions of traditional leadership was the allocation of land in accordance with customary or indigenous laws.

A similar system was erected in the 'self-governing territories' of the former homeland states. The long title of the Self-Governing Territories Constitution Act 21 of 1971 indicates that it was intended to regulate the constitution and functions of tribal authorities and the application of customary law.[26] This object was achieved in the body of the Act in s 11 and s 12, which ensured that the duties, powers, authorities and functions exercised by chiefs, headmen, and tribal and regional authorities would remain in force in the territory covered by the homelands.[27] Indeed, as Claasens & Ngubane show,[28] '[t]ribal authorities exist virtually wall-to-wall in the former homeland areas.'

The Ingonyama Trust established in terms of the KwaZulu–Natal Ingonyama Trust Act fulfilled a function very similar to the Development Trust. Land that was formerly vested in the Government of KwaZulu was to vest in and be transferred to the Ingonyama[29] as trustee of the Ingonyama Trust. Section 2(4) of the Ingonyama Trust Act states that the Ingonyama or the Ingonyama Board may administer the land vested in the trust 'in accordance with Zulu indigenous law'.

It is clear that the co-option of traditional structures of leadership and the incorporation of customary and indigenous law into the apartheid system distorted

[25] See chapter 9.

[26] The relevant part of the long title reads: 'to regulate further the constitution of tribal authorities and to provide for the proof by affidavit of the membership of tribal and regional authorities and the fact whether or not Black law and custom were observed in particular matters'.

[27] Section 11 stated:

> 'Notwithstanding anything in this Act contained, the duties, powers, authorities and functions lawfully exercised by paramount chiefs, chiefs and headmen at the date on which the first executive council for an area is constituted, shall be and remain in force until varied or withdrawn by the competent authority.'

Section 12 was an almost identical provision maintaining the powers of tribal and regional authorities.

[28] See chapter 7 in this book.

[29] 'Ingonyama' is defined in the Act as the person referred to in s 13 of the KwaZulu AmaKhosi and Isiphakanyiswa Act 9 of 1990. That section reads: 'The *inkosi* of the Usuthu Tribe is the paramount *inkosi* of the Zulus and is also known as the King of the Zulus, the *Ingonyama* or *Isilo*.'

those systems. Indeed, as Delius shows in his chapter of this book, the forms of land tenure officially endorsed by the apartheid regime were a significant departure from the forms and logic of land tenure in pre-colonial times. What cannot be doubted, however, is that customary practices came to play a central role in access to and rights in land in the areas covered by this legislation. Apartheid distortions notwithstanding, rights and access to land derived from existing customary entitlements and layered decisions made at a variety of levels of social organisation.[30]

The Communal Land Rights Act now provides that, where a recognised traditional council exists for a community, that council may exercise the power and duties of a land administration committee (s 21(2)). This marks a substantial shift away from the previous system in which the role of traditional leadership in the determination of access to and rights in land was based on customary practices. Not only is it a departure from a system in which decisions about land management and allocation were often taken by lower levels of social organisation, it is also a shift at an abstract level. The idea of absolute ownership endorsed by the Act is inconsistent with customary structures based on overlapping rights to land which survived at least partially into the 20th century.[31] In particular, it replaces the system of need-based land allocation and layered decision-making with one based on title deeds and the concentration of land administration and management responsibilities in traditional councils. One way of viewing this change is as a fundamental change to the rules of customary law itself. Another way is to view the Act as replacing the customary law-based system with an entirely new system. On either view, though, it has to be said that the Act has a substantial impact on customary law.[32] This brings it within the ambit of the Schedule 4 functional area of 'indigenous law and customary law'.[33]

The changes that the Act brings to the rules of customary law also affect the Schedule 4 matter 'traditional leadership' simply because traditional leadership is based on and constrained by principles of customary law. But the implications of the Act for traditional leadership can be seen more directly too. First, any definition of the limits of traditional leadership has substantial impact on traditional leadership. The Act affects the functions of traditional leadership by changing the basis of authority for the land administration functions of traditional councils. The role of traditional leadership in land tenure is to be understood in terms of the Act

[30] For a description of layered approaches to decision-making and responsibility for land, see chapter 4 by HWO Okoth–Okendo in this book.

[31] See chapter 9] by Peter Delius in this book.

[32] Okoth–Ogendo argues in chapter 4 of this book that the structures erected by the Act require reliance on conceptual approaches drawn from law other than customary law and undermine the existing security of tenure of people living under indigenous or customary systems. He adds that the centralising of decision-making functions and powers in traditional councils is at variance with the systems of layered decision-making established by customary law.

[33] The explicit allocation of concurrent responsibility for customary law to provinces under Schedule 4 means that one cannot sustain the argument that the introduction of a new legal regime for land previously governed under customary law is not a provincial matter.

quite differently from how it has been understood in the past. However, in the second place, and more importantly, even if the end or purpose of the co-option of traditional councils into the framework of the Act is land rather than traditional leadership, the means or mechanism by which that end is achieved is clearly traditional leadership. The traditional councils are institutions of traditional leadership. The use of these institutions as a means to perform a national function brings the matter under the concurrent jurisdiction of the provinces (*Liquor Bill* in para [70]).[34]

The Traditional Leadership and Governance Framework Act 41 of 2003 establishes the traditional councils referred to in the Communal Land Rights Act. It is not disputed that the Traditional Leadership and Governance Framework Act deals with the functional area of 'traditional leadership' (and it followed the s 76 procedure through Parliament). The fact that it is the legislation that establishes the traditional councils might suggest that traditional councils themselves fall within the functional area of 'traditional leadership' and that any legislation that assigns functions, powers and duties to these councils is legislation that similarly falls within 'traditional leadership'.[35]

Moreover, the constitutional necessity of engaging provinces in the passage of the Communal Land Rights Act is demonstrated practically when its impact on traditional leadership is considered. The Traditional Leadership and Governance Framework Act assigns significant responsibilities to the provinces in respect of the traditional councils.[36] The provinces are empowered and required to oversee the constitution and functioning of the traditional councils. The incorporation of traditional councils into the system of land tenure established by the Communal Land Rights Act directly affects what the provinces are required to do in terms of the Traditional Leadership and Governance Framework Act, both by imposing further oversight responsibilities on the provinces and by implicitly constraining their ability to develop the role of the councils.[37] In addition, because responsibility for land administration vests enormous power in traditional councils, their

[34] Indeed, s 24(3)*(b)* of the Act requires land administration committees to establish and maintain registers and records of all new order rights.

[35] Schedule 4 refers to traditional leader*ship* rather than traditional leaders.

[36] These functions relate to the recognition of traditional communities (s 2), the withdrawal of status as a traditional community, the recognition and removal of kings, queens and senior headmen (ss 9–12), dispute resolution (s 21) and the disestablishment of regional authorities functioning under tribal authorities established in terms of the Act (s 28(6)). The establishment, territorial jurisdiction, composition and performance of the functions of traditional councils must moreover be regulated by *provincial* legislation and oversight by the provincial premiers (ss 3–4). Provincial legislation will have to be implemented by provincial executives (s 125(2)*(a)* of the Constitution). The Act thus imposes responsibilities on provincial legislatures as well as provincial executives.

[37] Section 21(2) does not require traditional councils to act as land administration committees but the assumption is that they usually will, both because traditional leaders are asserting this right strongly and because communities will usually not be able to sustain two separate bodies.

establishment, which provinces must oversee, is likely to be a difficult and highly contested process.[38]

Perhaps anticipating these arguments, s 21(4) of the Communal Land Rights Act states that when a traditional council discharges obligations as a land administration committee 'its functional area of competence is the administration of land affairs and not traditional leadership as contemplated in Schedule 4 to the Constitution'. However intended, this provision could not override the constitutional division of powers and so cannot determine the tagging of the Act.[39]

In summary, the provisions of the Communal Land Rights Act fall 'in substantial measure' under Schedule 4 and the Act ought to have followed the s 76 procedure through Parliament. Parliament's failure to follow the right procedure is more than a technical oversight. It deprived provinces of their opportunity to engage with a law that has a direct and material impact on their constitutional responsibilities for customary law and traditional leadership. The result of this mistake must be that the law is unconstitutional.

THE IMPACT OF THE FAILURE OF THE NCOP TO 'FACILITATE PUBLIC INVOLVEMENT' IN THE PASSAGE OF THE COMMUNAL LAND RIGHTS ACT

Section 72(1)*(a)* of the Constitution requires the NCOP to 'facilitate public involvement in the legislative and other processes of the Council and its committees'.[40] In the *DFL* case, a majority of the Constitutional Court held that failure to comply with the requirements of this provision in the legislative process will result in unconstitutional legislation. More specifically, the Court found that

[38] Section 28(4) of the Traditional Leadership and Governance Framework Act states that a 'tribal authority' that is recognised as such prior to the commencement of the Act is deemed to be a traditional council for the purposes of both the Act itself and the Communal Land Rights Act. Provincial legislation confers on premiers the responsibility of deciding whether a traditional authority of community is recognised as such for the purposes of these Acts (see, for example, the North West Traditional Leadership and Governance Act 2 of 2005 s 3, the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 s 5, the KwaZulu–Natal Traditional Leadership and Governance Act 5 of 2005 s 2, the Limpopo Traditional Leadership and Institutions Act 6 of 2005 s 3, the Free State Traditional Leadership and Governance Act 8 of 2005 s 3, and the Mpumalanga Traditional Leadership and Governance Act 3 of 2005 s 3).

[39] Once the Act is recognised to be a law that falls under Schedule 4, this provision may be taken to displace the assumption in s 125(2)*(c)* of the Constitution that provinces administer Schedule 4 laws.

[40] The whole of section 72(1) reads:

> 'The National Council of Provinces must —
> *(a)* facilitate public involvement in the legislative and other processes of the Council and its committees; and
> *(b)* conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken —
> (i) to regulate public access, including access of the media, to the Council and its committees; and
> (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.'

even though the National Assembly had fulfilled its obligations in terms of the corresponding provision (s 59(1)*(a)* of the Constitution), the failure of the NCOP to 'facilitate public involvement' rendered the legislation in question invalid.

As *DFL* shows us, the Constitution has added a new element to the traditional 'manner and form' provisions that stipulate the way in which laws must be made. The case makes it clear that the constitutional import of the obligation of legislatures to involve the public in their processes is no different from that of the manner and form provisions setting out what the legislative process actually is. Failure to comply with this requirement will produce invalid legislation in the same way as failure to comply with a hard and fast manner and form provision such as a quorum requirement or a stipulation concerning how votes should be cast. However, this obligation departs from the traditional template of manner and form provisions in that it does not set out a standard procedure to be followed. Rather, it leaves it to the legislatures to determine the procedure. A court's only task is to determine if the procedure that has been followed can be said in the circumstances to have met the obligation to 'facilitate public involvement'. The requirements of 'public involvement' will vary from case to case, depending on a range of factors, and a standard capable of taking varying circumstances into account is the only way in which compliance with the obligation can be measured. Compliance with the requirement must be assessed on a substantive level, and the question that is to be asked, following the *DFL* decision, is whether the steps that the legislature has taken to facilitate public involvement are reasonable.

The obligation to facilitate public involvement does erect one formal procedural hurdle. The legislatures *must* consider and decide how to facilitate public involvement in each case. The content of that decision will be subject to scrutiny against the standard of reasonableness in each case (in para [146]), and legislation that is passed in the absence of reasonable steps to facilitate public involvement will not have been passed at all. But legislation that has been passed without the legislature even having taken a decision as to what procedure should be followed to facilitate public involvement will be invalid for purely procedural reasons. The failure to take a decision in this regard is as fatal to the legislative process as a vote taken without a quorum. The following passage from Ngcobo J's decision in *DFL* summarises the view of the majority of the Court:

> 'Parliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.
>
> In determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances ... Ultimately, what Parliament must determine in each case is what methods of facilitating public participation would be appropriate. In determining whether what Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method' (in paras [145]–[146]).

It appears that the process by which the Communal Land Rights Act was passed was similar to that of the legislation impugned in the *DFL* case. The National Assembly's Portfolio Committee on Agricultural and Land Affairs responsible for the Act received numerous submissions from various civil society organisations and held four days of public hearings. The minutes of the deliberations and discussions of the portfolio committee indicate that the content of these submissions was considered by the members of the portfolio committee. However, the NCOP—specifically the Select Committee on Land and Environmental Affairs—does not appear to have held any public hearings or to have received any comments or submissions from the public. Rather, the select committee was briefed by members of the Department of Land and Agricultural Affairs. The question is whether the NCOP's failure to facilitate public involvement in the legislative process pertaining to the Communal Land Rights Act is fatal to the constitutionality of the Act.

Different considerations come into play in answering this question if the Act was properly classified as a s 75 Bill or if it is found to be a s 76 Bill.

Section 76 and public involvement in the NCOP

Each of the three Acts that the Constitutional Court considered in *DFL* was tagged as s 76 legislation and passed according to the provisions of that section (in para [83]).[41] Each provincial delegation to the NCOP therefore voted according to the process outlined in s 65 of the Constitution—casting a single vote on the instruction of its own provincial legislature (in paras [84] and [86]). This is the key to reasonable public involvement in s 76 matters. A provincial delegation to the NCOP does not have authority to vote in a manner contrary to the mandate determined at the provincial level. Accordingly, the most significant public involvement is in the province. Moreover, as the *DFL* case confirmed, the determination of a mandate is a 'legislative or other process' of a provincial legislature, and public involvement in that process must be facilitated in terms of s 118(1)*(a)*. Thus, public involvement at provincial level in s 76 matters may fulfil two constitutional obligations: that imposed under s 72(1)*(a)* on the NCOP to involve the public in its 'legislative and other' processes, and the similar obligation imposed on provincial legislatures by s 118(1)*(a)*.

However, despite the 'identity of interests' between the NCOP and provincial legislatures, Ngcobo J does not simply allow the NCOP to hand its responsibility on to provincial legislatures (in paras [160]–[161]). Instead, the judgment insists that members of the NCOP should 'at a minimum, read the reports of the hearings prepared by the provincial portfolio committees' (in para [162]). This may seem unnecessary in light of the fact that provincial legislatures decide on how votes are cast in the NCOP. However, it is consistent with the relationship between the NCOP and the provinces. The NCOP provides an opportunity for provincial delegations to discuss and propose amendments to Bills that are before it. After these meetings, provincial delegations are expected to report back to their

[41] A similar challenge to a fourth Act of Parliament was not considered. The Court held that it had no jurisdiction to grant declaratory relief in respect of a Bill that has been passed by Parliament but not signed into law by the president (in paras [56]–[58]).

legislatures and to advise them on the views of other provinces and, presumably, on opinions and information gathered from the public in other provinces. The sharing of information should ensure that each provincial legislature determines its mandate with its knowledge of the needs of its province complemented by a broad understanding of concerns of the other eight provinces.

Whatever the requirements of public involvement where a Bill is tagged as a s 76 Bill, the Act was tagged to follow the s 75 route. Generally, Parliament considers it unnecessary to engage provinces when this procedure is followed. Instead, public participation initiatives by the National Assembly are usually considered sufficient.[42] However, tagging a Bill 's 75' does not automatically relieve the NCOP of its duty under s 72 to facilitate the involvement of the public in legislative business before it.

Section 75 and public involvement in the NCOP

A Bill is tagged as a s 75 Bill when it does not 'affect provinces'. What does and does not 'affect provinces' in this context is constitutionally defined. As we note above, most of the national Bills that 'affect provinces' and trigger the s 76 process fall within the concurrent jurisdiction of the national and provincial spheres of government and thus directly concern provincial governments. In fact, the scheme of the Constitution and the specific design of the NCOP suggest that one might consider the responsibility of the NCOP in relation to s 75 Bills to take second place to its responsibility in relation to s 76 Bills. As we describe above, the NCOP's involvement in the passage of s 76 Bills is central to the model of multilevel government embraced by the Constitution. Moreover, the NCOP is very small with only 90 members. It cannot be expected to engage fully with all the legislation that occupies the 400-member National Assembly. In addition, the NCOP's views on s 75 Bills are easily overridden by the National Assembly, signalling again that the NCOP has less influence over these matters.

However, even if one cannot expect a small legislative chamber, comprised of representatives of provincial legislatures and governments and with a weighty responsibility in relation to s 76 Bills, to give full attention to all the s 75 Bills that it must consider, it cannot disregard its constitutional obligations in relation to such Bills. This is not the place to explore these obligations fully but, taking a lead from *DFL*, they must at least require, firstly, serious consideration by the NCOP of how it should deal with each s 75 Bill and, secondly, a decision concerning whether or not specific steps should be taken to involve the public in its deliberations concerning the Bill. For instance, some s 75 Bills may be determined to be of minimal interest to provinces and, unless a substantial number of delegates to the NCOP request that special attention is paid to them, relatively speedy treatment in the NCOP will be justified.

Whether the NCOP has complied with its s 72(1)*(a)* obligation similarly depends on what is reasonable in the circumstances. In some cases, the NCOP may decide that matters such as the nature of the Bill, urgency and the way in which the National Assembly engaged the public means that it need not put any special

[42] These may, of course, involve hearings outside the seat of Parliament in Cape Town.

processes in place to facilitate public involvement.[43] But some Bills that impact directly and fundamentally on provincial governments are classified as s 75 Bills by the Constitution. Bills relating to local government and to the electoral system are obvious examples. One would expect the NCOP to consider such Bills carefully and, in doing so, to elicit the view of both provincial politicians and citizens. In such cases, provincial legislatures are not formally engaged in the legislative process at all and so their constitutional obligation to facilitate public involvement under s 118 is not triggered. The NCOP may need to fill this gap. Moreover, in some cases the nature of the matters with which a s 75 Bill is concerned may suggest that the NCOP, with its special access to the views of the provinces, should take measures to facilitate public involvement.

Even if it was correctly categorised as a s 75 Bill, the Communal Land Rights Act surely falls into the category of Bills with a direct and fundamental impact on matters of provincial concern—most obviously, customary law and traditional leadership. In addition, the NCOP's provincial character places it in a special position to engage with the public on such matters—customary law and forms of traditional leadership vary from community to community and, as a result, the changes that the Communal Land Rights Act introduces affect provinces differently. This suggests that in the case of that Act, reasonable involvement of the public should have included hearings in the provinces when the Bill was before the NCOP.

The actions of the NCOP in regard to the Communal Land Rights Act

The NCOP's Select Committee on Land and Agricultural Affairs (now known as the Select Committee on Land and Environmental Affairs) met twice in February 2004 to consider the Communal Land Rights Bill. It is quite clear that neither the committee nor the NCOP in any more general sense received any submissions from the public or held any public hearings. More importantly, there is no evidence that the committee considered the requirements of s 72(1)*(a)* and made a considered decision about what public participation was appropriate in the circumstances. Mohamed Surty, Chief Whip of the NCOP and ANC member from the North West, commented that the legislation affected communities living within provinces at a local government level. At the very least, he argued, the provinces and local government should be given sufficient time to consider the consequences of the legislation (NCOP, 2004a). No such time was provided for, however. The select committee met again on 18 February when it adopted the Bill without any amendments (NCOP, 2004b). Even if this period of nine days were to be regarded as sufficient time for the provinces and local government to consider the Bill, there is no indication that the provinces and local government were asked to comment on it or that their views were presented to the select committee.

Thus, the select committee failed to comply with the most basic duty imposed by

[43] Information about what Bills are before the NCOP and when they will be considered should always be available to the public.

s 72(1)*(a)*: it failed even to take a firm decision as to whether, to what extent, and how the involvement of the public should be facilitated. In these circumstances it cannot be said that the NCOP or the select committee have fulfilled their role in ensuring that provincial interests are taken into account in national legislative processes. This, *DFL* confirms, renders the Act invalid.

CONCLUSION

Despite its long genesis, the Communal Land Rights Act was finally adopted under considerable pressure. When Parliament convened in February 2004, it had a hefty legislative agenda, including, of course, the passage of the Budget, and just a few weeks in which to complete it before dissolving for the 14 April elections. The Communal Land Rights Act was a casualty of this process, fatally flawed both by the decision to treat it as a s 75 Bill and by the NCOP's disregard for its obligations under s 72(1)*(a)*.

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North West Traditional Leadership and Governance Act 2 of 2005
Population Registration Act 30 of 1950
Self-Governing Territories Constitution Act 21 of 1971
Separate Representation of Voters Act 46 of 1951
South Africa Act, 1909
Traditional Leadership and Governance Framework Act 41 of 2003

Part three

Land rights and customary law

4

The nature of land rights under indigenous law in Africa

By HWO Okoth–Ogendo

INTRODUCTION

On the eve of the decolonisation process in the late 1950s and early 1960s, a series of conferences was organised by British legal scholars, judicial luminaries and former colonial administrators on the 'future' of customary (read indigenous) law in Africa (Allott, 1960). These conferences were fuelled by a variety of concerns, among them the need to construct a framework for the development of legal systems in the emerging states. The organisers also sought to preserve what they saw as the most valuable contribution to 'civilisation' in Africa, namely, the English common law. In addition, they wanted to define the province (and limits) of indigenous law in the legal systems of the emerging states, and to provide justification for the academic study of indigenous law in foreign universities.

Many of these concerns were clearly unfounded for upon independence African countries quickly adopted and preserved the colonial legal edifice 'warts and all', especially its general ambivalence as regards the applicability of indigenous law. In none of the new states was the application of indigenous law extended to areas already covered by foreign law. Hence, as was the case in English-speaking colonial Africa for example, the hierarchy of laws comprising the legal system remained determined by the reception statutes promulgated at the end of the 19th century, namely:

- Acts of the legislature;
- subject thereto, the common law of England, the doctrines of equity and the statutes of general application in force in England (at a specific date); and
- indigenous law—but only to the extent that it was applicable, and as long as it was not repugnant to justice and morality or inconsistent with any written law.

However, because the new states were created by written constitutions, the relevant national constitution was placed at the top of that hierarchy, thus signifying supremacy over other bodies of law.

The struggle for the recognition of indigenous law in national legal systems in

Africa has, despite this clear bias against such law, nonetheless continued. This has been particularly evident in relation to the manner in which indigenous law determines access to land as well as control and administration of land. This chapter examines that struggle and argues that unless indigenous law is recognised, strengthened and integrated into national legal systems, the development of the land sector, especially in rural areas, will continue to stagnate.

LAND RIGHTS IN INDIGENOUS LAW

The intellectual framework

Some juridical fallacies

Underlying colonial and post-colonial ambivalence about the applicability of indigenous law were a number of juridical fallacies. Five of these are especially germane to this discussion.

The first was the view, preferred by early anthropologists, that so-called 'indigenous law' was really not 'law' at all. Sir Kenneth Roberts–Wray, who served for a long time as a legal adviser to the Commonwealth Relations and Colonial Offices, lamented on the eve of decolonisation that he sometimes met people

> 'even among those who have lived or served in Africa, who speak light-heartedly about the study of native law and native courts and seem to imply that it is an esoteric exercise of little more practical importance than, say archeology; but it is safe to say that these people cannot have had occasion to give much serious thought to the matter' (Roberts–Wray, 1957: 82).

This fallacy lay in the beliefs that law, properly so-called, always issued from sovereign commands and that since many African societies were acephalous (headless) they could have no legal system. The way to order such societies was therefore to impose foreign law even though that law was comprised largely of the customary norms of the colonising societies.

Although the fallacy that law derives only from a sovereign state has long been exposed, the preference for foreign law as the defining medium of post-colonial legal systems remains evident to this day. It is a powerful driver in the reform of law in all sectors of the legal system including such culture-specific areas as family law, succession and, of course, land relations.

The second juridical fallacy was that indigenous law conferred no property in land. In other words, this fallacy lay in the assertion that the way in which indigenous communities occupied and used land did not constitute a system of property worthy of recognition under state law. Indeed, it was often asserted that indigenous people themselves 'acknowledged' that land was not held as property, that is, as an asset exclusive to identifiable individuals or groups. The basis of this assertion was the notion that property rights are constituted only when individuals or other 'jural' persons exercise jurisdiction coupled with exclusive control over corporeal phenomena, that is, concrete things. In this view, therefore, property existed only if exclusive rights of use, abuse and disposition were vested in individuals. Since communities used and controlled

land in common, indigenous land relations conferred not property rights but mere privileges.

This reasoning was used to justify indiscriminate declaration of land as vacant and ownerless not only by British colonial authorities but also by their French, German, Belgian and Dutch counterparts. It also supported the drive for the imposition of foreign property law as a means of filling the perceived gap in this vital legal regime. In Kenya, Zimbabwe and South Africa, for example, that reasoning led to the importation of a regime of property law designed primarily for the acquisition and administration of private rights to land, and more, as indicated in the next paragraphs.

The third fallacy was that radical (ultimate) title to land could only vest in the colonial sovereign. This was held to be the case whether the land was occupied or unoccupied. In many jurisdictions, colonial courts went so far as to declare that indigenous communities were mere tenants at will of the colonial state (Okoth–Ogendo, 1991). This is the position that led to the designation of vast tracts of land or entire territories as government or state land, and which gave the state considerable power in the allocation of rights based on imposed property law.

The fourth fallacy was the belief that indigenous communities had no juridical persona. According to this view, Africans, as individuals and communities, could therefore not hold land (and indeed any property) directly. It was this belief that was used to justify the notion that any land 'reserved' for Africans must be placed in trust for them. This belief was duly legislated in Kenya, Malawi, Zimbabwe, South Africa and Namibia, among other British colonial possessions. At independence, denial of juridical persona to communities remained an important rationale in the interpretation of the nature of African land rights even as the scope of individual ownership was expanded. Thus the trusteeship system continued.

The fifth fallacy lay in the assumption that indigenous social and governance institutions were incapable of, or unsuitable as, agents for the allocation of land and the management and resolution of disputes relating to land. Consequently, these institutions were not only suppressed but were often by-passed or replaced in the ordinary process of land administration. Instead, new and parallel state institutions exercising a wide range of powers over indigenous land and associated resources were promulgated—without consultation with communities or their presumed 'trustees'. The result was that indigenous land governance institutions quickly atrophied, making it even easier for the state to raid indigenous land and associated resources.

Some of these fallacies did not simply persist in the formulation of state policies on the reconstitution of the post-colonial state; they found their way into legislation and court decisions after independence. Thus the trusteeship concept was entrenched in Kenya, Malawi, Zimbabwe, Namibia and South Africa, among other jurisdictions. The fallacy that radical title could only be held by the state or the sovereign survived in Zambia, Tanzania, Swaziland and Lesotho. With the exception of Botswana and some West African jurisdictions, indigenous land institutions continued to be ignored.

The ideological character of these legal fallacies

It is important to emphasise that the persistence of these fallacies in policy-making and legislation was more than just an intellectual error. These fallacies were part of an enterprise designed to justify the expropriation of land by colonial authorities and later by post-colonial elites (Okoth–Ogendo, 1976). The imposition of foreign property law thus became the necessary infrastructure for that enterprise. It provided a system of law that colonial administrators understood and could manipulate to gain access to the 'dead capital' locked up by indigenous culture and custom, as well as the framework for the control and administration of African communities.

The legal fallacies and assumptions used to justify appropriation of land by colonial governments and post-colonial elites were, and remain, essentially ideological in character. While in colonial Africa they made the establishment of colonial administration possible through the application of brute force and administrative subjugation, they remain an arena of contestation between the poor and the rich, the government and the governed, and ultimately between the forces of development and those of underdevelopment. It is for this reason that land remains a serious political issue in Africa.

The consequences

The consequences of that ideology for the juridical status of customary law as it relates to land relations in particular have been severe. Although these consequences have been discussed in depth elsewhere (Okoth–Ogendo, 2002), they bear repetition here.

Firstly, the juridical status of indigenous law as it applies to land relations remains precarious in many national legal systems. Legislative policy in many countries considers indigenous land law to be a dying regime, its substantive content ever diminishing as statute law and court interventions propounding foreign law principles override it, and as its institutional structures continue to crumble. This is the perspective that has driven programmes for the conversion of indigenous land rights into private property in Kenya, Uganda and Zambia, and similar experiments elsewhere.

Secondly, the nature and content of land rights under indigenous law continues to be persistently misrepresented and distorted in scholarship and public policy. Although, as indicated below, indigenous land law makes a clear distinction between individual and collective land rights, for example, this continues to be denied. This has led, among other things, to inappropriate legislative interventions designed to further denigrate indigenous norms, values and cultures.

Thirdly, severe tenure insecurity continues to persist in areas of land held under indigenous law. Empirical studies conducted by the World Bank (Bruce & Migot–Adholla, 1994) indicate that tenure insecurity is not an inherent characteristic of indigenous property systems, but rather of the dislocation of these systems from the social and institutional context that defines and sustains them. In addition, the systematic neglect of the indigenous land sector even after decolonisation has deprived it not only of state services and infrastructure, but of a framework for evolution and development. The system of law governing that sector consequently

remains stunted and largely incapable of meeting the challenges of contemporary changes.

Fourthly, the fact that public policy continues to by-pass indigenous land administration systems and institutions has contributed, to no small extent, to social instability in many parts of rural Africa. The persistence of land disputes across generations is only one piece of evidence of the inability of non-indigenous institutions to process and enforce permanent solutions to them. The disregard of those systems has also opened up informal avenues for the exploitation of vulnerable members of indigenous communities, especially women and children, through abuse of custom or denial of access to state institutions.

The nature of the contemporary discourse

The persistence of indigenous law

Now, more than four decades after independence, it has become clear that the lifestyles of most African people, especially of those living and drawing their livelihoods from rural areas, continue to be determined by values and norms indigenous to their culture and history, and that despite the extensive reach of state law, these remain resilient and robust. There is further evidence of areas in which state law has become a prisoner of indigenous values and norms in the sense that the latter continue to provide the social context in which the former operates. Consequently, state law is often ignored where it is not compatible with the social and cultural milieu in which it is applied.

The persistence of indigenous values and norms is particularly evident in relation to the manner in which land and associated resources continue to be held, used, controlled and managed. Despite the importation of a complex system of property law in many African countries, land relations continue to be determined, either directly or indirectly, by those values and norms. An enquiry into the nature of land rights in indigenous law would therefore shed useful light, not only on the nature of that law, but also on the extent to which it continues to provide an important framework for social development.

Reconceptualising indigenous land rights systems

Contemporary research on indigenous land rights has reaffirmed the view that indigenous law not only confers real and substantive rights over land upon individuals and communities governed by it, but also that this 'juridical fact' will remain a reality for the foreseeable future. For that reason, it is important to restate the essential incidents of land rights under that law. The place to start is to debunk the misconception that indigenous land rights systems are 'communal' in nature, meaning, among other things, that 'ownership'—if it indeed exists—is collective, and that communities as 'corporate' entities make all decisions regarding access to the use and control of land. The concept of community is defined in such a manner as to include what the 1910 Report of the Northern Nigeria Lands Committee refers to as 'the dead, the living and the unborn'.

Proponents of this view often go on to list a number of so-called inherent impediments to that system. These include allegations that under that system

individuals have no established land rights; that land rights cannot be sold or otherwise transferred; that rules of succession will automatically generate fragmentation; and that 'modern' agrarian practices incorporating new technologies of production are not possible (Okoth–Ogendo, 1982).

Nearly two decades ago I argued that indigenous land rights systems could not be adequately explained

> 'by directing inquiry into whether or not African social systems know of or recognized the institution of ownership, and whether, if they do, that ownership was "absolute" or "corporate" and who in society, the individual, the chief, the family, the clan, the lineage, or the "tribe"—was the repository of that ownership' (Okoth–Ogendo, 1989: 7).

I suggested that a more fruitful way of understanding indigenous land rights systems would be to clarify what it is that constitutes property in land in the African social order.

To arrive at that clarification, I suggested that we should direct enquiry into how individuals on their own, or in community with others, relate not simply to the physical solum, but to each other in respect of that solum and its associated resources. My argument then was that what the social order creates is not property rights over land *per se*, but rather a set of reciprocal rights and obligations that bind together and vest power in community members over land. It is the continuous performance of these rights and obligations that determines who may have access to, or exercise control over, the land and associated resources that specific communities occupy.

That clarification, I argued, would direct attention to a paradigm built around two sets of questions. The first relates to how societies determine who may have rights of access to particular categories of land, and the range of functions 'conferred' by that access. The second relates to who controls and manages those resources on behalf of those who have access to it. Control and management in this context would include allocation, re-allocation, adjustment and transmission of access rights between and across generations.

In reconceptualising the essential incidents of indigenous land rights systems in accordance with that paradigm, a distinction must therefore be drawn between the manner in which access to land is obtained and the mechanisms through which land resources are controlled and managed. An empirical reflection of that distinction indicates several important parameters.

The first is that access to land is essentially a function of membership in the family, lineage or community, and is available to any individual on account of that membership. Further, access is always specific to a resource management function or group of functions depending on the level of social organisation—whether family, clan lineage or wider association—at which access is asserted. Finally, access is maintained through active participation in the processes of production and reproduction at particular stages and levels of social organisation. Because membership categories vary by birth, marriage, adoption, co-optation or association, it follows that the quality of rights conferred to individuals by virtue of membership in a family or community will, in terms of quantum, duration and function, also vary. Thus conceived, the right of access is a multiple phenomenon which varies in nature and content with the membership category to which

individuals belong, the range of production activities in which they are involved, and the level of social organisation at which it is being asserted. For this reason, in any given community, a number of individuals, families or lineages could each simultaneously hold a right or bundle of access rights expressing a specific range or variety of functions.

The second is that the control and management of land resources is essentially an incident of a community's sovereign power (in its jurisdictional and non-proprietary sense). Consequently, these functions are typically vested in, and exercised by, the political authority of society. That authority, however, is not by any means monolithic. It is segmented, vertically and horizontally, so as to supervise specific functions at different levels of social organisation. In that sense, therefore, control and management of land resources is exercised in terms of a social hierarchy in the nature of an inverted pyramid. The tip of the pyramid represents the authority of the family unit over cultivation and residence; the middle the clan or lineage unit over grazing, hunting or redistribution of resources in space and time and between generations; and the base the authority of the community or nation over a wide range of cross-cutting functions including territorial expansion and defence, dispute settlement and the maintenance of transit facilities.

Specific aspects of these functions could also be exercised individually across those levels. The point to note is that control and management of land resources are not functions exercised by a single authority in the nature of the state. The primary purpose of this control structure is to guarantee the rights of individuals entitled to access to land resources by virtue of membership at any of those levels. As decision-making units, those levels are designed to respond to issues of allocation, distribution and management of resources on the basis of scale, need, function and process.

It would therefore be misleading in the extreme to try to analyse tenure of land resources under indigenous law in terms of the conceptual categories of Anglo–European property law. Clearly, neither the right of access nor the power of control and management can be equated to 'ownership of the physical solum'. Similarly, no person or group of persons has the exclusive dominion over both access to and control over land resources. Tenure under indigenous law is a complex process that relates access rights and their functional equivalents to the governance system at all levels of social organisation. Land tenure in indigenous law therefore balances access rights, their functional equivalents and control. This understanding provides answers to a number of concerns that have been expressed over several decades with respect to the nature and viability of indigenous land rights systems. These are that rights of access under these systems are indeed 'secure' as long as they are being asserted; individuals have real rights under those systems; and indigenous social structures are able to manage land resources sustainably.

In a recent review of the discourse on the specific issue of land tenure security, I pointed out that this is as much an issue of law as it is of social organisation. The former will not confer security unless it reflects the basic norms and values upon which the latter functions (Okoth–Ogendo, 2006). Tenure security must therefore be seen essentially as a composite factor. It is an assurance that:

- access to land resources will always be available as long as membership in a community and equivalent use functions are maintained;
- the land resources of the community will always be preserved for the sole enjoyment of its members;
- land resources remain also available to future generations; and
- community land resources are generally not alienable outside the group unless this is in the interest of its members.

That approach to tenure security has been acknowledged in contemporary studies on land tenure in Africa (Bruce & Migot–Adholla, 1994; Van den Brink, 2003).

The claim that indigenous communities had no juridical persona was used extensively by colonial administrators, as indicated earlier, to deny indigenous peoples direct control of their land. It should be obvious, however, that once indigenous law was recognised in whatever form, the existence of structures and institutions through which it was administered could not at the same time be denied. The fallacy here lay in the assumption that a definition is always required for any set of facts to acquire juridical content. Trends in international jurisprudence now clarify that because communities are constituted through cultural and social ties, self-identification is the process through which juridical persona is established. Simple empirical enquiry, therefore, is what is needed to establish this.

The position of individuals in respect of the land resources controlled by communities to which they belong has similarly been under scrutiny. The claim here is that since indigenous land tenure is 'communal', individuals can have no exclusive rights to the resources they occupy or use. This is what fuelled the discourse on 'the tragedy of the commons' which has been raging among property economists for centuries (Hardin, 1968; Demsetz, 1967). That discourse is based on the misconception that land use decision-making under indigenous land rights systems is 'collective' and so precludes the possibility of individual choices. That, as more sophisticated analyses have shown, has no basis in empirical reality (Bromley & Cernia, 1989). There is no doubt that use functions in respect of which communities confer access rights upon their members entail extensive exercise of individual control and enjoyment of land resources.

STATE RESPONSES TO INDIGENOUS LAND RIGHTS SYSTEMS

The discourse on indigenous land rights systems is not complete without consideration of state responses to their persistence in economy and society. This has occurred at several levels: constitutional, judicial, legislative and policy development.

Before specific aspects of those responses are considered, it is worth remembering that throughout Africa the state remains an important instrument in the suppression of indigenous land rights and cultural resources. This is not only a carryover of colonial perceptions of indigenous property relations but also of the strong belief, without proof or empirical justification, that indigenous land rights systems are incapable of supporting modern agrarian development. Consequently, the state is generally averse to pressures for their integration into national legal systems. Official state policy in many African countries still favours the eventual

eradication of those systems through privatisation of land rights under a regime of Anglo–European property law.

Because credible evidence is emerging that that policy is a major cause of increased poverty in rural Africa, many jurisdictions are beginning to reconsider the status of indigenous land rights systems, at least at the level of recognition of indigenous law, the juridical framework which constitutes and gives content to them.

Constitutional responses

Most constitutions handed over to post-colonial states carried, as would be expected, an extremely regressive perspective of indigenous law. In a provision typical of most ex-British colonies, the 1963 Kenya Constitution provided, among other things, for the application in

> 'case of matters of a particular race or tribe, of customary law, with respect to any matter to the exclusion of any law in respect of that matter which is applicable in the case of other persons' (s 82(4)*(c)*).

The Constitution went on, in the same section, to single out the customary law of 'adoption, marriage, divorce, burial, devolution of property on death or other areas of personal law' as areas to which indigenous law would continue to apply.

The implications of that formulation are at least threefold. Firstly, no positive recognition was accorded to indigenous law: it was and remains an exception to the general search for universality based on imposed law. Secondly, land rights, except with regard to rules of succession, were carefully excluded from the list of exceptions. And, thirdly, even those exceptions remained vulnerable to the extension of foreign law through either statutes or judicial pronouncements.

However, constitutional development in the last two decades gives some prospects for the reversal of that perspective. For example, Uganda, Tanzania, Lesotho, South Africa, Mozambique and Ethiopia, among others, now recognise the legitimacy of indigenous law as one of the foundations of property relations.

Judicial responses

Although these constitutional provisions do not, as would be expected, define what indigenous law is or the range of social or economic entitlements to which it applies, judicial pronouncements coming out of a number of jurisdictions are beginning to respond to that lack of specificity.

In an important judgment delivered nearly two decades ago, Kenya's Court of Appeal resolved the issue of the relationship between legislative enactments, the common law of England and indigenous law as follows:

> '[T]he place of customary law as the personal law of the people of Kenya is complementary to the relevant written laws. The place of the common law [of England] is generally outside the sphere of personal . . . law with some exceptions. The common law is complementary to the written law in its sphere . . . . In this way these two great bodies of law, for that is what they truly are, complement each other' (Ojwang & Mugambi, 1989: 141).

By raising the status of indigenous law to the level of foreign law and emphasising its complementarity to written law, the Court advanced the debate closer towards

the recognition of indigenous law as a legitimate component of Kenya's national legal system. Similarly, the Constitutional Court of South Africa, in a more recent case, has reaffirmed the legitimacy of indigenous law in that country's legal system, subject, as is the case with any other body of law, to the Constitution.[1]

Legislative responses

The implication of these judicial responses must be, among other things, that to the extent that indigenous law governs rights to property in land for particular communities in Africa, it will form an integral part of the national legal system. That leads to a consideration of legislative responses to the status of indigenous land rights systems.

A number of jurisdictions—among these Botswana, Mozambique, Uganda, Ethiopia and most recently South Africa—have enacted legislation giving explicit recognition to indigenous land rights systems or aspects thereof. That recognition has taken a variety of forms. These include:

- provision for the recognition of indigenous law as the foundation of property relations (Djibouti, Ethiopia and Swaziland);
- recognition and strengthening of indigenous land governance institutions (Botswana);
- simple recognition of indigenous law as a framework for determining tenure relations (Uganda and Kenya);
- development of a framework for the administration of land resources on the basis of local custom and norms (Tanzania, Sahelian countries);
- the conferment of juridical persona directly on indigenous communities for purposes of control and management of land resources (Mozambique);
- the codification or partial codification of indigenous rules and principles governing access to, as well as control and management of, land (South Africa); and
- the development of hybrid systems combining elements of Anglo-European and indigenous law (Ghana).

SOUTH AFRICA'S COMMUNAL LAND RIGHTS ACT

The most comprehensive of these responses at this point is South Africa's Communal Land Rights Act 11 of 2004.[2] The Act purports to confer security of tenure on individuals and communities having rights in land in terms of s 25(6) of the South African Constitution which states as follows:

> '[A] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament either to tenure which is legally secure or to comparable redress.'

There is grave doubt as to whether this Act will achieve its stated primary objective, as set out in the Preamble, of providing

[1] See the author's affidavit in the DVD included with this book.

[2] The Act was passed in 2004 but still had not been brought into operation by the time this book was published.

> 'for legal security of tenure by transferring communal land . . . to communities or by awarding comparable redress; to provide for the conduct of a land rights enquiry to determine the transition from old order rights to new order rights [and]; to provide for the democratic administration of communal land by communities.'

That doubt is fortified by the fact that the Communal Land Rights Act is to be read together with the Traditional Leadership and Governance Framework Act 41 of 2003, which gives enormous powers over land to traditional councils. The Communal Land Rights Act will fundamentally undermine tenure security under indigenous land law and reinforce the state of insecurity of tenure currently experienced by individuals and communities whose land rights are governed by customary land law. This view is based on my research and analysis which indicates that the overall design of the Act is not capable of delivering clearly recognisable or secure land rights to individuals or communities under indigenous law.

This is so because, firstly, the Act defines communities by reference to 'shared rules determining access' which logically cannot be made until a community has been identified by some prior criteria. The Act gives no indication as to what the essential content of those rules might be. Secondly, the fact that the minister can, under s 19(5), prescribe 'standard' rules for communities in default must mean that these so-called 'community' rules will operate as instruments of public administration rather than land administration *per se*, for such adoptive rules are unlikely to reproduce the intimate and complex correspondence between gradations of social status as well as access to and control of land which is the hallmark of land relations under indigenous law. Thirdly, the Act defines 'communal' land not with reference to community perceptions, rules and territorial principles, but rather with reference to past apartheid laws and entities. While communities define their existence in territorial terms, the power given to the minister under s 18(2)–(3) 'where applicable [to] determine the location and extent of land to be transferred to a community or person' could undermine that principle. Lastly, the administrative framework of the Act, consisting as it does of the minister, land administration committees or traditional councils, and land rights boards, is designed to by-pass the family and community structures and processes of land administration outlined in this chapter. The result will be that over time these structures and processes will be destroyed—or at any rate their inherent balancing mechanisms, which are essential to community coherence and sustainability, will be severely damaged.

More generally, the implementation of the Act as presently designed will impede the organic growth and evolution of customary law, which is at the heart of genuine tenure security in tandem with changes in the economy and society. In this regard, I have already indicated that among the insidious devices used by colonialism and apartheid to frustrate or stultify the evolution of indigenous law was the imposition of statutory regimes designed to eradicate custom and introduce new property concepts into community land, and failure to provide a framework for the articulation of customary law. These devices are repeated in the Communal Land Rights Act. In addition, the introduction of new land rights regimes and concepts such as 'ownership', 'beneficial occupation' and 'freehold' into community customary land relations will further have that impact as deeds registries, courts,

land administration committees, land rights boards and the minister strive to re-interpret community social facts in the light of those regimes and concepts.

The Act will re-entrench and perpetuate the distortions and misrepresentations of indigenous land tenure, land use and land administration systems outlined in this chapter. By handing over land administration functions to traditional councils, the Act will re-entrench the fallacy that communities, even as jural entities, cannot be entrusted with land administration functions. There is real danger that the land administration committees contemplated under s 22, which are intended to have an existence and constitution independent of traditional councils, may never be established.

In addition, by giving traditional councils (or land administration committees) the power to dispose of community land, the Act confers something more than supervisory functions: it reintroduces the fundamentally flawed colonial thesis proclaimed by the Privy Council in several cases[3] that traditional authorities or chiefs hold both dispository and reversionary rights in community land. Further, by giving the minister, working directly or through land rights boards, the power to determine who has what rights in community land, the state will, as was the case under colonialism, exercise discretion to 'create' property for individuals and communities. This power has no derivation in customary law.

The probability is that the method of enquiry into so-called old order rights under ch 5 of the Act will not accurately determine the true content and complexity of those categories of rights derivable solely from customary law. My research and study indicate that unless the process of land rights enquiry is *(a)* informed by organising concepts and idioms that are culturally specific and *(b)* fully participatory, the nature and extent of those rights, the identity of persons or communities in which they vest, the territory or territories over which they are enjoyed, and the extent and character of comparable redress where security is not possible, cannot be fully ascertained.

This view is based on the observation that there is real danger that the land rights enquirer will be tempted to use conceptual categories drawn from law other than customary law to capture the content of old order rights, and that the conclusions thus arrived at will be translated into new order rights for purposes of registration. This result has occurred in every African country in which attempts have been made to convert indigenous tenure rights into rights capable of registration under other systems of law. In addition, because the Act does not define the specific incidents of what constitutes a new order right, and indeed treats all converted old order rights in the same way, it is more than likely that such incidents will be created by the registrar of deeds in terms of categories known to the current system of land registration.

Without proper correspondence between the nature of various categories of old order rights and registered new order rights, the following consequences will, over time, emerge:

- attempts by elites to exercise exclusive rights over community land, especially since s 9(1) permits individuals to acquire 'freehold' in such land;

[3] See, for example, *Sakariyamo Osbodi v Moraimo Dakola and Ors* 1930 AC 667.

- appropriation of the temporal access rights of women (especially if unmarried) and children, and the extinction of trans-generational rights and their conversion into mere rights of 'inheritance'; and
- perpetual conflict between unrecognised community values and principles and statutory rights recorded in the register. This will render the register irrelevant and dysfunctional as has happened elsewhere in Africa.[4]

The Act will further marginalise the already precarious property rights of certain categories of individuals and groups, especially unmarried women and children, arising from apartheid legislation and practices. This is a logical consequence of the fact that in most cases individual rights to land conferred on indigenous people under apartheid, and especially via Permission to Occupy certificates, were vested exclusively in male household heads or traditional chiefs or councils, without the guarantees inherent in and accorded by customary law. Secondly, the confirmation of new order rights in favour of married women and widows under s 18(4)*(b)* is at the discretion of the minister rather than the result of enquiry under customary law. Thirdly, the registration provisions of the Act do not address the issue of the land rights status of the spouses of persons who at the time of acquisition of new order rights were single, but who subsequently marry.[5]

For all of these reasons, the Act will undermine existing security of tenure held by people living under customary or indigenous law. It will also impact very substantially upon the nature and content of customary law in South Africa, and confer upon traditional leaders powers that are completely out of kilter with their role under customary law.

This chapter has reviewed the nature and status of indigenous land rights systems in Africa. It has noted that although radical changes are taking place in the epistemology of indigenous land rights systems in post-colonial Africa, a great deal more still needs to be done (Wily, 2006). The most important issues that must still be tackled include:

- unequivocal recognition of indigenous law as part of national legal systems;
- reversing legislative and judicial policies which oppress and suppress indigenous legal regimes;
- correcting public policy prejudices against the development of land resources under indigenous law;
- democratising land administration systems through effective use of indigenous land governance institutions and structures; and
- provision of capacity and resources to effectively safeguard indigenous land rights systems.

In other words, more effort is required to ensure that the empirical reality—that is, the persistence of indigenous principles, values and institutions, to the extent that they do not impede social, cultural, and economic progress—is reflected in and forms part of the living law in Africa.

[4] Okoth–Ogendo (1982).

[5] In Kenya, registers established after the process of conversion of community-held land into individual holdings have totally broken down for this reason.

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5

Characterising 'communal' tenure: nested systems and flexible boundaries

By Ben Cousins

INTRODUCTION

The stated objectives of the Communal Land Rights Act 11 of 2004 are to provide security of tenure for the occupiers of communal land and to create a democratic land administration regime. Communal land is defined in ch 1 of the Act as land 'occupied or used by members of a community subject to the rules or custom of that community', and community is defined as 'a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group'. Security of tenure is to be achieved through the transfer of ownership of such land from the state to communities and the confirmation or conversion of 'old order rights' to 'new order rights', which can be registered.

Are these measures likely to promote tenure security for people living on 'communal' land in South Africa? A key factor to consider is the manner in which these measures engage with the complex realities of 'actually existing' land tenure regimes. The African experience of tenure reform in the post-independence era has largely been one of ineffective law and policy. Interventions have, at best, failed to bridge the gap between *de facto* and *de jure* realities (Toulmin & Quan, 2000). Inadequate funding and state capacity have contributed to these failures, but so has a persistent lack of understanding by policy-makers and legislators of the character of existing systems of land rights (Okoth–Ogendo, 2002).

This chapter explores the nature of land rights within 'communal' systems in contemporary South Africa. It also identifies some key commonalities and distinctive features, while noting a number of important variations across different settings. A long history of state interventions means that it is necessary to take into account the impacts of past policies. These are particularly marked in relation to the powers of traditional authorities, but also with regard to women's land rights. A high degree of variability means that there is no one system of 'communal' or 'customary' tenure in contemporary South Africa. However, significant commonalities across contexts reveal this form of property rights to be clearly distinct from that of individual, private property.

It is inherently difficult to characterise non-Western land tenure systems.

Terminologies are contentious due to the historically specific character of legal concepts derived from European systems of law and which may not be appropriate in non-Western contexts. This was recognised by some colonial administrators and in much early anthropological research, leading to controversies over concepts and analytical frameworks (Bohannan, 1963; Gluckman, 1965). According to Biebuyck (1963: 52),

> '[c]ommon general formulae like . . . ultimate or sovereign rights, rights of allocation or of control, or rigid oppositions between ownership, possession, use and usufruct . . . have often obscured the understanding of the scope and nature of rights and claims relating to the land.'

'Custom' is often invoked in describing the nature of land rights in Africa and in claiming legitimacy for them. In contemporary contexts marked by dynamic market relations, the commercialisation of production, large-scale population migration, growing social inequality and increasing institutional complexity, the term 'customary' with its connotations of an unchanging social and moral order is clearly problematic. Yet it continues to be articulated in discourses and struggles over property. Can land rights in contemporary South Africa still be described as 'customary' or 'traditional' in character? Does the notion of 'living custom' or 'living law'—understood as law that is 'negotiated within ever-fluctuating social and political settings' (Oomen, 2005: 203)—allow land rights and land administration to be seen as both 'customary' *and* evolving over time? Given the centrality of a notion of 'living custom' in recent Constitutional Court rulings, this is an important question, and is returned to later.

'Communal' and 'customary' are not coterminous. As Walker (2004: 5) notes, the terms tend to be used interchangeably yet it is quite possible 'to have communal tenure systems that support poor people's livelihood strategies, that are not based on customary law, nor dependent on traditional institutions for their administration'. Advocates of traditional systems as well as women's rights activists at times elide these meanings, but for analytical purposes they must be seen as distinct.

The chapter draws largely on ethnographic analyses and historical accounts from the southern African region, but makes occasional reference to debates elsewhere in Africa or further afield. Key issues discussed include the social and political embeddedness of land rights, the relative balance of 'individual' and 'communal' features, women's land rights, common property resources, territorial and jurisdictional boundaries, nested systems of administration, and the role of traditional authorities in relation to land. Important controversies in the literature are identified and discussed, for example, debates on the source of land rights and the nature of land allocation. The conceptual framework for understanding property regimes suggested by Okoth–Ogendo (1989) informs a characterisation of the key features of land rights in 'communal' systems. Challenges to the approach to tenure reform adopted in the Communal Land Rights Act are noted, but the potential impacts of the Act are not discussed in detail here.[1]

[1] See chapter 7 in this book by Aninka Claassens and Sizani Ngubane as well as chapter 11 by Claassens.

THE GENERAL CHARACTER OF 'COMMUNAL' LAND TENURE SYSTEMS IN SOUTHERN AFRICA

Anthropologists undertaking field research in the early to mid-20th century attempted to identify the general features of African land tenure in the pre-colonial era. Biebuyck (1963: 52–64) provides a useful summary of their views: land was plentiful and exploitation of resources was generally extensive; land was essential for livelihoods but had little exchange value; land was 'vested in groups' (chiefdoms, villages, lineages or other social groupings) represented by chiefs, elders and/or councils. There was 'a close relationship between features of social and political organisation and principles of land tenure'. A mythical association between ancestors and land was often present in belief systems.

All members of a group had rights of access to land, derived in the first instance from membership of the group or in some cases from political allegiance of the subject to the political authority of the group. Rights in land could also be obtained through marriage, migration, friendship and formal transfer. The exercise of any right was always limited by obligations and counterbalanced by the rights and privileges of others. Individual security was great, provided that the necessary respect for the ethical code of the group was maintained. Effective use and appropriation were generally required for the maintenance of individual and family rights in a particular piece of land. Often a number of social personalities exercised rights and claims in the same piece of land. Land tenure was both 'communal' and 'individual' (Biebuyck, 1963: 54–5), and can be seen as 'a system of complementary interests held simultaneously' (Bennett, 2004: 381).

Conquest and colonial rule brought the imposition of new forms of authority and economic organisation as well as the subordination of indigenous forms. African reserves were created as a way of containing resistance to dispossession, and later facilitated the supply of cheap labour to the emerging capitalist economy (Wolpe, 1972). The reserves also allowed for the creation of a system of indirect rule in which traditional leaders undertook low-cost local administration on behalf of the colonial state (Mamdani, 1996). According to Hendricks (1992), government-sponsored communal tenure bore little resemblance to the pre-colonial system and was severely distorted. State policy thus sought to retain a form of 'communal' land tenure because this appeared to suit the interests of the dominant classes.

Regional variations in policies and their impacts occurred within this overall pattern. In the Cape Colony in the 19th century, government attempted to replace customary tenure with individual titles. The Glen Grey Act 25 of 1894 (C), for example, entitled married men to only one arable plot, and only title-holders were allowed to graze livestock on commonage land. Often, however, boundaries were not observed, the distinction between arable and commonage land became blurred and people did not register their inherited titles. The system tended to revert back to 'communal' tenure (Delius *et al*, 1997). In Natal, by contrast, individualisation of land rights was not pursued. The British Diplomatic Agent, Theophilus Shepstone, attempted to codify custom and in so doing enshrined in law many of the despotic powers created for Zulu chiefs during the reign of Shaka.

Later the Native Trust and Land Act 18 of 1936[2] established the South African Native Trust[3] in which would vest all Crown land set aside for 'native occupation'. This added another 6 per cent to the 7 per cent of land area of South Africa which had been set aside for Africans. The Act allowed regulations to prescribe the conditions under which residents could hire, purchase or occupy land held by the trust and to control soil erosion. Rights to transfer or bequeath land were limited, the size of allotments was set, and women's land rights were severely circumscribed. In terms of Proclamation R188 of 1969, two forms of tenure were recognised—quitrent[4] for surveyed land and 'Permission to Occupy' (PTO) for unsurveyed land. For the latter, chiefs and headmen were to undertake the task of allocation, agricultural officers to survey the boundaries of sites and fields, and magistrates to issue PTO certificates. Registers of permit-holders were to be kept at the magistrates' offices. The manner and degree to which these formal requirements were implemented varied across the country (Macintosh *et al*, 1998).

In the colonial and apartheid eras, the retention of 'communal' land tenure was intended to underpin cheap labour policies and cost-effective control of rural populations from above. But the system also widened access to relatively independent, land-based livelihoods. In addition, it helped rural communities to resist exploitation and state control, and they often actively defended the system (Delius *et al*, 1997; Beinart, 1982). The effect was to provide for elements of both continuity and change in land tenure systems—to varying degrees in different areas depending on the outcomes of local political struggles and the degree to which state policies were implemented (Cousins & Claassens, 2005). The legal status of such land rights remained weak, given their 'second class' status, as evident in the difficulties faced by people attempting to defend their rights against the state or powerful private interests (Budlender & Latsky, 1991).

Contemporary South African case studies[5] generally characterise land tenure in the former reserves as being simultaneously 'communal' and 'individual' in character. Secure rights to land and natural resources derive largely from recognised and accepted membership of a local group or 'community'. Membership flows from birth in the first instance, but outsiders who apply for land can be accepted into the community through defined procedures (for example, approval of an application

[2] Subsequently renamed and repealed. The Development Trust and Land Act was its last valid name.

[3] Later named the South African Development Trust (SADT).

[4] Quitrent was originally a form of leasehold on state land, and was held by white settlers in the early colonial period. It was extended to blacks in parts of the Eastern Cape and Natal in the 19th century, but in a highly restricted form (for example, land was inalienable and could not be mortgaged).

[5] For KwaZuluNatal see Alcock & Hornby (2004), Cross (1994), Ferguson & Sithole (2004), Hornby (2000), Liversage (1993), Sithole (2004), Walker (1997). For Eastern Cape see De Wet (1995), Fay (2005), Kingwill (1996), Kepe (1999; 2001), McAllister (1986), Ntsebeza (1999), Turner (1999). For Limpopo see Claassens (2001), Lahiff (2000), Lahiff & Aphane (2000), Oomen (2000; 2005). For North West see Small & Winkler (1992). For Mpumalanga see Levin & Mkhabela (1997), Small & Winkler (1992).

and payment of a *khonza* fee in KwaZulu–Natal)[6] or through transactions such as purchases of houses (or sometimes even land). Land rights, as in the pre-colonial era, are closely inter-related with social and cultural relationships more generally and the identities associated with these. People often view land rights as underpinning the continuity of social units as well as securing access to the basic conditions of human existence. Tenure security derives in large part from locally legitimate landholding rather than the law.

In many of these case studies, however, relationships and values are shown to be under stress as a result of social and political change. This gives rise to tension and conflict over the precise definition of both collective identities and individual rights (Claassens, 2001; Hornby, 2000; Oomen, 2005). Development planning often precipitates conflict over land rights due to lack of legal clarity (Adams *et al*, 2000; Kepe, 2001).

Cross (1992: 314–17) suggests that contemporary communal tenure systems in South Africa refer back to an 'indigenous social land ethic'. While varying according to local context, the principles underlying this ethic 'offer a basis for either common property rights or different forms of individual property rights under community supervision' (Cross, 1992: 318). The most basic principle is that all families have a claim on the community for land, that is, there should be universal access to land. She explains the trend towards higher levels of individualisation in terms of adaptations, rather than abandonment, of the land ethic. She suggests that private discretion in land transfers is allowed more now than in the past; permanent individual rights have become more accepted than before; and egalitarianism has begun to prevail over the principle of settlement seniority. Rates of change are highly variable and are highest in areas closest to towns and cities, but the land ethic often underpins *de facto* tenure systems that emerge in informal settlements in urban areas (Cross, 1994: 181). Change has been slowest in relation to the notion of a universal land right (Cross, 1992: 320).

Despite state intervention and control, land rights in contemporary systems of 'communal' tenure thus remain socially embedded, involving 'complementary interests held simultaneously' (Bennett, 2004: 381) by members of groups. The challenge for tenure reform legislation is to give appropriate legal recognition to the nature of such rights.

WHERE DO LAND RIGHTS DERIVE FROM: AN ALLOCATION BY AUTHORITIES OR AN ENTITLEMENT OF 'CITIZENSHIP'?

The source of rights in land within pre-colonial African property systems remains controversial. Although some writers concur with Biebuyck's formulation that rights were 'vested' in the group, others assert that these rights were vested in individuals, arose from membership of society and were akin to a claim of citizenship. Gluckman (1965: 78) asserts that the underlying principle of African land tenure (in common with most 'tribal societies') is that rights to land

[6] See Alcock & Hornby (2004: 13).

> 'are an incident of political and social status. By virtue of membership in the nation or tribe, every citizen is entitled to claim some land, whether it be from the king or chief, or from such political unit as exists in the absence of chiefly authority.'

Colson (1971: 197) asserts that land rights could not be bought nor ceded 'any more than the citizenship upon which [they] rested'.

In contrast, some anthropologists have described land rights as deriving from allocations by chiefs acting as 'owners' of land or in a trusteeship role. Reader (1966: 65), for example, describes Zulu land tenure rights as 'usufructory' and not 'absolute', and stemming from 'the tradition that the chief holds all tribal land in trust for those who owe political allegiance to him'. In Swaziland, according to Kuper (1969: 44), 'the land and the people are interlocked, and the political bond between rulers and subjects is based largely on the power that the rulers wield over the soil on which the people live'. Kuper (1969: 45) says that 'as representative of the nation, the king allots land to his people'. It may be significant that both the Zulu and Swazi cases are societies in which state power became highly centralised in the period immediately before colonial subjugation.

The strong emphasis on chiefly allocation as the source of rights has been heavily criticised by authors such as Cheater (1990), Chanock (1991) and Ranger (1993). Chanock (1991: 64) suggests that

> '[t]here is a profound connection between the use of the chieftaincy as an institution of colonial government and the development of the customary law of land tenure. The development of the concept of a leading customary role for chiefs with regard to the ownership and allocation of land was fundamental to the evolution of the paradigm of customary tenure ... the chiefs were seen as the holders of land with rights of administration and allocation. Rights in land were seen as flowing downward.'

In central and southern Africa, this 'feudal' model fitted well with British ways of thinking about states and societies. It also linked British land law and colonial contexts, and served the interests of regimes seeking to acquire land for settlers. In addition, it suited the South African state to 'ground the powers of chiefs in the right to allocate customary land for use' (Mamdani, 1996: 140, 144).

For Biebuyck (1963: 55), writing from an Africa-wide perspective, land allocation was not necessarily undertaken by the representatives of the landholding groups. The primary role of chiefs and elders was often to maintain peace between the land-using units, to defend the integrity of the territory or to ensure its fertility. Colson (1963) describes the case of the Valley Tonga of present-day Zambia where, before 1900, people lived in neighbourhoods under a ritual leader known as a *sikatonga*. Individual cultivators had rights over the land they brought into cultivation and 'no authority within the community had the right to allocate land'. Men and women were 'equally eligible' to receive lineage land (Colson, 1963: 141–2).

The contemporary literature also contains contrasting characterisations of the source of land rights and, in particular, of the meaning of the term 'allocation'. Some authors portray rights as deriving primarily from allocations by an authority structure (Oomen, 2005: 157–8; Ntsebeza, 1999: 75, 101; Ntsebeza, 2005: 219–20). Others see the origin of rights in accepted membership of a 'community', and portray 'allocation' as an essentially administrative procedure to ensure that land is distributed fairly and to avoid boundary disputes (Alcock & Hornby, 2004: 13).

Fay (2005: 189–90) describes land allocation in Hobeni in the Eastern Cape as follows: applicants approach neighbours in the area to seek their approval and then approach the sub-headman who arranges an open meeting of residents to reach consensus on the acceptability of the applicant and the site. Access to land through inheritance or sub-division of existing plots does not involve consulting with the headman or sub-headman.

Small & Winkler (1992: 6) describe land allocation among the Bafarutse ba Braklaagte as follows. Large areas of land are set aside for extended family groups or clans (*kgoros*). Every family is entitled to residential plots, fields for ploughing and access to communal grazing. The allocation is undertaken by an elder representing the clan on the *kgotla* or council of elders. In these cases, it seems clear that the entitlement to land precedes the actual process of allocation.

In other studies the issue of the source of land rights is not explicitly addressed and the precise meaning of the term 'allocation' in this regard remains unclear. This ambiguity is not resolved by Bennett (2004: 383–4), who discusses the powers that traditional leaders have to decide where their subjects are to live and how much land they are to be given, but also characterises this as a *duty*. Since the present day reality is that most land has already been allocated, in most cases leaders now do no more than 'approve a transfer between existing landholders'. Bennett goes on to describe the origin of land rights as an 'entitlement to land [that] arises not from affiliation to the nation but, rather, from attachment to one of its wards'. He describes the decision to allot land (or approve a transfer) at the local level as 'taken on the advice of elders and the applicant's future neighbours'. He characterises this as 'an administrative act', subject to the principles of administrative law, because 'an applicant has no definite rights before an allotment is made' (Bennett, 2004: 384). He does not engage with arguments that the powers of traditional leaders to grant land rights were over-emphasised during the colonial period.

The land allocation powers of traditional leadership and the nature of land rights are central issues in the constitutional challenge to the Communal Land Rights Act. They are returned to below.

SECURITY OF INDIVIDUAL RIGHTS TO LAND WITHIN 'COMMUNAL' SYSTEMS

The early anthropological literature emphasises the strength and security of individual rights to residential and arable land within 'communal tenure' systems, but also describes a variety of social obligations that constrain these rights. Schapera (1955: 199) asserts that for the Tswana in the 1930s,

> 'a homestead once built remains the exclusive property of the family occupying it; and is handed down from one generation to another. . . . Without their permission, no-one may occupy it; and they can return there at any time to live in it again.'

Male heads of families were granted arable land without restrictions on size or number of fields, the family's capacity to work the fields being the effective check (Schapera, 1955: 202). The land of the male head was inherited by his heirs. He also had the right, subject to approval of his headman, to give away part of it to a

relative or friend, or to lend it to someone else. But he could never sell it, hire it out or dispose of it in any other way in return for money (Schapera, 1955: 205).

Hunter (1979) describes rights to land in Pondoland in the 1930s. She states that there had been comparatively little change in the land tenure system since contact with Europeans because no serious shortage of land had yet occurred, and 'all who wish it can obtain land to cultivate' (Hunter, 1979: 117). She also asserts that the Pondo 'are very much averse to the introduction of individual tenure which holds in a number of districts of the Transkei and Ciskei'. Nevertheless, in relation to arable land 'the Pondo approach more nearly the European conception of ownership' (Hunter, 1979: 113).

In general, the older anthropological literature emphasises the security of individual rights against arbitrary decisions by socio-political authorities acting as land administrators.

The imposition of colonial rule saw many changes in land tenure (Biebuyck, 1963: 56). These involved a growing scarcity of land due to increased population, agricultural development, the development of new markets and the demand for good quality land; new ideologies of inheritance and economic co-operation; new legislation and interventions by the courts; and large-scale resettlement of people. Sales of land became widespread in some areas but elsewhere remained repugnant. In some places rights became highly individualised; in others they remained under the control of groups. According to Sansom (1974: 168–9), the general trend in southern Africa was towards 'adaptation' of customary tenure to meet the new conditions of land shortage. He cites Gluckman's (1961) views that the basic principle that every male member of the tribe had a right to land to support his family was generally upheld by chiefs, who were then forced by scarcity to progressively commandeer and re-allocate first unused land, then fallowed land, and then to restrict each family to a defined area of garden land. Sansom (1974: 169) also cites evidence of bribery of chiefs in relation to land.

Under apartheid, the security of individual rights within 'communal' systems was weakened in several ways. Bureaucratic controls imposed through the PTO system included a one-man-one-lot requirement, restrictions on plot size, a rigid system of male primogeniture to govern inheritance, and non-recognition of women's land rights. Officials were given extensive powers to appropriate land and to cancel quitrent titles and PTOs. As Delius *et al* (1997: 38) comment, 'access to land depended upon the whims of white officials and strict observation of a host of regulations', and there was 'a reduction in the scope for flexibility and diversity in land holdings which had characterized "customary" systems'. Resentment of state intervention in land tenure helped provoke major rural revolts in Sekhukhuneland and Pondoland (Chaskalson, 1987).

In contemporary case studies, rights to residential and arable plots are usually portrayed as being held by households with married men at their head (Alcock & Hornby, 2004; Cross & Friedman, 1997; Turner, 1999). In some communities, single women with children to support are also allocated land (Fay, 2005; Meer, 1997; Sithole, 2004; Thorp, 1997). The principle that families need land to establish an independent base for their livelihoods is still widely upheld. Once land has been allocated these rights are secure; the holders cannot be deprived of them

unless they permanently leave the community, or someone commits a major crime such as murder or engages in witchcraft.

The pre-1994 system of issuing PTO certificates is still in place in some areas and provinces but not in others. Whether or not officials still survey and demarcate plots, as they used to do in the apartheid period, is also highly variable (Macintosh *et al*, 1998). In many places registers are not being maintained. The effective breakdown of land administration can lead to tensions and disputes over land rights (Lahiff & Aphane, 2000; Turner, 1999; Macintosh *et al*, 1998).

High population densities in communal areas have led to a widespread shortage of arable land, and often only residential land is now allocated (Turner, 1999). In many areas, grazing land is being given over to residential plots or fields. The economics of dryland cropping under current conditions means that large areas of arable land are not fully used (Andrew *et al*, 2003). The principle that land not in use can be reallocated to community members in need is rarely invoked; in these cases non-use of fields for periods of five to ten years or even longer must be demonstrated (Alcock & Hornby, 2004: 17; Kepe;[7] Turner, 1999: 16). In many areas a certain amount of sharecropping or lending of arable land takes place, but this is often constrained by a lack of formal oversight of such arrangements and consequent insecurity (Fay, 2005: 199). Land is also sometimes allocated to small groups, usually women, for income-generating projects such as gardens, poultry enterprises, brick-making or bakeries, but the security of these rights is sometimes in question (Claassens, 2001).

The underlying principle that communal land cannot be bought or sold is still strongly articulated by residents in many communal areas (Alcock & Hornby, 2004: 17). However, in some places, such as Pondoland, it is evident that sales to outsiders do take place (Kepe).[8] Sale of buildings or other permanent improvements such as fruit trees is usually seen as acceptable, but allocation of the land itself must then follow a procedure similar to that followed when outsiders apply for land (Turner, 1999: 13). However, in many places it appears that there is a high incidence of chiefs and headmen selling land to outsiders without such procedures being applied (Ntsebeza, 1999: 74–5; Oomen, 2005: 158, 173).[9]

In Ekuthuleni, a former mission station farm in KwaZulu–Natal, landholders have the right to allocate, lend and bequeath their land, and to sell top structures such as houses. Allocations, however, are always made to relatives who need land (including single mothers, widows and elderly women) and in practice neither allocations nor sales to outsiders currently take place (Hornby, 2000). It is the responsibility of the local headman or *nduna* to allocate vacant land in consultation with an *ibandla* (group of neighbours). There is lack of agreement, and at times contestation, over some aspects of the tenure system (for example, whether or not loans are permanent, and whether or not payment to the *nduna* is legitimate), over precisely what a land allocation means, and over how some disputes can be resolved. This has led to anxiety over tenure security, deriving from 'unclear adaptations of

[7] Personal communication, 2004.
[8] Personal communication, 2004.
[9] See the case studies in chapters 11, 12 and 13 in this book.

rules and procedures', themselves an indication of 'processes of change in response to internal and external pressures' (Ziqubu *at al*, 2001: 6).

Contemporary case studies suggest that many occupants of communal land enjoy *de facto* tenure security. This is because existing systems, many of them now informal in character, work reasonably well on a day-to-day basis. But these systems are under severe strain as a result of in-migration, overcrowding, informal individualisation, breakdowns in administrative systems, abuses by some traditional leaders, the continued insecurity of many women, and lack of clarity over the role of traditional authorities and local government bodies (Peires, 2000). As a result, many people experience problems, anxieties and tensions in relation to the security of their land rights. Tenure reform must address the breakdown in the formal land administration system and create greater certainty over the legal status of land rights—but at the same time allow the many local variations in the definition of rights and duties to be recognised in law.

INSECURITY OF LAND RIGHTS DUE TO FORCED REMOVALS

The previous section illustrates the variable manner in which 'individual' and 'communal' aspects of land rights can articulate with each other without any necessary threat to tenure security. There are other cases, however, where individual rights are *not* secure within group systems as a result of South Africa's history of state intervention, regulation and repression. Forced removals and dispossession of the land of black South Africans were undertaken by previous regimes for a variety of purposes. Most of the victims found themselves living in 'homelands', and were placed under the jurisdiction of traditional authorities approved of by the state as well as under SADT-administered 'trust tenure' and betterment regulations.[10] These massive displacements altered the social composition of rural communities and affected the security of individual land rights in a variety of ways.

Communities who purchased farms in 'white' areas in the late 19th or early 20th centuries lived in areas known as 'black spots' and were targeted for removals. Some (for example, Daggakraal, Driefontein and Doornkop) accommodated the victims of forced removals or evictions (Adams *et al*, 2000; Claassens, 1990; Small & Winkler, 1992). Often the original rights-holders and later arrivals stood together in attempts—sometimes successful—to resist removals, but latent tensions over land rights have emerged strongly since 1994. Forced overlapping of the land rights of the original group, tenants and squatters means that in some situations the status of the underlying land rights of the original purchasers cannot be 'upgraded' without other people's land rights being placed in jeopardy.

In some parts of the country the relocation of large numbers of people, attempts to consolidate 'homeland' boundaries, and the placement of groups under tribal jurisdictions led to the creation of patchworks of farms occupied by groups of diverse origin and identity. Today, land in these areas is held under different versions of 'communal tenure'. The underlying (registered) titles are sometimes

[10] See chapter 9 by Peter Delius in this book.

held by different 'owners', and some farms are subject to competing restitution claims. Two detailed case studies from Limpopo Province illustrate the complexities and tensions that can result: Dikgale (Lahiff & Aphane, 2000) and Rakgwadi (Claassens, 2001; Small, 1997). In Rakgwadi the situation is marked by major contestations over land rights, with many sub-groups under the jurisdiction of the tribal authority feeling under threat from the authoritarian traditional leader who acts as though he is the 'owner' of land. These cases illustrate a more general point: simplistic notions of homogenous 'communities', with clearly defined social and territorial boundaries and under the accepted authority of traditional leaders, are inappropriate in many communal areas in South Africa.

In these situations the challenge to tenure reform is twofold, as recognised in the White Paper on South African Land Policy of 1997 (DLA, 1997: 30–3). Firstly, it must seek to secure the land rights of both original rights-holders and subsequent occupiers, and 'unpack' the forced overlapping of rights that occurred in the past. One way to do so is through making additional land and other resources available, thus giving tenure reform a redistributive thrust. Secondly, it must address the legacy of forced tribal jurisdictions and allow groups a choice as to which administrative authority they fall under. Tenure reform would then incorporate a strong element of democratisation (Cousins & Claassens, 2004).

WOMEN'S LAND RIGHTS

Although the early anthropological literature often uses the term 'individual rights' in relation to residential and arable land, it also describes how such land was controlled by families. These were often large, extended households comprised of descent groups. Along with control came a host of social obligations to members of these groups. This was true not only of land but also of other forms of property such as livestock. Production was family-based, with a clear but flexible division of labour, and its organisation through property rights and rules was complex and variable. Exchange of property between families (for example, through bridewealth payments) linked families and descent groups, and made for additional complexity. Women's rights to land were embedded in a social context of family rights and obligations (Sansom, 1974: 159–62).

Hunter's (1979: 121) description of property rights among the amaPondo of the Eastern Cape is echoed in much of this literature: 'ownership entails duties, and with property are inherited obligations' such as consulting spouses and children about its disposal and 'administering it for the benefit of dependents' (Hunter: 1979: 121–2). Cultivation was primarily the responsibility of women. In pre-colonial Pondoland a married woman selected her own fields for cultivation provided she did not encroach on someone else's fields; they were not allotted to her. Once she turned over the soil, she had an exclusive right to cultivate that field, no matter how long she left it in fallow. There was no limit to the number or size of the fields she could cultivate. Fields reverted to common pasture once the crop had been reaped, but the right to cultivate the fields was maintained as long as the family using them lived in the district. When a woman died, exclusive rights to her fields were inherited by her youngest son (Hunter, 1979: 119).

Preston–Whyte (1974: 179–82) describes a common feature among the

polygynous peoples of southern Africa: the division of a homestead into 'houses' founded by different wives, the first wife founding the 'great house' comprising herself and her children, and subsequent wives being ranked accordingly. Each 'house' had its own property in the form of dwellings, livestock, fields, a granary, utensils and so on. These were generally inherited within that house (Preston–Whyte, 1974: 180). House property could only be inherited by children born to that house. Bridewealth cattle from the marriage of a daughter belonged to the house of her mother, and enabled a son of that house to marry.

The colonial and apartheid periods saw a sharp decline in the tenure security of women as PTOs and quitrent titles were issued only to men. This reflected a broader shift in power relations between women and men. Walker (2002: 11) argues that

> 'in southern Africa, the interpretation of "customary" law by colonial administrators and magistrates served to strengthen, not weaken, patriarchal controls over women and to freeze a level of subordination to male kin (father, husband, brother-in-law, son) that was unknown in pre-colonial societies . . . this project involved not simply the imposition of eurocentric views and prejudices on the part of colonisers, but also the collusion of male patriarchs within African society, who were anxious to shore up their diminishing control over female reproductive and productive power.'

The legacy of colonial and apartheid policies is that women are generally disadvantaged in access to resources, but also in the control they exercise over them (Meer, 1997: 1). The contemporary literature reveals that in many cases unmarried women with children to support can be allocated land, but only through their fathers or other male relatives (Alcock & Hornby, 2004; Cross & Friedman, 1997; Sithole, 2004). Widows generally retain rights of access to the land of their deceased husbands until one of their sons or grandsons inherits it. However, even before then widows can be vulnerable to eviction. On the breakdown of a marriage, women can also be evicted and in many places are then supposed to return to their original families where they may or may not be allocated land. However, here too they can be vulnerable and their claims may not be recognised by male relatives such as brothers (Claassens, 2005).[11] In addition, land administration bodies such as tribal authorities are dominated by men and often engage in discriminatory practices such as refusing women permission to speak at meetings (Meer, 1997).[12]

Awareness of post-1994 constitutional rights to gender equality has led to recognition in some communities that widows as well as unmarried women and divorcees with children to support are entitled to be allocated land in their own right (Alcock & Hornby, 2004; Sithole, 2004; Turner, 1999). However, the extent of these new practices appears to be uneven (Claassens & Ngubane, 2003). In parts of the Eastern Cape they apply only to residential land (Turner, 1999). In Limpopo Province it has been reported that women are particularly vulnerable to accusations of witchcraft, which constitutes grounds for loss of land rights (Lahiff & Aphane, 2000: 26). Because of all these problems, some women in communal areas are in favour of individual title as a way to secure independent land rights (Claassens, 2003).

[11] See chapter 7 by Claassens & Ngubane in this book.
[12] Ibid.

It is important to recognise that women are not a homogeneous category: they hold a range of other social identities and interests (such as wives or relatives of traditional leaders, in relation to class status, marital status, political affiliation and so on). Women with elite identities—as members of 'royal' families, for example—have often managed to access land more successfully than commoner women (Walker, 2002).

The context is one in which women constitute a majority of the population in the areas under 'communal tenure' and are the main occupiers and users of land.[13] Given high levels of unemployment and poverty, access to arable land for food production and access to common property resources for a range of livelihood contributions are important for women in particular (Shackleton *et al*, 2000). Around 40 per cent of women in rural households are neither the household head nor a spouse of the household head,[14] and they access land and resources through family membership. Marriage appears to be in decline among African women, and single women with children are increasingly applying for allocations of land. HIV/Aids is also impacting on the security of women's land rights (as well as that of orphans and youth), mainly through the lack of strong and clear inheritance rights (Drimie, 2003). There is thus a strong case to be made for tenure reforms that greatly strengthen women's rights.

The challenge to tenure reform legislation is to transform existing definitions of the rights of women to land in accordance with the constitutional principle of gender equality since these definitions are inherently discriminatory and cannot simply be recognised and confirmed. What does require recognition and confirmation is the existing occupation and use of 'communal' land by women, many of whom are not spouses. Transformation of decision-making on land within local land administration bodies and dispute resolution contexts is also required in order to open up space for the active participation of women on an equal basis to men.

COMMON PROPERTY RESOURCES

A key feature of pre-colonial tenure systems described in the anthropological literature is the right of access to common property resources such as grazing, water and a variety of other natural resources (such as trees for building, fences and fuel wood; grass for thatching; wild fruits and vegetables; medicinal plants; wildlife; clay and sand). Regulation of resource use in the common interest occurred to a greater or lesser extent, and was particularly evident in relation to grazing.

Sansom (1974) argues that ecological contrasts between the wetter east of the sub-continent and the drier west led to key differences in settlement patterns, land tenure systems and the institutional arrangements for regulation of resource use, including the demarcation of boundaries. What he terms 'Type A' systems were found in the east where rainfall was higher, all the resources required for household production were available in a highly localised area, and settlement was dispersed. Land administration was highly decentralised and headmen played a central role. In

[13] Ibid and the affidavit by Debbie Budlender on the DVD with this book.
[14] See the Budlender affidavit.

the drier and less climatically reliable zones of the central and western parts of the region, resources were exploited over a much larger territory and settlement tended to be more concentrated ('Type B'). Land administration tended to be 'centralized in the person of the chief' (Sansom, 1974: 140), but this refers to regulation of common property resources, not to allocation of residential and arable land, which was decentralised in both ecological zones.

Rights of access to common property resources were an important component of 'communal' tenure regimes throughout the colonial and apartheid periods. Even where attempts were made to impose individualised forms of land rights, such as quitrent areas in the Eastern Cape, shared commonage areas remained vital for grazing and other uses (Kingwill, 1996). The same was true for farms purchased in the late 19th or early 20th centuries by groups of Africans seeking to secure their land rights against settlers and the state (Small & Winkler, 1992).

Contemporary studies reveal that rights of access to common property resources are still important for rural livelihoods in many areas (Shackleton *et al*, 2000; Andrew *et al*, 2003). Rights to land usually include rights to use or collect natural resources from the commons. In some cases, rights and duties are subject to well-defined community rules and management regimes, enforced by local authorities such as traditional leaders or elected committees (Cousins, 1996; McAllister, 1986). In others these management regimes have broken down and 'open access' prevails (Ainslie, 1999). In some cases, use of these resources by community members is not restricted in any way, but outsiders are expected to request permission (or sometimes to pay) for a right to use them (Kepe, 2001).

A major problem in many rural areas is the unauthorised exploitation of common property resources by outsiders, in particular by entrepreneurs able to transport large quantities of fuel wood, thatching grass or medicinal plants to distant markets (Kepe, 1997; Shackleton *et al*, 2000). Lack of clarity on land and resource rights sometimes means that local community members are unable to assert their claims to such resources or leads to tensions between local groups (Kepe, 2001; Turner, 1999).

The area within which community members may use or collect common property resources is usually variable by the resource in question. For example, often grazing is restricted to the boundaries of a village, or of a group of villages under a headman (sometimes called 'wards' or 'administrative areas' or, in KwaZulu–Natal, *izigodi*). Primary rights to use resources such as forest patches or woodlots may be held by specific villages or wards, or may be held by members of the wider 'community' (for example, the 'tribe'). In most cases these boundaries are flexible and negotiable rather than being exclusive (Alcock & Hornby, 2004). They can also be the focus of conflicts (Cousins, 1996; Turner, 1999). Kepe[15] describes common property resource use in the Mkambati area of Pondoland as taking place within 'administrative areas' under the jurisdiction of headmen. Use of resources across these boundaries can and does occur, but should take place only after seeking the permission of residents and the endorsement of the headman. In practice, most resource use takes place within villages, which are somewhat smaller

[15] Personal communication, 2004.

than administrative areas. Boundaries at these different scales are flexible and porous, but when prior permission to cross a boundary has not been sought such access can give rise to tensions.

Boundaries of common property resource use are a critical issue when attempting to define 'community' (Kepe, 1999), and the variability of boundaries depending on the resource in question contributes to the complexity of the issue. It underlies many of the tensions that have arisen in recent years over contested definitions of 'community' in restitution claims to land in nature reserves (Kepe, 2001; Palmer *et al*, 2002; Wynberg & Kepe, 1999). The challenge to tenure reform policy is to provide workable definitions of social and resource use boundaries that take account of their flexibility and negotiability. These features reflect both ecological realities and the nested character of land administration.

NESTED SYSTEMS OF LAND ADMINISTRATION

Many studies describe pre-colonial land administration functions—along with other aspects of authority (judicial, military, religious)—being undertaken at different levels of authority, nested or layered within one another. Schapera (1955: 89), for example, describes the Tswana system as 'one of ever-widening jurisdiction extending upwards from the household'. Although regulation of common property resources took place at higher levels, the acquisition of rights to residential and arable land was highly decentralised. In the first instance, a man would ask his father for a residential plot or fields to plough. If this was not available he might try to acquire some land from a relative or friend. If that did not succeed he would apply to the headman for some ward land held in reserve. Only if none was available would the headman take the applicant to the chief for an allocation (Schapera, 1955: 204).

In Pondoland, according to Hunter (1979: 378–82), land administration was largely decentralised to the level of groups of homesteads (*imizi*) and the 'petty headman'. Minor disputes were dealt with at local level but could move upwards if not resolved; major disputes were heard in the courts of district chiefs or that of the paramount chief. Hunter (1979: 379) also describes the loosely knit nature of the 'tribe' as a unit, which was 'an affiliation of districts recognising one paramount', and thus of varying size and solidarity depending on the extent of outside dangers and the personality of the paramount. Some district chiefs, for example, paid no dues to the paramount and did not allow appeals to his court; others became independent by fighting or sometimes even with the sanction of the paramount. Kuper (1997) stresses the fluidity of social and political boundaries between 'tribes' and chieftaincies across the region more broadly.

Sansom (1974: 145) reviews a large number of cases—Tswana, Sotho, Pedi, Zulu, Mpondo, Lovedu, Venda—and suggests that '[a] similar apparatus for the delegation of authority to administer rights in land is found in all Southern Bantu tribes'. He follows Gluckman (1965) in describing the nested nature of land administration in terms of a set of 'estates'. The supreme independent political authority (for example, a chief or paramount) controlled a *primary estate of administration*, the entire tribal territory. This was divided into estates of lower orders (for example, sub-chiefs or district heads) or *secondary estates of*

administration. In some societies a third, or *tertiary estate*, existed. Administrators did not (unlike feudal lords) own their estates, but regulated access to resources and 'protected individual and communal rights' (Sansom, 1974: 146). The hierarchy of estates corresponded with the devolution of political authority and of judicial functions. At the lowest level were *estates of production* where households used resources to support themselves.

The imposition of colonial rule and the development of the system of indirect rule impacted on these nested systems and the balance of power within them. Beinart's (1982) study of Pondoland, for example, describes how a new system of administration was established by the colonial state after annexation of the territory in 1894. This was designed to limit the independent power of chiefs. The area was divided into districts, under the control of magistrates, and hut taxes were introduced. Districts were divided into locations under government appointed headmen. Most chiefs were designated as headmen, and their geographical jurisdiction was limited to one location even if it had previously been much larger; commoners were also elevated to chieftaincies. These appointments and boundary delimitations generated major disputes, and became part of a struggle between the colonial state and the paramount for the support of headmen. This allowed headmen to build a local power base for themselves, and undermined the system of paying 'customary dues' to chiefs. The first decades of the 20th century thus saw an ongoing struggle between the state, the paramountcy and headmen over political control (Beinart, 1982: 112–22).

In terms of the Native Administration Act 38 of 1927,[16] Africans were to be governed in a distinct domain legitimated by 'custom' and chiefly rule, but under strict control from above. The governor general—as 'supreme chief of all natives in the provinces of Natal, Transvaal and the Orange Free State'—could recognise or appoint anyone as a chief or headman, and define the boundaries of any tribe or location. The Bantu Authorities Act 68 of 1951[17] involved the establishment of tribal authorities that were often highly authoritarian, 'stripped of many of the elements of popular representation and accountability which had existed within pre-colonial political systems and which had to some extent survived within ... the reserves' (Delius *et al*, 1997: 39).

In the late 19th or early 20th centuries, various forms of communal tenure were found in contexts where groups of people purchased farms as a way of securing their land rights (Small & Winkler, 1992). In some communities, such as Daggakraal, arable and residential land was divided into individual plots and registered, and land sales could take place (for example, from owners to tenants). The social origins of the original group were diverse, and there was no traditional authority at first. Later a chief was installed to deal with administrative matters, but this system did not endure and a committee was elected to manage the community's affairs (Small & Winkler, 1992: 23). In Doornkop, before the forced removal, land was administered by an elected committee and there was no hereditary traditional leader; someone on the committee was nominated for this position 'for the

[16] Renamed the Black Administration Act.
[17] Renamed the Black Authorities Act.

administrative purposes of dealing with the authorities', but he did not have any special powers (Small & Winkler, 1992: 20). Individual plots were allocated to married people if they were descendants of the original buyers, and could be either sons or daughters. In Driefontein, KwaNgema and Kalkfontein, land was also administered by elected committees rather than chiefs. In these cases the groups purchasing land did not consider themselves to be 'tribes'.[18]

Contemporary case studies show that land administration remains spatially and institutionally nested. As described above, regulation of common property use occurs at different levels of social and political organisation and is variable by the resource in question. Despite attempts by colonial and apartheid regimes to centralise decision-making in the hands of an 'upwardly accountable' traditional leadership, in most areas the procedures for allocating residential and arable land to newcomers are still enacted at the local level and involve prospective immediate neighbours as key decision-makers, often under the oversight of either a traditional or an elected leadership (Alcock & Hornby, 2004; Fay, 2005; Ntsebeza, 2005; Turner, 1999). The relevant social and administrative unit is variously termed a neighbourhood (for example, the *isithebe* in Pondoland), a sub-ward (*umhlati* in *isiZulu*-speaking areas), a sub-village or a village. The traditional authorities overseeing these procedures and endorsing the allocation are variously a sub-headman (in Pondoland, *unozithetyana)*, a headman (*nduna, isibonda,* etc) or occasionally a chief (*nkosi, kgosi, morena,* etc). In some places traditional leadership is no longer seen as legitimate, and elected committees play these roles (Turner, 1999).[19]

Fay (2005) describes the situation in Hobeni in the Eastern Cape as one in which land access is governed at the level of the neighbourhood, with variations in tenure practices related to kinship composition. These neighbourhoods are nested within a number of larger structures but primary decision-making rests with 'those who inhabit and use the land: neighbourhoods organised under neighbourhood members and subheadmen'—and is characterised by 'downward accountability and flexibility' (Fay, 2005: 199).

Land allocation to an outsider often requires payment by the applicant of a fee of some kind, seen as 'chief's dues' in some places, or an indication of acceptance of the authority of traditional structures (*khonza* in *isiZulu*-speaking areas*)*, or simply as an administrative fee (Alcock & Hornby, 2004; Kepe[20]). However, in many places payments for land rights to chiefs or headmen take place without any oversight by neighbours or the wider community (Ntsebeza, 1999; Oomen, 2005).[21] Community members often perceive this as corruption (Claassens, 2003).

Located between the smallest, more localised social and administrative units such as the *umhlati* or *isithebe* and the outer boundary of the group as a whole (for example, the tribal or tribal authority area) lies an intermediate level, a ward or an

[18] See the discussion on Kalkfontein by Claassens and Durkje Gilfillan in chapter 12 of this book.
[19] Ibid.
[20] Personal communication, 2004.
[21] See also chapter 12 in this book on Kalkfontein and chapter 13 on Makuleke and Makgobistad.

administrative area under a headman (*nduna, isibonda; dikgosana*) or sometimes a 'sub-chief'. This layer of authority plays a key role in dispute resolution and in co-ordinating and regulating use of common property resources—for example, opening up of fields for post-harvest grazing, or cutting of thatching grass (Alcock & Hornby, 2004; McAllister, 1986). Headmen may also play a number of other roles in tribal administration, such as collecting tribal levies (Claassens, 2001).

In some cases, the highest level of the traditional hierarchy, the chief (*nkosi, kgosi, morena*) ratifies the land allocations undertaken at lower levels and takes a share of the administration or allegiance fee. These fees may be seen either as a personal payment—although this is controversial and arouses fears of corruption (Alcock & Hornby, 2004), or have a public use (for example, to fund community projects or to meet administrative costs). In some contexts, annual 'tribal levies' for a variety of such purposes are still paid; in others this practice has been eroded (Claassens, 2001; Oomen, 2005).

Tenure reform laws and policies need to acknowledge and take into account the nested and layered character of land administration in 'communal' systems. Focusing on only one level, such as the chieftaincy, is likely to skew the relative balance of power between different layers, create tensions and conflicts over jurisdictional boundaries and resource use, and undermine the flexibility and downward accountability of administrators to rights-holders. It could reduce the degree to which rights-holders are involved in local decision-making on land, which, as this section has shown, is integral to the nature of land rights in these systems.

SUPPORT FOR TRADITIONAL LEADERS' ROLE IN LAND ADMINISTRATION

Most contemporary case studies provide evidence that the majority of people would prefer traditional leaders to continue to play key roles in the operation of land tenure systems. On the other hand, many studies also report widespread community resentment of abuses of power by traditional authorities in relation to land (Claassens, 2001; Ntsebeza, 1999; Turner, 1999; Zulu, 1996). Levin & Mkhabela (1997) report that as a result of such abuse, most participants in community workshops in Mpumalanga in 1996 as well a great majority of the authors' survey respondents rejected continued allocation of land by traditional leaders. Yet Levin & Mkhabela (1997: 166) also refer to a 'deep seated respect for the chieftaincy' and 'an acceptance of the durability of the chieftaincy and its ceremonial functions'. This is the case even in contexts where residents complained bitterly of corruption over land allocation and tribal levies, and where as a result the powers of traditional leaders were being directly challenged.

Oomen (2000) describes a community in Sekhukhuneland where dissatisfaction over the lack of consultation by the king and the tribal authority on land matters was one motivation for a local initiative to rewrite the 'tribal constitution'. Nevertheless, 73 per cent of people felt that the chief should allocate land compared to 14 per cent who were in favour of a democratically elected body. Traditional authority was approved of because it is 'central to rural identity', but also 'tradition is far from fixed [and] constantly redebated at the local level' (Oomen, 2000: 91).

Debates within 'traditional systems' are evident in Alcock & Hornby's (2004) study in KwaZulu–Natal. In one community it was said that *izinduna* are no longer appointed by the *inkosi*: 'since there's democracy, people have changed . . . and so now they want to elect *izinduna*'. In another case, women can now be elected as *izinduna*. Discussions are also taking place about land allocations to unmarried women and men, given social changes that have resulted in the decline of marriage (Alcock & Hornby, 2004: 14).

An alternative explanation of continuing support for traditional leaders is that it is underpinned by insecurity and fear of punitive action (Ntsebeza, 1999; Zulu, 1996) as well as 'the hegemony [that the chieftaincy] exercises through the manipulation of tradition' (Levin & Mkhabela, 1997: 165). Claassens (2001) analyses the shifting balance of power between ordinary residents and civics on the one hand, and traditional authorities on the other, in one rural area between the 1960s and the 1990s. This case illustrates well the contingent character of the power wielded by traditional authorities and the degree of popular support they enjoy, with the critical variables being: *(a)* the degree of external support provided to traditional leadership structures by the state; *(b)* the degree of control by such structures over land rights; and *(c)* the relative ineffectiveness of new, post-1994 structures of democratic local government. The latter is also emphasised by Ntsebeza (1999) and Oomen (2000; 2005).

The challenge to tenure reform policies is to underwrite increased security of land rights with accountable structures for the administration of land. Downward accountability will reduce the scope for corruption and abuse. The democratisation of land administration, whatever institutional form this takes, is thus central to achieving tenure security in practice. Case study evidence suggests that broader processes of democratisation in post-apartheid South Africa are influencing local debates on land rights and administration, and are prompting innovations.

THEORISING PATTERNS OF CONTINUITY AND CHANGE

This overview of the literature reveals how deeply African societies were affected by the imposition of colonial rule in southern Africa and the incorporation of local agrarian economies into wider political and economic relations. These interventions resulted in a number of (sometimes contradictory) processes and adaptations:

- a greater stress on individual and family rights and decision-making in relation to land;
- a defensive stress on the group-based nature of land rights;
- the weakening of women's land rights;
- chiefs and headmen becoming a symbol of resistance to colonial rule and loss of land;
- chiefs and headmen being used by the state as instruments of indirect rule;
- the erosion of mechanisms that constrained the power of traditional leaders and kept them responsive to rights-holders, 'upward accountability' to the state creating opportunities for abuse and corruption; and
- the maintenance of elements of 'downward accountability' to rights-holders in situations where land administration remained a local function.

Despite the range of adaptations and high degree of local variability revealed in the literature, some of the key features of 'communal' tenure regimes have proved remarkably robust over time. Early ethnographies, studies of historical change and recent case material describe in particular the nested, shared and relative character of land rights. These were acquired mostly through membership of social groups and involved access to common property resources as well as flexibility of social and territorial boundaries.

This pattern is consistent with Okoth–Ogendo's (2002: 10) view that across Africa more generally indigenous norms and structures demonstrated great resilience in the face of colonial and post-colonial policies of 'suppression or subversion'.

The continuities reflect, in my view, what Guyer (2004: 6–7) refers to as the 'persistent elements and relationships by which people individually and collectively create economies'. They may derive from what Kuper (1997: 74), with reference to social and political structure more generally, identifies as 'common circumstances and shared traditions' that 'produced a series of similar structural transformations, so that the various societies in the region can be analysed as variations on common themes'.

What are these 'persistent elements and relationships' in relation to land tenure? One is the direct and immediate embeddedness of land tenure in social relations. This is found in many non-Western and pre-capitalist societies, where land rights have tended to be inclusive rather than exclusive in character (Peters, 1998). Capitalist private property emerged, according to theorists such as Polanyi (1944), through a process of 'disembedding' property from social relations (Hann, 1998). Whitehead & Tsikata (2003) suggest that social embeddedness is central to understanding the gendered character of access to land in Africa since men and women have 'differentiated positions within the kinship systems that are the primary organising order for land access' (Whitehead & Tsikata, 2003: 77).

Closely linked to social embeddedness is the central importance of power relations and micro-political processes within land tenure regimes. Access to land via social relations and identities usually involves an ongoing politics of land. Berry (1993) argues that despite attempts by governments to clarify and regulate land rights, access to land in rural Africa has continued to hinge on social identity and status, and is thus subject to 'a dynamic of litigation and struggle which both fosters investment in social relations and helps to keep them fluid and negotiable' (Berry, 1993: 133). In addition, power relations are key because 'struggles over property are as much about the scope and constitution of authority as about access to resources' (Lund, 2001: 11). Land rights in Africa are thus also *politically* embedded.

Okoth–Ogendo (1989) provides a persuasive analysis of the nature of property rights that probably applies more generally to non-Western property regimes rather than being Africa-specific. The core of his argument is that a 'right' signifies a power that society allocates to its members to execute a range of functions in respect of any given subject matter; where that power amounts to exclusive control one can talk of 'ownership' of 'private property'. However, it is not essential that power and exclusivity of control coincide in this manner. *Access* to this power (that

is, a 'right') and its *control* are distinct, and there are diverse social and cultural rules and vocabularies for defining access and control.[22]

Land rights tend to be attached to membership of some unit of production; are specific to a resource management or production function or group of functions; and are tied to and maintained through active participation in the processes of production and reproduction at particular levels of social organisation. Control of such access is always attached to 'sovereignty' (in its non-proprietary sense) and vested in the political authority of society expressed at different levels of units of production. Control occurs for the purposes of guaranteeing access to power over land for production purposes (Okoth–Ogendo, 1989: 11).

In these tenure regimes there is no coincidence of access and control, and property does not involve the vesting of the full complement of power over land that is possible (that is, private property). In addition, variations in power (that is, rights) derive from social relations, not the market. Rights over land are trans-generational. Control is exercised through members of the units of production and is not simply the product of political superordination. Different land uses attract varying degrees of control at different levels of socio-political organisation.

Using Okoth–Ogendo's conceptual framework, distinctive features of 'communal' tenure regimes in southern Africa can be identified:

- land rights are embedded in a range of social relationships and units including households, kinship networks and various levels of 'community'; the relevant social identities are multiple and overlapping and therefore nested or layered in character (for example, individual rights within households, households within kinship networks, kinship networks within local communities and so on);
- land rights are inclusive rather than exclusive in character, being shared and relative. They include both strong individual and family rights to residential and arable land as well as access to common property resources such as grazing, forests and water;
- rights are derived from accepted membership of a social unit and can be acquired via birth, affiliation or allegiance to a group and its political authority or transactions of various kinds (including gifts, loans and purchases). They are somewhat similar to entitlements of citizenship in modern democracies;
- access to land is distinct from control of land (through systems of authority and administration);
- control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access (for example, trans-generationally), and resolving disputes over claims to land. It is located within nested systems of authority with many functions at local or lower levels;
- social, political and resource boundaries, while often relatively stable, are also flexible and negotiable given the nested character of social identities, rights and authority structures.

[22] See also Bennett's (2004: 380) discussion of Allott's analytical framework in which he distinguishes between interests of benefit and control.

The flexibility and negotiability of land rights in such property systems means that they are capable of dynamic adaptations to changing conditions, but also that they are susceptible to 'capture' by powerful interest groups (as perhaps all property regimes are to some degree). Both authority and rights are constructed in ways that are 'historical, contextual and contingent' (Lund, 2001: 33).

Where these processes have not led to fundamental shifts in the way that rights to land are held and exercised, many of the key features listed above can be observed. Whether or not they are present, and to what degree, are empirical questions. Where these features *are* present within 'actually existing' tenure regimes, law and policy need to respond to them in appropriate ways. This is the key challenge for tenure reform.

HOW 'CUSTOMARY' ARE CONTEMPORARY LAND TENURE SYSTEMS?

Bennett's chapter in this book points out that the courts in South Africa have now accepted that there is a distinction between 'official' and 'living' customary law. The former is tainted by its origins in the colonial and apartheid eras. It is expressed in laws such as the Native Administration Act of 1927 and in the ethnographies and textbooks of researchers and legal scholars aligned with previous regimes. 'Living' customary law is acceptable because it is based on existing and accepted social practices, and reflects the capacity of customary law to grow and develop; it is this living version that is protected by the 1996 Constitution of the Republic of South Africa, according to recent court judgments. Bennett also discusses the problem of how to ascertain the content of 'living custom' given its dynamic and variable quality.

For Oomen (2005), the term 'customary' remains problematic. She details the way in which people in Sekhukhune draw on a variety of resources and institutions in creating a local legal culture, including state law, official customary law and traditional, constitutional and developmental values. She thus prefers the term 'local law' and shows how this is 'negotiated within ever-fluctuating social and political settings', is 'crucially shaped within political relations' and gives rise to a 'legal culture that is much more *processual* than the common law with its reliance on absolutes and legal certainty' (Oomen, 2005: 203). In this context, rights tend to have a 'relational' character in which shifting identities and variable status make all the difference to what rights people enjoy in practice. 'Custom' falls within the repertoire of norms, rules and values available to people, but is only one of the resources that they deploy to defend or advance their interests.

A similar argument can be made in relation to land rights. The key features of contemporary tenure systems identified in this chapter have the character of underlying principles rather than 'rules', and there is a great deal of local variation regarding how and to what degree these principles are given effect. They have much in common with the norms and principles informing pre-colonial property regimes, and could perhaps be described as informing the 'living customary law of land'. However, the literature reviewed here also describes cases where these features are *not* explained or justified by local actors in terms of customary law, but rather in terms of pragmatic concerns over secure and equitable access to a fundamental livelihood resource (Hornby, 2000; Small & Winkler, 1992). The

relevance and legitimacy of these key features of African tenure systems can also be argued for in terms of democracy, accountability and socio-economic rights—as did many of the community groups making parliamentary submissions on the draft Communal Land Rights Bill in 2003 (Cousins & Claassens, 2004), and as do some of the applicants in the constitutional challenge to the Communal Land Rights Act.[23]

It is thus not necessary, and perhaps misleading, to use the term 'customary' to describe the nature of 'communal' land rights. Given the manner in which official customary law was used in the past by the state, traditional leaders and men to advance and support elite and male interests, it may also be advantageous to avoid the term altogether, as argued by feminist scholars such as Whitehead & Tsikata (2003). It may be preferable to focus on the substantive issues of how to secure existing rights of occupation and use in appropriate ways.

THE COMMUNAL LAND RIGHTS ACT AND 'ACTUALLY EXISTING' COMMUNAL TENURE

How well does the approach to tenure reform adopted by the Communal Land Rights Act fit with the key features identified here? The Act adopts a 'transfer of title' approach that accepts the private ownership paradigm of property rights. Ownership of land will be transferred from the state to 'communities', and community members' rights will be secured through the issuing of deeds of communal land right. There is a poor fit, however, between the ownership paradigm, which involves the coincidence of access and control within clearly defined and exclusive boundaries, and a key feature of contemporary 'communal' tenure, the nested or layered character of both the social units within which land rights are held and of land administration institutions. As a result, major problems are likely to arise in attempts to define the boundaries of the 'communities' who will receive title (Cousins, 2004).

A second potential problem arises from the land administration powers that the Act, in s 21 and s 24, together with the Traditional Leadership and Governance Framework Act 41 of 2003, provides to traditional councils. These councils generally coincide with tribal authorities, which typically have large populations of between 8 000 and 20 000 residents. Transfer of ownership to these large 'communities' will mean that land administration functions (including the allocation of land rights, and the establishment and maintenance of registers and records of rights and transactions) will be undertaken at the pinnacle of the traditional hierarchy. This gives the chieftaincy 'even more powers than it previously enjoyed' (Mulaudzi, 2004). Not only does this fit poorly with the reality of nested systems and the fact that much land administration occurs in practice at the local level, it also represents a decisive shift of the 'relative balance of power' in favour of tribal authorities and chiefs. This is at the expense of both individuals and families and of other levels of authority such as headmen and sub-headmen. It thus weakens downward accountability (Fay, 2005) and undermines

[23] *Tongoane and others v The Minister of Agriculture and Land Affairs and others* (TPD) 11678/06, pending).

the objective of democratising land administration. It also potentially threatens the tenure security of smaller groups placed under the jurisdiction of tribal authorities under apartheid.[24]

A third and related problem arises in relation to the tenure security of community members. The Act attempts to create a balance between group ownership and individual rights through the issue of registered deeds of communal land rights to the holders of 'old order rights' and to those who are allocated 'new order rights'.[25] It does not, however, describe or define the content or legal status of these new order rights. On the one hand, it provides in s 18(3)–(4) for the content of these rights to be defined in 'community rules'; on the other, it allows the minister to determine their 'nature and extent' as well the identity of rights-holders. Subsequent to a determination by the minister, a land administration committee must allocate and register new order land rights. This is at odds with the nature of land rights in these systems in which rights-holders are intimately involved in local level decision-making on land. It thus threatens the security of existing rights of occupation and use—as has already occurred in many situations where chiefs abuse their powers over land.

A fourth problem is in relation to the land rights of women. The Act deems new order rights to be held jointly by all spouses in a marriage, and these must be registered in all their names. The tenure rights of female household members who occupy and use land but are not wives—such as mothers, and divorced or unmarried adult sisters—are not addressed.[26]

Finally, the Act does not address the wide range of 'communal tenure' situations found in contemporary South Africa. Instead it adopts a 'one size fits all' approach that could result in disputes and uncertainty in situations where its assumptions do not hold. For example, the Act does not address situations in which people do not desire a transfer of title because of its perceived drawbacks, but do want greater security of tenure than that provided by the Interim Protection of Informal Land Rights Act 31 of 1996. It does not address adequately the legacy of a history of forced removals which, along with ongoing social change, means that the composition of many rural 'communities' is socially heterogeneous, that 'tribal' affiliations do not always correspond with territorial boundaries, and that boundaries are often contested.

CONCLUSION

This chapter has argued that some of the key features of 'communal' tenure regimes have proved remarkably resilient over time and can be present even where groups no longer recognise traditional leaders, are socially and ethnically heterogeneous, readily accept newcomers, and are keen to assert their democratic rights as citizens. They are also dynamic and evolving regimes and not immune to innovations, such as the granting of independent land rights to unmarried women. Is there a way, then, to secure these distinctive forms of land rights without replicating problematic

[24] See the disussions in this book on Rakgwadi in chapter 11, Kalkfontein in chapter 12 and Makuleke in chapter 13.

[25] See the summary of the Act by Henk Smith in chapter 2 of this book.

[26] See chapter 7 in this book by Claassens & Ngubane.

versions of 'custom' imposed on communities in the past, and in a manner that promotes democratic decision-making?

This question is taken up in more detail in the concluding chapter of this book. In brief, one productive approach may be to vest land rights in individual members of group systems rather than in the group or its institutions, and to make socially legitimate existing occupation and use, or *de facto* 'rights', the primary basis for legal recognition. These claims may or may not be justified by reference to 'custom'. This approach would allow the victims of forced removals to claim rights based on long-term occupation, and validate the claims of the descendants of group members who collectively purchased land in the early 20th century. Rights-holders would be entitled to collectively define the precise content of their rights, and choose, by majority vote, the representatives who will administer their land rights (for example, by keeping records, enforcing rules and mediating disputes). The primary accountability of these representatives would be downwards to rights-holders, not upwards to the state.

Securing individual rights need not take the form of individual titling, but through a statutory right that is legally secure yet also qualified by the rights of others within a range of nested social units, from the family to user groups to villages and other larger 'communities' with shared rights to a range of common property resources. Women's rights would need to be explicitly recognised at all levels. This focus on 'socially embedded individual user rights' is consistent with the nature of rights in contemporary land tenure systems, which are 'everywhere both "communal" and "individual"' (Biebuyck, 1963: 54).

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6

'Official' vs 'living' customary law: dilemmas of description and recognition

By Tom Bennett

THE TRANSFORMATION OF CUSTOMARY LAW INTO AN 'OFFICIAL' VERSION

Land tenure is perhaps the most problematic topic in customary law. Bohannan (1963: 101) remarked that although land had occupied 'so many students and men of affairs ... no single topic concerning Africa has produced so large a poor literature'. As he said, the problem derives 'less from want of "facts" than that we do not know what to do with "facts" or how to interpret them'. While we are now better informed than we were when Bohannan made this statement over four decades ago, certain misconceptions about customary tenure persist, all of them arising out of the ways in which the data are described.

Customary law derives from social practices considered to be obligatory by the communities in which they operate. By implication, rules imposed by external authorities and rules having no local support cannot be considered valid. In South Africa today, however, so much customary law is of dubious origin that the term is regularly accompanied by a qualifying adjective: 'official' customary law is the body of rules created by the state and legal profession,[1] whereas 'living' law refers to the law actually observed by the people who created it.[2]

Because the authentic customary law is distilled directly from current social practice, it is subject to continual, often imperceptible, change and is most likely to exist only in an oral tradition. Qualities such as these do little to contribute to the

[1] This is a complex concept since it refers to virtually all the written sources of customary law, which are naturally of very uneven quality and authenticity. Thus the official law includes enactments, such as the Natal and KwaZulu Codes (Proclamation R151 of 1987 and the KwaZulu Act on the Code of Zulu Law 16 of 1985 (Z), respectively); court precedents, especially of the former Black Appeal Court, but, indeed, all judgments stating customary law; ethnographic works, whether specifically legal, such as Van Tromp (1947), or anthropological, such as Wilson (1961); and reports of commissions of inquiry such as the Cape Commission on Native Laws and Customs (1883).

[2] See Sanders (1987: 405ff).

coherence of the normative order, and, indeed, no living customary law bears any resemblance to the written codes used in modern legal systems.[3] The norms of written law strive towards precision and fixity, whereas the norms of custom are volatile and open-ended.

Any normative regime, however, requires a minimum degree of certainty and coherence if it is to perform its basic function, which is to bring social order. And, as will become apparent in this discussion, the qualities of custom do not present insuperable problems for the communities they usually serve.

In the first place, the rules are imbued with a sense of tradition, which provides an unspoken but authoritative sense of legitimacy. As a stabilising principle, tradition implies the persistence of the past, although it does not necessarily put an end to change. Far from it: tradition facilitates change in subtle and various ways. In fact, the very flexibility of this principle is its greatest value. Thus, while serving as a potential check on aberrations of behaviour, tradition also provides a simple idiom for expression and innovation. In this process the inconvenient past can be lost, generally unnoticed by the present participants, while the new appears in forms comfortably acceptable as past (Krygier, 1986: 251ff).

These propositions were borne out by Sally Falk Moore's (2000) study of the Chagga, a people who live on the slopes of Mount Kilimanjaro in Tanzania. She showed that with the introduction of coffee as a cash crop and a steady decrease in the amount of land available for agriculture, rights of access had to be reformulated to meet the conditions demanded for a modern economy. All this was accomplished under the banner of traditional customary law although, at the time of the study, these rules were certainly not those of the pre-colonial past.

In the second place, oral cultures meet the requirements of stability and certainty by the use of various social and stylistic controls on speech. The vagaries of memory are mitigated by linking rules to specific social and physical contexts. Oral cultures rely heavily on the mnemonics of objects and topographical features, thereby marking rights to land, for instance, by reference to trees, streams, hills and gullies, and by the location of ancestral graves. In addition, stylistic devices serve as useful aids to memory: myths and proverbs provide commonly understood genres for presenting rules; assonance, alliteration and rhythm contribute to the creation of pithy maxims, such as the Tswana *morena ke morena ka batho* [a chief is a chief by the people] (Schapera, 1966: 121ff). Hence, although oral laws do not appear as systematic abstractions, they are nevertheless formulaic and structured.

Furthermore, oral information is kept alive by being repeated frequently, but only on specific occasions and only by certain people. The social conventions of Africa, for instance, allow only senior males to expound the law, and then only on the occasion of formal trials or council meetings.

In the third place, legal precision has no particular value in small, close-knit societies. The courts operating in such contexts are more concerned with

[3] Without exact definition, the rules cannot be organised systematically. See Goody (1987: 258–89). Lack of definition and system are magnified by the absence of a professional class dedicated to analysis of, and reflection on, the law.

substantive than formal justice, and they look for compromise settlements.[4] A fixed and certain code of rules does little to advance these aims. By comparison, courts working in heterogeneous modern societies favour the mechanical application of rules to facts and win-or-lose solutions. The legitimacy of this type of regime is secured by the impartial application of pre-determined codes of rules.[5]

Unlike their customary counterparts, courts of a Western type find that the qualities typical of custom are serious obstacles to the administration of justice. Indeed, colonial courts would have been unable to work with customary law without a major adjustment to their thinking and procedures. Predictably, however, the courts changed the law rather than the other way round.

The most immediate change was the reduction of customary rules to writing—and in nearly all cases the language chosen was English or Afrikaans. (It was of no concern to the early colonial authorities that writing destroyed the distinctive character of oral tradition since written sources always have a higher value in Western law.) Initially, material was gathered from missionaries and travellers, but from the mid-19th century onwards these anecdotal sources were superseded by works dedicated exclusively to the use of lawyers.[6]

In Natal the process of reducing local customs to writing culminated, in 1878, in the production of a formal code of customary law.[7] Even at the time the Code was being drafted, critics argued that it would impart an artificial rigidity to custom (Welsh, 1973: 164), but the administration pressed on. The Code was partly a codification of custom and partly an enactment of new rules. As far as colonial officials were concerned, it was the primary and, on the matters it dealt with, exclusive source of customary law for the Colony.

In the 1870s, sources of customary law were augmented by the publication of judgments handed down in the Native High Court (in Natal) and the Native Appeal Court (in Transkei). Decisions of the subsequent Native Appeal Court, established in 1927, continued to be reported until the Court was abolished in 1986.[8]

By the early 20th century, primarily in response to the Union government's demand for a better understanding of the African social order, anthropological fieldwork began to increase in volume and quality. Most early ethnographies documented the full spectrum of life and were therefore unsuited to use in court. However, in 1938 Schapera's *Handbook of Tswana Law and Custom* began a new genre: anthropological texts catering specifically for the needs of lawyers. Since then, many works in a similar vein have appeared, amply supplying the demand for known and certain rules of customary law.

South Africa now has more information on customary law than any other country

[4] See Bennett (1991: 54–5).

[5] See generally Woodman (1985: 145ff) and Bennett (1991: 9–10).

[6] Such as Seymour (1953).

[7] The Code was revised several times: in 1891, 1932 and 1967. The most recent version was promulgated in Proclamation R151 of 1987. In 1981 KwaZulu issued its own Code of Zulu Law, Act 6, which was revised and re-issued by Act 16 of 1985 (Z).

[8] By the Special Courts for Blacks Abolition Act 34 of 1986.

in Africa. The nature of these rules, however, is a far cry from the original custom. Apart from the use of codification, precedent and restatement to impose common-law requirements of certainty and system on changeable custom, the authors were highly selective in their representation of the material.

Colonial occupation put settlers into a dominant position, one that allowed them to become arbiters of the African cultural heritage: they documented it and they determined how it was to be interpreted. Revisionist scholars have put forward a convincing case to show that colonial authors did as much to create the world they were writing about as to describe it.[9] Hence, although many of the rules being described owed less to ancient practice than to the interests of officialdom,[10] the legitimacy of colonial justice depended on customary law being cast as a tradition with origins in an autonomous, pre-conquest African society.[11] Traditional rulers collaborated in this enterprise. Authors turned to them for information, as they were considered to be repositories of wisdom and authority, and patriarchal elders responded with what they thought appropriate behaviour ought to be (Rwezaura, 1983: 22).

In addition, colonial writers used their European legal training as a framework for organising the data. For example, when writing about family relationships, they tended to discount the obligations of family members *inter se* as irrelevant to a legal text. These rights and duties might have been a critical component of customary law, but they were demoted to mere morality or convention.[12]

Lawyers trained in a European tradition also found it difficult to understand the asymmetrical nature of many African legal relations. For instance, in customary law the powers of the head of a household were seen as limitless, and so, like those of a Roman paterfamilias, appeared to be draconian to the outsiders. Yet in reality the African family head was expected to do no more than behave as a wise care-giver, judging disputes fairly, providing his subordinates with food and shelter and making appropriate decisions on their behalf. When considering fulfilment of this role, customary courts would emphasise the family head's responsibilities rather than his authority. Colonial writers, however, tended to describe his status in terms of powers and privileges in relation to the duties and disabilities of his subordinates (Seymour, 1953: 42ff).[13]

Finally, customary rules were classified according to the common-law categories—such as marriage, succession and property—and common-law concepts were freely used to describe customary institutions. For purposes of this chapter, the most important issue was a propensity to interpret customary systems of tenure in terms of the common law, especially in terms of the concept of ownership.

[9] See Snyder (1981: 49) and Roberts (1984: 1ff).

[10] The notion of the 'invented tradition' was introduced to the study of customary law by Chanock (1985). See further Gordon (1989: 41).

[11] See Burman (1979: 129). Chanock (1978: 80) therefore endeavours 'to correct the process by which Africa is being given an authoritarian law invalidly claiming to embody its indigenous legal genius'.

[12] See Chanock (1998: 172–216).

[13] Seymour's *Native Law in South Africa* is cited here. Negligible changes were made to the first edition produced some forty years earlier by the author's father. A similar work was Whitfield's *South African Native Law* published in 1930 and 1948.

OWNERSHIP AND COLONIAL DESCRIPTIONS OF CUSTOMARY TENURE

In cross-cultural studies, it is axiomatic that writers should avoid the use of Western legal concepts. The Constitutional Court, in *Alexkor Ltd & another v Richtersveld Community & others* 2003 (12) BCLR 1301 (CC) in para [56], described 'the dangers of looking at indigenous law through a common law prism [as] obvious. The two systems of law developed in different situations, under different cultures and in response to different conditions.' Ownership, however, is a stubborn exception to the rule. Since early colonial times, it has exercised a curious fascination for writers on customary tenure, and it still pervades descriptions of customary tenure.

Admittedly, few writers were so insensitive as simply to apply the common-law construct of ownership directly to customary law.[14] Instead, they tried in various ways to account for having to describe exotic data. Unfortunately, these attempts led to serious misconceptions.

The first misconception was a belief that society could produce the concept of ownership only when fully civilised.[15] In its notorious decision, *Re Southern Rhodesia* [1919] AC 211 (PC) at 233–4, for example, the Privy Council pronounced customary interests in land irreconcilable with 'the legal ideas of civilized society':

> 'Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.'

If primitive society knew nothing of ownership, but rather precarious possession, colonial governments were free to expropriate African land on the basis that it was 'unowned'.[16] Happily, such ideas about customary tenures in South Africa have now been banished.[17]

The second misconception was to view customary tenure as 'communal'.[18] In another highly influential decision, *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 404,[19] the Privy Council held that

[14] Cf Simpson (1961: 145ff).

[15] These ideas were endorsed by evolutionist theory. See Maine (1861) and Morgan (1871: 492).

[16] See Chanock (1991: 62) citing Bentham: 'Property and law are born together and die together.'

[17] By implication of the fact that customary law interests are protected in post-1994 legislation. See especially s 1 of the Restitution of Land Rights Act 22 of 1994 and the *Alexkor* case (CC) in paras [50], [51], [62].

[18] Which was implicitly opposed to the individualistic notion of ownership in Western law. Gluckman (1971: 36), however, says that this is a false antithesis because it is quite possible for individuals to have different and concurrent rights and powers over the same thing.

[19] In *Sobhuza II v Miller* [1926] AC 518 (PC) at 525, the Privy Council again said that individual ownership was foreign to customary law—because land belonged to the community.

> '[l]and belongs to the community, the village or the family, never to the individual. All members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner.'

This idea—that communities, and sometimes entire nations, hold their lands communally—persisted throughout the last century. Even today it is being propagated in official circles, as is evident from the title of the Communal Land Rights Act 11 of 2004.

The word 'communal' is unobjectionable if it is intended to imply that all the members of a community have equal access to land[20] or that membership of a political community is the basis of an individual's entitlement to land. 'Communal' is also perhaps unobjectionable if it suggests that an individual is not free to use and dispose of land at will. In other words, landholders must obtain permission from the relevant authorities before changing the conditions of their tenure or before attempting to alienate their interests.[21]

Describing tenure as 'communal', however, implies more than the above. It is also taken to mean that a community of people, closely bound together by common interests and values, is sharing its land for purposes of subsistence farming.[22] In addition, members of this group are assumed to farm the land collectively and somehow share the produce.[23] These assumptions, however, are not borne out in fact. In the economies of pre-colonial southern Africa, neither farming nor herding had much to do with people co-operating in joint ventures.[24] Landholders worked for their own benefit, and it was only when a large project had to be tackled, such as clearing virgin land, that neighbours were called upon to constitute a communal work party.[25]

Moreover, 'communal', in a purely legal sense, is ambiguous. It may mean either that a right is held by a group of people jointly (where the unit has a single, inseparable title) or by a group in common (where each person has a separate but same title). Neither of these meanings correctly describes the customary tenures of residential sites or arable plots.[26] 'Communal' in the second sense would be a fair description only of rights to pasture and natural resources.

The third misconception of customary tenure is that it is the equivalent of a trust. By this term writers seemed to imply that allodial or bare title vested in the tribe

[20] For example, each household is entitled to more or less the same amount of land for residential and arable purposes, together with equal access to grazing. See Cross (1993: 3).

[21] Instead, acquisition and loss of rights depends on the approval of family, neighbours and political authorities (Cross, 1993: 7).

[22] See Cheater (1990: 188ff) on the myth of communal tenure and its ideological implications in pre- and post-colonial Zimbabwe.

[23] See, for example, Westermann (1939: 147) on the idea that African society represented an early form of communism.

[24] According to Hamnett (1975: 73), in Lesotho the reverse was true: subsistence cultivators tended to perceive one person's gain as another's loss.

[25] See Schapera (1943: 195), Sheddick (1954: 83–6), Kuckertz (1990: 199–208) and Hamnett (1975: 73).

[26] See, for example, Ng'ong'ola (1992: 145).

with the chief acting as trustee (*Amodu Tijani* at 404); individuals, who enjoyed beneficial occupation of the land, had no more than 'usufructuary rights' (*Noveliti v Ntwayi* (1911) 2 NAC 170; *Dyasi* 1935 NAC (C&O) at 9).[27] Again the word 'trust' gives only a partial understanding of customary tenure (Asante, 1975: 29ff).[28] It helps to signify a traditional ruler's responsibility to ensure that all his subjects have a place to live and farm on the land under his jurisdiction, and it helps to explain why he may not alienate land or dispossess individual landholders. However, the notion of 'usufructuary' rights does not do justice to a landholder's interests in customary law.[29] Nor is the concept of trust of any use in situations where rulers abuse their powers, because the customary landholders have none of the remedies that would be available to a trust beneficiary under the common law (Asante, 1975: 109ff).[30]

QUESTIONING CUSTOMARY LAW: THE 'LIVING' VERSION

The above descriptions of customary tenure were the ones committed to the official version of the law. This version, however, need no longer be accepted as authoritative. The courts have freely acknowledged the difference between official and living laws (*Alexkor Ltd* (CC) in para [52]; *Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 in para [152] per Ngcobo J). The courts have also declared that only the living version of customary law is protected by the Constitution of the Republic of South Africa, 1996.[31] The result is that, today, customary rules should be deemed valid and acceptable only if they are grounded in current social practice.

So far as rules created before the new Constitution are concerned, there are at least two good reasons for this stance. First, any product of colonialism and apartheid should have no place in the new South Africa.[32] Secondly, the democracy which allowed a previously disenfranchised people their vote suggests that they should also be given control over their law.[33] Awareness of a voice previously silenced serves both to explain the anachronistic nature of the official law and to

[27] Cf *Henrietta Luke v Michael Luke* (1920) 4 NAC 133.

[28] Asante says the notion of trusteeship had in any event been eroded by an increase in commercial agriculture and the decline of traditional forms of authority.

[29] Customary interests do not correspond to the common-law meaning of usufruct, that is, a right that is terminable on the death of the holder but binding on all owners of the land. See Asante (1975: 8).

[30] Asante (1975: 50) says that, apart from deposing the chief, there were no remedies for abuse of trust in customary law.

[31] *Ex Parte Chairperson of the Constitution Assembly: In re Certification of the Constitution of the RSA, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 in para [197] held that the Constitution guarantees 'the survival of an evolving customary law'.

[32] For this reason, vehement objection was raised to the so-called repugnancy proviso, which had subjected customary law to public policy and natural justice: *Bangindawo & others v Head of Nyanda Regional Authority & another* 1998 (3) SA 262 (Tk) at 273, 1998 (3) BCLR 314 at 327; *Mabuza v Mbatha* 2003 (4) SA 218 (C) in para [30].

[33] This principle complements the protection of cultural diversity: those actually living the culture in question should be the ones to determine its incidents. See Himonga & Bosch (2000, 330–1).

demand respect for the living law. For these reasons, Langa DCJ, in *Bhe*, in para [43],[34] decried the fossilisation of customary law, which had led to its marginalisation and inability to adapt to changed circumstances. South African courts and academics are now at pains to stress the capacity of customary law to grow and develop.[35]

The above approach to past laws is perfectly understandable, but what of the customary laws recorded and adjudicated since 1994? Although recognition of the living law may be the only principled approach possible, courts have no immediate access to it, mainly because courts of the Western type are socially distanced from the communities they serve. A major problem is now presented: customs are subject to almost infinite variation, and it is impossible to take account of such variety without proving each new custom as it is asserted.

Prior to 1988, proof was demanded by the former Supreme Court and magistrates' courts because they regarded customary law as if it were the same as common-law custom.[36] As a result, for each case in which it arose, a rule had to be proved by calling witnesses.[37] However, s 1(1) of the Law of Evidence Amendment Act 45 of 1988 introduced a complete change by allowing all courts to take judicial notice of customary law. They could then rely on whatever law had already been recorded in the official code. New and unrecorded customs were assumed to be at least similar, if not the same.

Admittedly, litigants are not bound by the official code. They are free to contest whatever rules are adduced in court either in terms of a proviso to s 1(1) of the Act (that customary law may be applied only if it 'can be ascertained readily and with sufficient certainty') or in terms of s 1(2) (which entitles any party to question the authenticity of a rule and to lead evidence to establish a more reliable version). Anyone who disputes the official account, however, bears the onus of proof (*Mosii* at 930) and so must call witnesses to establish whether an alleged rule was certain, reasonable and uniformly observed for a long period of time (*Van Breda*).[38]

If a party claiming a new or more reliable interpretation of customary law cannot convince the court on a balance of probabilities, then the accepted version must prevail for want of better evidence,[39] subject always, of course, to s 211(3) of the Constitution, which gives the Bill of Rights overriding status. Thus, notwithstanding the failings of the official code, this is the version that will in the first instance be available in court. In fact, its very availability has the effect of creating a *de facto* presumption in its favour.

[34] Citing Mokgoro J in *Du Plessis & others v De Klerk & another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 in para [172]. See, too, Hlophe JP in *Mabuza* in para [25].

[35] See, for example, Langa DCJ in *Bhe* (in paras [44], [81], [153]).

[36] See *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A) at 394–5; *Mosii v Motseoakhumo* 1954 (3) SA 919 (A) at 930.

[37] In accordance with the test laid down in *Van Breda & others v Jacobs & others* 1921 AD 330.

[38] See also *Mazibuko* 1930 NAC (N&T) 143.

[39] See, for example, *Ruzane v Paradzai* 1991 (1) ZLR 273 (SC) at 278.

MORE APPROPRIATE TERMS OF ANALYSIS

It is clearly wrong to continue using the official code with its highly specialised concepts of the common law to describe customary systems of tenure—and there are alternatives available.

Language is obviously a critical issue (Bennett, 1985: 173).[40] Although we are no doubt free to employ the relevant vernacular languages, this approach has several disadvantages. English is still the dominant language of the courts and legal profession, and, if new terms were introduced, they would require translation and explanation. Experience in the past has shown that legal systems are highly resistant to such changes (Bennett, 1985: 178).

Nevertheless, a middle path between common-law and vernacular terminology is available.[41] Although the language is still English, the word 'ownership' with its specific common-law meaning,[42] together with the concepts of communal tenure and trust, should be avoided. Instead, less technical terms should be used such as 'right', 'power' and 'interest'. It is true that they, too, are the products of particular times and cultures, but they do not carry the connotations of ownership and its variants, and they are so fundamental to legal discourse that they are difficult to escape.[43]

This approach was proposed by Allott, a leading jurist on West African land tenures. Allott (1968: 122–4) claimed that, when investigating any such system, three basic questions should be asked. The first seeks to identify the status of the interest-holder. For instance, in customary law, it has long been apparent that, in order to acquire an interest in land, a person must belong to a political unit, be it a family, a ward or a nation.[44] Depending on the individual's status within those units, he or she may lay claim to certain rights and powers.

The second question concerns the content of the interest. This is the most complex area of inquiry, for it is aimed at discovering what holders may do and what limitations and contingencies are implicit in their interests. Allott (1968: 121ff) suggested that a distinction should be drawn between interests of 'benefit'

[40] The absence of a special vocabulary about property rights in customary law is an important factor in the workings of the system in general. See Kiernan (1976: 361–98).

[41] As the Court found in *Milirrpum v Nabalco Pty Ltd* 1971 (17) FLR 141 at 164–5, it can be highly inconvenient to use vernacular terminology when the prevailing language is English. See, too, Gluckman (1971: 42).

[42] Although Gluckman (1972: 140) claimed that the English word 'ownership' could reliably be used to translate the Barotse word *bunga'*, few, if any, scholars in legal anthropology would support this view. See MacCormack (1983: 10). Those examining Gluckman's work, for instance, have shown that ownership was not always the best translation for *bunga'* because it sometimes denoted highly personal relationships in which property did not feature.

[43] See, too, Hughes (1972: 60).

[44] Because of the association between land rights and an affiliation to a political superior, customary tenure has often been described as 'feudal'. Although customary law does not carry all the connotations of English feudal tenure (Gluckman, 1971: 40), use of this model, with its suggestion of land for loyalty and service, is closer to customary law than the Roman–Dutch model of ownership.

and 'control'.[45] Benefit denotes a right to use and enjoy land, while control denotes a power to decide who may benefit from the land, when they may exercise their rights and in what circumstances.

The third question concerns the uses to which particular tracts of land are put, and thus what rights and powers can be exercised over them. Whether land is used for agricultural, grazing or residential purposes tends to determine the rights and powers attaching to it. Dry grassland, for example, is usually set aside for grazing, and all members of a community may pasture their herds here. Fertile, well-watered land, on the other hand, is reserved for agriculture, and here individuals are allotted specific plots of their own over which they have more exclusive rights that come closer to the common-law idea of ownership.

From Allott's scheme, it is apparent that two or more interest-holders may, simultaneously, exercise rights and powers over the same tract of land. Those who begin an investigation of customary tenure with the assumption that common-law ownership is a universal phenomenon, however, tend to represent the data as if one person, or body of people, holds a plenary right out of which fractions are given to others. It follows that lesser rights of use and enjoyment are conditional on grants by the 'owner'.[46] On this understanding, it is then said that 'ownership' of land vests in the tribe, and that traditional rulers grant individuals lesser interests from this plenary right. From such a description, it seems as if the tribe has an 'absolute' title, the traditional ruler is a trustee and individuals have 'usufructuary' or some similar limited right. In fact, it would be more appropriate to describe customary law in terms of feudal tenure, whereby a political superior recognises and protects the interests of subjects provided that they return allegiance and military support.[47]

Allott's scheme frees us from the ownership paradigm (and the connotations of either absolute or communal ownership). It is not necessary to postulate traditional rulers, families and individuals having parts of the same interest in land. Instead, we can say that these interests are different and concurrent. It follows that the head of a community and his political subordinates have the power to control allocation and use of land in order to accommodate the needs of community members for sufficient land on which to live. At the same time, the individuals are entitled to exercise their right to benefit from the land they occupy.[48]

CONCLUSION

No matter how apt Allott's scheme, and no matter how undesirable the official code, the language of officialdom persists. A clear example is provided by the 2003 judgment by the Constitutional Court in *Alexkor Ltd*. Commenting on the nature

[45] Allott based this idea on a distinction made earlier by Gluckman (1971: 42, 88–91). Gluckman in turn referred to Sheddick (1954: 1ff), who had distinguished between 'estates of administration and production', terms that mean much the same as Allott's 'control' and 'benefit'.

[46] See Allott (1961: 99) and Van der Walt (1995: 405).

[47] See Sansom (1974: 146).

[48] See Sheddick (1954: 7).

of customary land tenure,[49] the Court, in paras [51] and [53], endorsed the living version of the law and the need to discard common-law preconceptions when analysing it:[50]

> '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' (in para [51]).[51]

To reinforce the point, the Court went on to cite the Privy Council judgment in *Amodu Tijani* (at 402–4):

> 'The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community ... To ascertain how far this latter development of right has progressed *involves the study of the history of the particular community and its usages* in each case. Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading' (at para [56]).[52]

But then the Court offends its own precepts. In language typical of the official code, it concluded in para [62] that

> '[i]n the light of the evidence and of the findings by the SCA and the LCC, we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of *communal ownership* under indigenous law.'[53]

The inability to abandon the terms 'ownership' and 'communal' is testimony to their powerful ideological functions in discourse about land, and their centrality to the socio-political context in which judgments are given, in this instance restitution of land for past dispossession. The descriptive term 'communal', for instance, invokes communitarian values, which the law-maker hopes will continue to animate new tenure programmes. This idea was evident from the start of the government's land reform process.

The precursor to the Communal Land Rights Act was the Communal Property Associations (CPA) Act 28 of 1996,[54] which introduced CPAs as a new method for

[49] The Court upheld the decision of the Supreme Court of Appeal, in *Richtersveld Community and others v Alexkor Ltd* 2003 (6) SA 104 (SCA) in para [29], where it had been held that the community had a 'customary law interest' in the land within the definition of 'right in land' in the Restitution of Land Rights Act, and that the 'substantive content of the interest was a right to exclusive beneficial occupation and use, akin to that held under common-law ownership'.

[50] As was noted previously, the Court then continued to say, in para [56], that the dangers of analysing customary law in terms of the common law were obvious because the two systems developed in different cultures and in response to different conditions.

[51] See *Mabuza* in para [32].

[52] Emphasis added.

[53] Emphasis added.

[54] While designed to serve the needs of disadvantaged groups generally, the CPA was especially aimed (s 2(1)) at those receiving land under redistribution programmes or under the Restitution of Land Rights Act. Under s 2(1)*(d)*, however, the scheme was also available, on a voluntary basis, to other communities acquiring land.

structuring tenure.[55] A group could set up a juristic person by which members would be able to acquire, hold and manage property in common, under a written constitution.[56] Each CPA was free to devise rules that would serve its particular needs but the rules were always subject to the constitutional principles of equality and non-discrimination (DLA, 1997), even though these principles might be antithetical to the traditional understanding of 'communal' tenure. The term CPA nevertheless continued to project the positive associations of 'communal', mainly the idea 'community',[57] but also the new emphasis being placed on the value of *ubuntu*.[58]

Common-law ownership carries a quite different set of associations.[59] The intellectual shift in Roman–Dutch law, brought about in part by Grotius' work, helped to facilitate a strongly individualistic conception of property-holding.[60] By suggesting individuality, ownership serves to strengthen the particular holder's claim, thereby offering protection from state interference and, at the same time, allowing the individual freedom to use or alienate the land at will. Not surprisingly, individuals with the power to control access to and use of land, especially traditional leaders, have been quick to use this concept of ownership for their own purposes.

Neither 'communal' nor 'ownership' can capture the essence of customary law. Although the individual's interest in arable and residential land does not amount to ownership, it is not so precarious that it may be expropriated at whim. Nor does it permit the freedom to alienate at will or to use the land for whatever purpose the holder may choose.[61] As for traditional rulers, they are clearly not owners although they do have powers of control, subject to broader responsibilities to care for their subjects. The term 'trustee' probably comes closest to describing their position, but even this term cannot do full justice to the sense of responsibility inherent in their office. In a telling observation, Kuper (1947: 45) noted that, with the Swazi, the verb *kuphakela* is used to describe an act of allotment. This is the same word that is used to denote serving food—and every individual has a right to be fed.

[55] The intention was to accommodate a widespread practice whereby groups of people held land under what were called 'informal' systems of 'communal' tenure. The government's choice of these terms (rather than 'customary') is, of course, significant in itself. See DLA (1997) s 4 'Land Reform Programmes' Box 4.11.

[56] In order to establish this type of association, the community had to draft a constitution providing for equal access to, and management of, its land (s 9).

[57] See Thornton & Ramphele (1988: 29–39).

[58] In *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 at para [224], *ubuntu* was described as 'a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of.'

[59] Its development in the common law, together with its social functions, have been well documented. See, for example, Van der Walt (1995: 396ff).

[60] As Van der Walt (1995: 404–5) notes, in France the same break with feudal tenure (which, as we have seen, is much closer to the notion of customary interests in land) required a political revolution.

[61] See Bennett (2004: 379).

Family obligation is a powerful organising idiom of customary law, and the idea of obligation always supersedes whatever personal rights an individual may have to property. The great theorist on customary law, Max Gluckman (1969: 259–63), declared that there could be no question of anyone 'owning' food, cattle or land absolutely in the area of his study (Barotseland in Zambia) because rights were being constantly overridden by the claims of kinfolk. This observation has been borne out on many occasions, particularly, for our purposes, by the fieldwork of Monica Wilson (Hunter) (1936) and Fr Heinz Kuckertz (1990) in Pondoland.

Writing about family heads, the two authors noted that all property vested in the senior male of a homestead (Kuckertz, 1990: 198). Nevertheless, they both stressed that control of property was much less important than the responsibilities it entailed, namely, to administer family estates for the benefit of dependants. Thus Wilson (1936: 121–2) said that

> '[o]wnership of cattle or grain does not imply the right to dispose of them without consultation of kin. Even the head of a line is expected to consult his younger brothers and sons before killing cattle or using them *ukulobola* ... or selling a beast. On similar occasions a son, whether living in his father's *umzi* or not, must consult his father, father's brothers, and father's son, and the wife of the house concerned. Of a man's property it is said, *Yonke impahla kayise xa uyise esekho* (All his property is his father's while his father is alive).'

Kuckertz (1990: 180) goes even further to say that, in the small Pondo chiefdom where he worked, people rarely separated the economic and the social (although, as distinct analytical categories, they are taken for granted in Western thinking). While linguistically the Pondo might distinguish economic matters (*impahla* = cattle and property) from social or family matters (*usapho* = wife, children and family), the former was continually being subsumed under the latter.

Careful fieldwork such as the above (especially when framed in Allott's language of analysis) reveals customary tenure as a system of complementary interests held simultaneously (Cross, 1993: 12–14, 18). For such a system to work, all the right- and power-holders are obliged to defer to the interests of others. Traditional leaders, for example, may seem to be in overall control, but their role as providers means that they are not free to allot or dispose of land at will. They must defer to social needs, and they may act only on the advice of elders and an applicant's future neighbours (Marwick, 1996: 162; Hughes, 1972; Kuper, 1947: 48–9). The official code, however, provides an opportunity to ignore these nuances in favour of cruder ideas of communalism and ownership.

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7

Women, land and power: the impact of the Communal Land Rights Act

By Aninka Claassens and Sizani Ngubane

INTRODUCTION

This chapter examines the likely impact of the Communal Land Rights Act 11 of 2004 on rural women in South Africa. It is based on research undertaken by the authors in the context of the legal challenge[1] to the Act. The Act deals with the content and vesting of land rights as well as the powers and functions of the structures that will administer 'communal' land. The chapter looks at the interplay between land rights and power over land.

The discussion begins with a description of some of the problems facing rural women in the former homeland areas covered by the Act. It then describes issues raised by women's organisations in late 2003 during the parliamentary process leading to the passing of the Communal Land Rights Bill. There were two main objections to the Bill. The first was that entrenching the power of traditional leaders over land was likely to reinforce patriarchal power relations and harden the terrain within which women struggle to access and retain land. The second was that the Bill would entrench past discrimination against women by upgrading and formalising 'old order'[2] rights held exclusively by men.

In response to strong lobbying from women's organisations, the provisions dealing with the vesting of 'old order' rights were amended when the Act was adopted by Parliament in early 2004 and various provisions pertaining to equality for women were added. However, the provisions dealing with the powers of traditional councils were not materially changed. This chapter discusses the amendments made during the parliamentary process and asks whether these adequately address the problems facing rural women.

Single women are in a particularly vulnerable position when it comes to land tenure. This chapter focuses on their situation given that the Act is likely to

[1] *Tongoane and others v The Minister of Agriculture and Land Affairs and others* (TPD 11678/06, pending).

[2] The Act defines old order rights in communal land to include rights that are formal or informal, registered or unregistered and derive from law, including customary law, practice or usage.

exacerbate their insecurity, and that the wording of the amendments may undermine hard-fought struggles by single mothers to be allocated residential sites. It is therefore argued here that the Act conflicts with the constitutional imperative to secure the land rights of people whose current vulnerability arises from past discrimination. It is also argued that the impact of the Act on single women is inconsistent with the right to equality—in particular because it discriminates on the basis of marital status.

It is suggested that many of the problems created for women stem from the failure of drafters of the law to engage with the prevalence of family-based systems of land rights, the overlapping and nested nature of such rights, and critical issues pertaining to the status and content of women's rights in family-held land.

The chapter then discusses the impact of patriarchal power relations on women's land rights. It describes how decision-making forums that deal with land allocation and dispute resolution have a material impact on women's capacity to access and retain land in the context of competing claims and family disputes. It argues that the 30 per cent women's quota introduced by the 2004 Act and its sister Act, the Traditional Leadership and Governance Framework Act 41 of 2003, will not be sufficient to offset the consequences for women of entrenching and expanding the power of institutions that have systematically discriminated against them in the past.

The chapter goes on to situate the discussion of the Communal Land Rights Act in the context of broader debates about approaches to tenure reform and the impact of these on women. It argues that if reforms—of whatever nature—are not informed by an accurate understanding of current systems of land rights and power dynamics, they are likely to have unintended consequences which may exacerbate women's vulnerability. It is argued that existing inequalities in property relations between men and women already have serious consequences in terms of evictions and domestic violence. It is suggested that unequal property relations have contributed to declining rates of marriage and the increasing number of children born to single mothers. The chapter argues that the challenge of improving—rather than undermining—women's bargaining position within the family in relation to land and property rights is critical not only for women's security, but also because of the societal consequences when unequal property relations contribute to the breakdown of family structures.

Property relations are created through processes of human interaction at the local level and are not established by the introduction of laws (Hann, 1998; Lund, 2002). While law *per se* cannot create new property relations (and is likely to have unintended consequences when applied beyond its limits), it is a critical factor in establishing the balance of power within which people interact to create property relations. National laws and institutions have a major impact as important reference points for action, in bolstering the power of certain groups and in providing possible avenues for legitimising property and authority (Lund, 2002: 32).

This chapter argues that while the 2004 Act contains provisions that provide for formal equality between men and women, it falls short in terms of substantive equality, and will in fact undermine the land rights and security of tenure of single women. While it has important potential advantages for married women, many of its provisions cannot be implemented at scale. Moreover, strengthening the powers

of traditional councils in relation to land exacerbates the unequal power relations within which women struggle to access and retain land rights, and is likely to further undermine the bargaining position of most women, and single women in particular.

This chapter ends by putting forward some alternative approaches to advancing rural women's interests through law and tenure reform.

PROBLEMS FACING RURAL WOMEN

Community consultation workshops were held in five provinces during 2002 and 2003[3] to inform people about the 2002 version of the Communal Land Rights Bill and to discuss the tenure problems faced by rural communities. In these workshops, a range of problems were raised in relation to women and land rights. These problems were similar to those raised in many workshops held by the Rural Women's Movement (RWM) and surface time and again in accounts by other authors writing about the position of women in rural areas (Cross & Friedman, 1997; Mann, 2000; Meer, 1997; Small, 1997; Thorp, 1997):

- women are often evicted when their marriages break down or end. In particular, widows are often evicted from their married homes by their husbands' families;
- divorced or widowed women who return to their natal home when their marriages end are often made unwelcome and are evicted by their brothers;
- unmarried sisters are often evicted from their natal homes by their married brothers after their parents die. This occurs because sons assert that they alone inherit the land, even where the father may have chosen his daughter to be responsible for the family home;
- married women are not treated as people who have rights in the land. The land is treated as the property of the husband and his natal family. Wives are often not consulted in relation to decisions about the land—whether these are about how to use the land or about transactions in the land. Women are treated as minors, both within the family and the community;
- women, particularly single women, struggle to access residential land because traditional leaders generally refuse to allocate land to women;
- women are often excluded from traditional institutions such as tribal and village council meetings where key decisions about land rights are taken. The problems cited include women not being represented in tribal councils and courts, not being allowed to address meetings, and being denigrated or ignored when they try to speak;
- tribal courts that decide family and land disputes are generally dominated by elderly men and are perceived to favour men over women. This has serious consequences because disputes may result in women being evicted from their homes, and women being denied redress when they complain that their land rights have been abrogated.

[3] The meetings took place under the aegis of a project co-hosted by the Programme for Land and Agrarian Studies and the National Land Committee, and aimed at extending civil society participation in the legislative process around the draft Bill. A total of 700 people attended the meetings, representing 75 rural communities from five provinces. For more detail on the problems raised in relation to women and land rights, see Claassens (2003).

A series of follow-up workshops was held with women's groups in KwaZulu–Natal and the Eastern Cape in late 2003. Women recounted their personal histories at these gatherings. One of the factors motivating the workshops was a statement made by the Deputy Minister of Land Affairs, Dirk du Toit, to a delegation of rural women in July 2003[4] stating that they could not expect tenure reform law to address or solve their 'personal family problems'. The women's accounts were collected to illustrate the impact of tribal authority structures and existing land laws on the unequal power relations that give rise to the evictions characterised by the deputy minister as 'personal family problems'.

The stories of four women are included here because they illustrate some of the problems already listed. Several other accounts described physical assault and sexual abuse of children. Women said they had no option but to put up with abuse, whether from their husbands or male relatives after the death of their husbands, because otherwise they would lose everything and be left homeless. The last two stories are unusual in that the women 'won'. The stories are included because they were celebrated by the women at the workshops as proof that positive change is possible.

Thandiwe Zondi: a widow spurned

Thandiwe Zondi[5] is a widow with six daughters. She was pregnant with her last child when her husband Siphiwe died in 1990. He was a traditional leader and a member of the KwaZulu Legislative Assembly. During their marriage they built a family home in Inadi.

After Siphiwe's death, his nephew, Sondelani Zondi, was appointed chief. In 1992 a member of the Zondi family who is a policeman took Thandiwe to the local station commander who told her that she must leave her house at Inadi and return to her father's house because her marital home now belonged to the new chief, Sondelani. She refused to relinquish the house despite this as well as a message from the tribal council saying she should leave. In 1993, when she was away, the house was ransacked and most of the contents stolen. The stolen goods were found at Sondelani's house. In the subsequent criminal case another person was found guilty of the damage and theft. Thandiwe's stolen furniture was held by the police during the criminal case and she went to live at her parents' home until the case was concluded.

On her return, she found that a fence had been erected and that the house was guarded. Her request for police assistance to gain access to the house was denied so she approached the magistrate in KwaVulindlela. He said he could not get involved in family disputes and advised her to sort the matter out with the Zondi family. Her father approached a chief, also a Zondi, from a neighbouring area to intervene with the family. He refused to do so.

[4] The authors attended this meeting.

[5] Zondi participated in a series of consultations organised by the RWM in KwaZulu–Natal. This account is based on her statement to an attorney at the Durban Legal Resources Centre (LRC). Because the eviction took place before the new Constitution was enacted in 1996, she was advised that it was not possible to legally challenge the eviction and apply for reinstatement in the house.

In 1998 Thandiwe was approached by two *indunas* (headmen) from the tribal council and told to pay a R30 levy towards Sondelani's marriage to his second wife. The levy was broken down as R10 towards *lobola* (brideprice), R10 towards the wedding and R10 towards the renovation of a house. Fearing that the proposed renovations were of her house, to which she had not had access for years, she suggested that the Zondi family buy the house from her or build her a similar one in another location—or at least allow her to demolish the house so that she could use the building materials. There was no response to this proposal, and repeated requests via councillors for a meeting with Sondelani were turned down. The *indunas* she approached mocked her for showing her desperation. In 1999 Sondelani occupied the house and has done so ever since.

In 2000 Thandiwe attended a public meeting where Sondelani insulted her and accused her of having slept with Nelson Mandela—a provocative statement since the area is a stronghold of the Inkatha Freedom Party. At subsequent community meetings, Sondelani said she was lucky he had restrained people from killing her.

Thandiwe has been living at her parent's home. They have both died. Since her father's death her brother has been pressurising her to leave. He says that Thandiwe, her six daughters and her grandchildren take up too much room. The family homestead has five buildings: Thandiwe and her family live in two while her brother and his family live in the other three. He threatened her with a spear in 2000, and in 2002 he assaulted her daughter Gugu. This was in the context of again telling them to leave. Thandiwe and Gugu obtained a protection order against the brother from the court in Pietermaritzburg.

The local *induna* and two male cousins support the brother, saying that as the only son he is the rightful heir to the property. However, a senior male relative supports Thandiwe, saying she has the right to remain at home and that it is her brother's duty to accommodate her, especially as the property is big enough for both of them.

When the brother is drunk he attempts to assault Thandiwe, her children and grandchildren. For this reason, since 2002 she has been trying to find another site on which to establish an independent home for herself and her daughters. She has approached the tribal authority in two areas but both have refused to allocate her land on the basis that she is a woman and has no sons.

In 2002 she approached Induna Makhaye of Mpumuza in the Vulindlela District and asked for an allocation of land. She was introduced by a teacher who vouched for her. The *induna* showed them a notebook with records of land allocations he had made. It contained the names of about ten people and recorded that they had each paid him R500. It also recorded that people had contributed a rooster, a case of beer, a bottle of alcohol, meat and home-brewed beer.

The *induna* refused to allocate her land on the basis that she had no son. He said that had she never married he could have allocated the land in the name of her brother. However, because she was a widow he could allocate her land only in the name of a male relative of her husband. Because her husband's family had evicted her she knew they would not vouch for her. She also felt she would not be secure on land allocated in their name.

Thandiwe then applied for a site in KwaNyavu near Manqongqo. The *induna* she approached referred her to a meeting of the tribal council where seven other

people had applied for sites. The other six applications were approved but she was told that because her husband had been a traditional leader, her application must be considered by the traditional leader, Skosiphi Mdluli. She was then asked for a referral letter (*trekpas*) from the tribal authority in her husband's area. After initial difficulties, she managed to obtain the referral letter as a personal favour from the tribal secretary. Notwithstanding this, the tribal office at KwaNyavu informed her that her application had been turned down because she had no son.

The Zondi family is now claiming that the *lobola* being offered to Thandiwe by Gugu's fiancé must be paid to them, and that because she is of royal blood only a high amount is acceptable.

Nosibonile Jibha: a 'family problem'

Nosibonile Jibha[6] is a young widow with four children. She was married according to customary law and comes from Engcobo in the Eastern Cape. She was 18 years old at the time of her marriage and her husband was 65. She did not know him before she married him. The union was arranged by her parents and future husband who said he needed another wife because his first wife had only one child and his second wife had left him.

Nevertheless, Nosibonile says they were happy and had four children. After her husband's death in 2001 her life changed dramatically. She was insulted by her in-laws and made to feel unwelcome. When she objected to the family cattle being used to pay the *lobola* of the first wife's grandson she was threatened. In despair, she fled with her children to her parents' home. After two weeks they said she must return to her married home. On her return she was assaulted by two of her husband's male relatives who said they would kill her if she ever tried to come back again. She tried to insist that this was her children's home and that they were entitled to live there, but the men only laughed at her. She asked to be allowed to collect her bride's clothes and the furniture she had brought to the marriage but they refused.

She reported the assault and loss of her possessions to the local *induna* who called a family meeting and tried to intervene on her behalf with her husband's brothers. However, they refused to accept his advice so the *induna* suggested she report the assault and eviction to the local magistrate. At the magistrate's office she was told that hers was a 'family problem' and was advised to call a family meeting to resolve the matter.

She says she is too scared to go back to her marital home. She and her children do not receive any support from her husband's estate. She lives with relatives and her children do not go to school.

Nomvuyo Vuvu Daka: a court victory

Nomvuyo Vuvu Daka[7] is a teacher from Qhumanco location in the Engcobo district. She has always lived in her parents' house. However, when her father died

[6] This account was recorded by the Transkei Land Services Organisation (Tralso), a non-governmental land organisation with its headquarters in Umtata.

[7] Account recorded by Tralso.

her brother demolished part of the house, took the building materials away and told her to vacate the house. He said that he, as the son, had inherited the house. Yet her father had appointed her to take over responsibility for the house and family on his death because of the role she had long played in supporting her parents and in light of the extensive renovations she had undertaken. Her brother, on the other hand, had moved away, built elsewhere and had not assisted their parents.

When she refused to vacate the house, her brother charged her with illegal occupation. She was arrested at the school where she taught and pushed into the back of a police van in front of the pupils. She spent some time in jail awaiting trial. Ultimately, the magistrate held that she could not be evicted since her brother had another house and her father had appointed her to be responsible for the family home.

Nonkosinam Kula: standing her ground

Nonkosinam Kula[8] lives in Ntshethu in the district of Mqanduli. She married her husband in community of property and they have five children. When he decided to take a second wife she was devastated. She thought that because they had had a 'white wedding' with a marriage certificate, he could not take a second wife. However, his parents supported his decision and he went ahead. He brought his new wife to live in the homestead that Nonkosinam had built during the years he was away working for Iscor in Johannesburg. She begged him to at least establish a separate homestead for the new wife. Instead, he took some of the cows they had received for their daughter's *lobola* to pay that of his new wife.

One day Nonkosinam came home to find many of her possessions outside in the rain. When she asked why, her husband accused her of stirring up trouble and assaulted her. She put her possessions back inside the house. The situation became very tense and a family meeting was called to 'discipline' her. The meeting was held in her house. She insisted that she could not be interrogated in her own home, and that according to custom the family must find an alternative venue for such a meeting.

Because she stood her ground so fiercely and steadfastly, her husband and his new wife failed to evict her and had to move into a new house. However, he took the family cattle to the new abode and refused to bring the oxen back so that she could use them when it was time to plough. He even refused her sons permission to handle the cattle. This meant she could not plough to produce food for her children. At this point she made a case in the magistrate's court in Mqanduli, and ultimately her husband was ordered to return the cattle and leave her in peace with the house and fields so that she could feed the children.

She is still struggling because he provides no financial support for her or the children. Moreover, even though the cattle have been returned and he lives separately, her husband continues to sell the family livestock without consulting her. People arrive demanding that she hand over the cattle and sheep that he has sold to them. She is challenging the validity of the sales.

[8] Account recorded by Tralso.

Rural women's response

At a meeting in 2003, Nonkosinam's victory in retaining her house and fields as well as getting the livestock back was celebrated by the other women present.[9] Her story stood in stark contrast to most of the other accounts which ended with women being evicted and forced to rely on the increasingly reluctant charity of others, or move to shacks near towns. Nonkosinam advised women to stand their ground and refuse to be intimidated by their husbands' families. She said she had 'used custom to fight their arguments and for that reason they couldn't answer'. She also attributed her success to having a marriage certificate, being married in community of property and being able to prove this in court.

During discussion, women said many of their problems arose from the terms of customary marriages and that these days land was regarded as the property of the husband and allocated only to men. They said that because wives arrived as outsiders, they had to pay allegiance to the rules and customs of their husbands' families. They said traditional authorities were reluctant to allocate land to women because they knew that 'outsider' husbands would never be as compliant as wives in having to obey the rules of the place. They said this was partly because of the way in which *lobola* worked, and also because the husband's family controlled the land. The women said that while *lobola* was useful and important because it bound two families together, it needed to be reinterpreted to protect the dignity of women. Some women said their grandmothers had told them that the situation had not always been this bad and that in the past women had not been evicted so often.

THE COMMUNAL LAND RIGHTS BILL AND THE PARLIAMENTARY PROCESS

The consultation meetings in 2003 discussed the version of the Communal Land Rights Bill gazetted for public comment in 2002. However, that version was substantially changed in October 2003 and public hearings were called within three weeks of the changes being made public. The Bill was then rushed through Parliament in record time before the 2004 general elections. The last-minute changes were widely perceived to constitute a pre-election deal with the traditional leadership lobby (Terreblanche, 2004a). This lobby had been threatening to call a boycott of the forthcoming elections because of dissatisfaction with the Traditional Leadership and Governance Framework Bill that was simultaneously going through Parliament.

The most significant change to the Communal Land Rights Bill was to make traditional councils into land administration committees with far-reaching powers in respect of communal land. The previous version had provided for elected land administration committees. It had limited the participation of traditional leadership in these committees to a maximum of 25 per cent. The last-minute changes to the

[9] The meeting took place on 27 August 2003 in Umtata. It was attended by 43 women from different areas in the Eastern Cape. Both authors participated.

Bill were welcomed by traditional leaders[10] and chiefly opposition to the sister Bill died down.

The eleventh-hour changes to the Communal Land Rights Bill were politically controversial for a number of reasons[11] and a wide range of civil society organisations came out in force to argue that the Bill be withdrawn and reformulated. The Chairperson of the National Council of Provinces at the time, Naledi Pandor, argued that the Bill impacted on provincial functions and should therefore follow a different parliamentary process, one that would enable more consultation with the provinces (Terreblanche, 2004b).[12] This would have entailed the Bill being held over until after the elections. However, Pandor's arguments were rejected and the Bill was adopted by Parliament in early 2004. More than four years later, the Act has still not been brought into operation.

During the public hearings, there was an outcry from organisations dealing with gender issues including the Commission on Gender Equality and the parliamentary Joint Monitoring Committee on Improvement of the Quality of Life and Status of Women. Rural women broke into Zulu as they made impassioned pleas to the Portfolio Committee on Agriculture and Land Affairs for the Bill to be scrapped. Both the South African Human Rights Commission and the Commission on Gender Equality submitted legal opinions which argued that various provisions of the Bill were in conflict with the Constitution.

The Bill provided for the transfer of title from the state to rural communities. A senior official of the Department of Land Affairs told the portfolio committee that existing tribal authorities constituted the communities to which the land would be transferred.[13] The Bill provided for land administration committees to have far-reaching powers over land, including the power to represent the community as the owner of the land, and the power to allocate and register land rights. At the same time, a transitional provision in the Traditional Leadership and Governance Framework Bill deemed existing tribal authorities to be traditional councils provided they met certain composition requirements within two years. Land administration committees were defined to be traditional councils. Tribal authorities exist virtually wall-to-wall in former homeland areas. They were the building block of the Bantustan political system. The impact of the two Bills was that adapted tribal authority structures would be given reinforced powers over land, complemented and extended by the authority to exercise ownership functions on behalf of the community.

[10] See Holomisa (2004) and Mzimela (2003). Phathekile Holomisa was President of the Congress of Traditional Leaders of South Africa, and Mpiyezintombi Mzimela was Chairperson of the National House of Traditional Leaders.

[11] See Cousins & Claassens (2004) and chapter 11 by Claassens in this book.

[12] See Chapter 3 by Christina Murray and Richard Stacey in this book.

[13] The Director of the Tenure Reform Directorate, Sipho Sibanda, was asked how many communities would receive title to their land in terms of the Bill. He gave the number of existing tribal authorities in South Africa (broken down by province) and added that some additional ones might be created because of the claims of 'landless chiefs' (portfolio committee, 26 January 2004, attended and recorded by Claassens).

At the same time as providing for the transfer of title to 'communities', the Communal Land Rights Bill provided for the formalisation and registration of 'old order' rights held by individuals within communal areas. (The law that was ultimately enacted remains similar in all material respects except that it is potentially ambiguous in relation to the role of traditional councils.)[14]

Women's organisations[15] expressed concern that apartheid-created tribal authority structures, which had discriminated against women in the past, were to be given expanded powers over land. They said these structures did not respect and support women. They pointed to the problems faced by single women in accessing residential sites and said tribal courts were perceived to favour men in family disputes that often culminated in the eviction of women. They said entrenching chiefly power over land would undermine women's prospects of obtaining secure land rights and make chiefs less susceptible to pressure for change.

In relation to the issue of converting old order rights into new order rights, various women's organisations argued that this would entrench and formalise the consequences of past discrimination against women. They argued that old order rights were derived from apartheid laws and regulations which not only prohibited the allocation of land to women but also registered family-held land exclusively in the male household head, ignoring women's strong rights to parts of the land. This downgraded the status of women's land rights and undermined their bargaining position within the family. Because the Bill provided that new order rights were potentially alienable, it created the danger that men would, for the first time, be able to unilaterally sell family land within which women had *de facto* rights, and which they depended upon for their survival.

The Commission on Gender Equality submitted a legal opinion which analysed some of the apartheid laws and regulations prohibiting African women from being allocated land and excluding them from Permission to Occupy (PTO) certificates. The commission said African women were, in the words of s 25(6) of the South African Constitution, people 'whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices'. It argued that they therefore had a constitutional right to tenure which was legally secure, and that this right had been abrogated by the Bill providing for old order rights to be upgraded to their current holders, who are men, thereby formalising the past exclusion of women.

THE AMENDMENTS: DO THEY SOLVE THE PROBLEMS FACING WOMEN?

In response to the strong lobby from women's organisations, the Bill was amended and the Communal Land Rights Act now provides:

> '4(2) An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses in a marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property

[14] See **Chapter 2** in this book by Henk Smith which summarises the Act.

[15] Submissions were made by the Commission on Gender Equality, the Women's Legal Centre, the parliamentary Joint Monitoring Committee on Improvement of the Quality of Life and Status of Women, and the KwaZulu–Natal RWM.

regime applicable to such marriage and must, on confirmation or conversion in terms of section 18(3), be registered in the names of all such spouses.
4(3) A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person.'

Although women members of the portfolio committee welcomed the changes as an improvement, they raised questions about the formulation of s 4(2), particularly in relation to its impact on unmarried women within the family, for example, widowed mothers whose sons had inherited the family land and divorced sisters who had returned to their natal homes.[16] They said that registering family land in the name of a man and his wife excluded other family members who had rights in the land. The proposed 'solution' failed to recognise the continuing *de facto* reality of family-based systems of land rights. Instead of giving the male household head exclusive rights to family land, it now included the holder's spouse but excluded all other family members, including unmarried women within the family.

The Act, like the Bill, provides that converted new order rights are potentially alienable,[17] thus creating the risk that land can be sold from underneath family members whose rights are not explicitly protected and whose names are not registered. The Act does not provide that family members must consent to transactions in the land. Nor is there a provision to ensure that the proceeds from land sales must be distributed among family members in accordance with their rights in the land. This is particularly serious in the context of the HIV/Aids epidemic in South Africa and its impact on orphaned children. Furthermore, there is no requirement or procedure to ensure that the spouse consents to transactions in the land. Manji (2003) has argued that consent requirements may afford women more effective protection from having land sold without their consent than joint vesting provisions that do not explicitly restrict men's ability to sell land unilaterally.

The General Household Survey of 2003 undertaken by Statistics SA indicates that 41 per cent of rural women over 18 years old are neither the household head, nor married to the household head.[18] In other words, 41 per cent of rural women live in households where other people will be the holders of land rights, to their exclusion. As has been mentioned, single women already suffer particular tenure vulnerabilities. Many of the examples of eviction cited during the parliamentary process were of widows being evicted by the family of their deceased husbands, of divorced sisters being evicted from their natal homes by their brothers, and of men asserting that they had never properly married the estranged 'wives' they were now chasing away. Furthermore, single women struggle to access residential sites for themselves and their children.

[16] During the portfolio committee deliberations on 25 November 2003, Lydia Ngwenya, a Member of Parliament for the African National Congress, raised the scenario whereby a widowed mother might now find the land she lived on registered as the property of her son and his wife (meeting observed by Claassens).

[17] See s 9, s 18(3)*(d)*(ii) and s 24(3)*(b)*.

[18] Analysis by Debbie Budlender of the raw data in the 2003 survey. See her affidavit on the DVD included with this book. The raw data is available at info@statssa.gov.za.

The problems for single women created by the Act stem from its basic structure. It imposes a structure of exclusive individual rights on a pre-existing system of family rights. It fails to assert women's land rights within the family or as producers and users of land. The Act also formalises rights deriving from discriminatory laws and distorted customary law without adequate protections for unmarried women who continue to occupy and use family land.

Does s 4(3) solve the problem for single women? It provides that '[a] woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man . . .'. This implies that sisters who occupy family land (for example, unmarried sisters or divorced sisters who have returned to their natal homes) would be entitled to the same security of tenure as their brothers. Yet, as has already been described, most old order rights are held by men. Section 4(2) contradicts the implications of s 4(3) by vesting what will often be family property, within which women have 'secondary' use and occupation rights, exclusively in a male and his spouse to the exclusion of other female family members, in particular the man's mother and his sisters. Section 4(3) is also contradicted by the entire thrust of the Act which focuses on formalising old order rights into registered, exclusive land tenure rights held by two people.

Insofar as the Act discriminates against single women, it is, in our view, in contravention of the equality provisions in the Constitution—both because the land rights of single women are undermined relative to those of men and married women, and in particular because s 9 of the Constitution prohibits discrimination on the basis of marital status.

THE SECURITY OF TENURE ARGUMENT

Section 25(6) of the Constitution provides:

> 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

Section 25(9) of the Constitution requires Parliament to enact the law referred to, and s 4(1) of the Communal Land Rights Act indicates that it is the envisaged law. However, in this section of the discussion we make the case that the current tenure insecurity suffered by rural African women derives, at least in part, from past racially discriminatory laws and practices, and that contrary to the requirements of s 25(6), the Act makes single women less, rather than more, legally secure. We argue that it cannot be consistent with the Constitution that a law required to enhance legal security of tenure should undermine the position of the most vulnerable category of rural women.

There is a range of historical and ethnographic material which shows that past racially discriminatory laws and practices undermined the tenure security of African women in South Africa. The material indicates that women previously had strong and specific rights to parts of the family land. In addition, women, including single women, often acquired land in their own right, whether by inheritance or by allocation. Many accounts describe arable land in particular as belonging to women, and not as the property of the male household head. For example, the 1931

account of the 'life and customs' of the Xhosa by the missionary John Henderson Soga (1931: 383) describes how

> '[e]ach wife of a chief or of a commoner has a grant of land given her for the upkeep of her family. Once granted it can only be forfeited by some misdemeanour on her part, or it may lapse through the death of the holder . . . .'

Schapera (1943: 136) wrote of the Tswana:

> 'The fields used by a family are generally called by different names. There is always a *tshimo ya mosadi*, 'the wife's field' . . . . It is cultivated primarily for subsistence and its crops are controlled by the wife. There may also be a *tshimo ya monna*, 'the husband's field'. Its crops are grown for sale rather than subsistence . . . .'

Simons (1968: 194) describes how originally the family, rather than the individual, had full legal capacity, with each family member having a clearly defined position with recognised claims and obligations. Each member had recognised claims to the property attached to their respective 'houses':

> 'The house is more than a dwelling. It is a distinct unit, a legal cell within the complex of a joint family, which is made up of a number of houses. Every wife constitutes a house, together with her children, the fields which she cultivates and the livestock set apart for her use.'

This description of a wife having strong and specific rights to her 'house', property and, in particular, to the fields she cultivated is described by Preston–Whyte (1974), in ethnographic accounts of the Tswana by Schapera (1943) and of the Zulu by Reader (1966). The accounts emphasise that the male family head could not make decisions that impacted on house property without the consent of the wife of that house. Women were in a relatively strong economic position within the family, as producers of food, and because of their pivotal role in the joint family enterprise of farming and subsistence.[19]

However, this changed with the introduction of laws decreeing that land could be allocated only to the male household head and when allocations of land to women were vetoed by native commissioners. Simons (1968: 261–5) quotes Barry with regard to the impact of Proclamation 227 of 1898 which introduced the rule of 'one man, one lot', and changed the 'traditional system of landholding which allowed each wife to have her separate fields'. Simons (ibid) also describes how administrative policy favoured men being allocated land, and how officials objected 'strenuously and with growing emphasis to the allocation of land to unmarried women'. He says that over time headmen stopped allocating arable land to women and allocated it only to men. In those instances where they did allocate land to women, the commissioner would cancel the grant.

Mills & Wilson (1952: 16–18, 133) describe the process whereby, in contrast to former practice and as the result of interventions by native commissioners and increasing land shortages, 'rights over fields came to be regarded as male property

[19] Again, this is consistent with evidence from other parts of Africa. Yngstrom (2002: 26) cites Mackenzie (1998), Kevane & Grey (1999), Moore & Vaughan (1993), Berry (1993) and Okali (1983) in this regard.

to be inherited by the eldest son, or, where polygyny survived, by the eldest son of each house'.

Changing practices and perceptions about the nature of men's land rights relative to those of women were reinforced by the PTO system used in most former homeland areas. Family-held land was recorded in PTO certificates issued in terms of Proclamation R188 of 1969[20] as the exclusive property of the male household head, thereby ignoring and undermining the status of other family members' rights in particular parts of the land. Nhlapo (1995: 162) has written that

> '[t]he identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion.'

The impact of treating family land as the private property of the household head was exacerbated by laws such as the Natal Code of Native Law of 1887 which made women perpetual minors and deprived them of the legal capacity to enter into contractual agreements and own property.

The result is that women's land rights were made invisible and, insofar as they were recognised at all, were characterised as 'secondary' to those of their husbands, fathers or brothers. This problem is not specific to South Africa. During colonialism, women's land rights were interpreted through the prism of Western constructs of ownership and in terms of hierarchies of 'higher' ownership and 'lesser' usufruct rights. This resulted in women's land rights being relegated to secondary status and made subservient to those of the male 'owner' (Yngstrom, 2002; Whitehead & Tsikata, 2003; Bikaako & Ssenkumba, 2003). This characterisation does not do justice to the reality of women—including daughters, sisters, widows or wives—acquiring land in their own right, whether through inheritance, allocation or other means. Nor does it represent the reality of systems of 'complementary interests held simultaneously' (Bennett, 2004: 381) and do justice to the strength of women's user rights within these systems.[21] Yngstrom (2002: 27) cites case studies pointing to the structurally important role of women in the household economy and the actual strength of women's land rights within the family. This is consistent with evidence that colonial authorities mischaracterised the nature of women's land rights in other parts of Africa and the far-reaching impact this had on women's legal status (Chanock, 1991: 73–4; Yngstrom, 2002: 25 who cites MacKenzie, 1998; Whitehead & Tsikata, 2003: 91–2 who cite Karanja, 1991).

In South Africa, as in the rest of Africa, the characterisation of women's land rights as secondary and subservient to those of men has had significant implications not only in terms of legal interventions and distortions, but also because of the

[20] The widespread PTO system used on South African Native Trust land in many provinces (see Chapter 5 by Ben Cousins) derived mainly from the South African Native Trust and Land Act 18 of 1936 and the Black Land Areas Proclamation R188 of 1969, which were subsequently slightly modified and adapted by legislation introduced by the different 'homelands'. However, there were also older pre-1936 PTO systems in areas such as the Transkei (personal communication, Rosalie Kingwill, August 2006).

[21] See chapter 5 in this book by Ben Cousins.

extent to which constructs of exclusive male ownership have been internalised and used by men to justify appropriating and ignoring women's land rights. Not only did discriminatory laws and practices undermine the legal status of women's land rights; they altered the balance of power between men and women within the family. This has had far-reaching implications because the family is a key decision-making forum for determining who gets to use and retain parts of the family land in the face of competing claims.

The joint vesting amendment contained in s 4(2) of the Communal Land Rights Act improves the position of the spouse of the household head, but it does not assist single women living on family land. African women are a category of people made legally insecure by past discriminatory laws. The Act, however, fails to secure the land rights of single women as required by s 25(6) of the Constitution. In fact, by registering the land they use and occupy as the exclusive property of other people who can unilaterally sell it, the Act renders them even less secure than at present.

To argue, as we have done, that the Act breaches s 25(6) of the Constitution because it exacerbates the legal insecurity of a category of people whose vulnerability derives from past discrimination, does not imply that there was a pre-colonial golden age when women were equal to men. It is simply to say that racially discriminatory laws severely undermined the status of women's rights to land and their security of tenure. Such laws ignored the strong and specific rights of women to parts of the family land, vested family land exclusively in male household heads, and prohibited women from owning and acquiring land.

Nor does our argument imply that as a result of these laws women lost access to the land. On the contrary, women constitute 58,9 per cent of the population of so-called 'tribal areas'.[22] They continue to use and occupy rural land. Most cultivation of arable land is still done by women. Systems of family-based access to land rights remain the norm despite laws that ignore them. Whitehead & Tsikata (2003: 78) cite studies from other parts of Africa that

> 'suggest not only that women's claims to land are much more diverse, but also that women's claims to land are much stronger than usually represented. (Cheater 1982; Moore and Vaughan 1994; Bosworth 1995; Yngstrom 1999, forthcoming). Ironically for those who link social embeddedness with women's *weaker* claims, the empirically demonstrated strength of women's claims seems to lie precisely in their social embeddedness.'

In South Africa women continue to contest, and sometimes defeat, evictions and exclusions on the basis that these are in conflict with 'proper' customary and family law. The accounts of the successful struggles by Nonkosinam Kula and Nomvuyo Daka to keep their homes are examples of this. However, women act within a legal regime that generally ignores both the family-based nature of land rights as well as women's specific entitlements within family land. A series of laws has severely tilted the balance of power within which women assert their entitlement to security of tenure.

[22] Budlender's analysis of the raw data of the 10 per cent sample of the 2001 census. See her affidavit on the DVD with this book.

Finally, our argument does not imply that joint vesting provisions are always problematic. Joint vesting of rights in both spouses may be a useful and necessary protection for women in a range of situations, for example, when new land or housing is acquired through redistribution programmes. However, it is inadequate as a sufficient solution to the problems faced by rural women in communal areas, and in that context it is likely to backfire on women other than wives. Moreover, it reinforces the perception that the primary problem facing rural women derives from the secondary status of the land rights of wives, a perception that both denies the problems facing other women and also reinforces Western constructs of hierarchies of rights that misperceive and undervalue the strength and status of different categories of women's rights in and of themselves (Yngstrom, 2002).

The problems that the Communal Land Rights Act exacerbates for single women do not derive from the joint vesting provision *per se*. They derive from the Act's imposition of a grid of exclusive, registered rights on a context of overlapping family-based rights where extended families continue to exist.

Where joint vesting is applied across the board without regard to the nature of pre-existing rights, it is likely to have unintended consequences. This applies as much to other excluded family members as it does to single women. In the context of legal interventions intended to confirm existing rights and interests in land, the state is under a particular duty to ensure the inclusion of vulnerable categories of people. If it fails to do so, it will create the contrary result of formalising their exclusion and increasing their insecurity.

CHANGING PRACTICES AND THE IMPACT OF THE ACT

This section considers hard-fought processes of change in land allocation practices and explores whether or not the wording of s 4(2) is likely to inhibit processes of positive change.

Land allocation to single mothers

During the consultative meetings about the Bill held in 2002 and 2003,[23] many women recounted the difficulties they faced in trying to secure land allocations from traditional leaders. They explained that the general practice was for residential land to be allocated only to married men. In Batlharos in the Northern Cape, a traditional leader said land was also being allocated to single mothers. He was immediately challenged by a woman who stood up and asked why in that case he had refused to allocate land to her (Claassens, 2003: 16). At Mpindweni in the Eastern Cape, women said unmarried mothers had to struggle to be allocated land, and if they succeeded then the land was allocated in the name of a male relative. KwaZulu–Natal women said single women, especially widows and women without sons, were seldom allocated residential sites. They said the problem was worse in

[23] Mashamba near Elim, Limpopo, 22–23 November 2002; Mpindweni near Umtata, Eastern Cape, 3–4 December 2002; Leeufontein, Sekhukhuneland, Limpopo, 11–12 January 2003; Tyhefu, Eastern Cape, 4–5 March 2003; Batlharos near Kuruman in the Northern Cape, 17–18 March 2003; Pietermaritzburg, KwaZulu–Natal, 22–25 March 2003; Mankaipaa, Madikwe, North West, 10–11 April 2003.

areas administered by tribal authorities, and that trusts and communal property associations generally allocated land to women on a more equal basis. Participants at the Sekhukhuneland meetings said stands were not allocated to single women unless they were over 40 and had children.

While the meetings indicated that land allocation to single mothers is a serious problem, they also showed that uneven processes of change are under way.[24] This is also the conclusion of a study by Alcock & Hornby (2004) in KwaZulu–Natal which describes changes in the process of land allocation to women. The study concludes that while current practices do indeed reflect the patriarchal nature of tribal structures and systems, the changes currently taking place draw attention to the capacity of customary systems to adapt and respond to the broader social and political context in which they function.

Some of the dynamics at play in relation to land allocation to women were illuminated at a meeting in Kalkfontein[25] in Mpumalanga in 2004. Young women challenged the community trust[26] as to why women were not represented on the land allocation sub-committee. Single mothers in Kalkfontein have been allocated residential sites for the last ten years or so, after challenging the previous practice of allocating sites only to 'sons' of the community. They argued that as 'daughters and granddaughters', they were just as much 'descendants' of the original purchasers as sons were, and that they also needed to be able to house their children. At the meeting, the land allocation committee conceded that daughters were entitled to residential stands, and also that women should be included in their committee. However, they raised recent problems of 'outside' men marrying Kalkfontein women and then causing trouble in the community by refusing to acknowledge the authority of the committee in resolving disputes. They said the problem arose when women who had been allocated land subsequently married outside men, who thereby gained access to the community's land without first having to agree to live by its rules. They said the land of the Kalkfontein descendants was being diminished by outside men gaining access to land rights in this way.

Women at the meeting acknowledged the problems cited by the committee and said that they were also concerned about unruly outsider men getting land rights in Kalkfontein by marriage. They argued passionately, however, that this problem should not be used to justify reverting to the old system of women not being allocated land. They said single women were in desperate need of residential sites and that no one could say for sure that a single woman would subsequently marry or that her husband would be 'troublesome'.

Traditional leaders often justify their reluctance to allocate land to single women by reference to the danger of 'outside' men gaining rights in the community via

[24] This was borne out by subsequent field investigations by Claassens into land allocation processes in other areas, for example, at Makuleke in September 2004, at Mundzedzi in October 2004 and at Kalkfontein in November 2004.

[25] On 4 November 2004. Attended by Claassens and Moses Modise from the LRC.

[26] The descendants of the original purchasers own Kalkfontein communally. They do not recognise the nearby tribal authority as having jurisdiction over their land, and have long administered the land through an elected community structure. (See chapter 12 in this book by Claassens and Durkje Gilfillan.)

marriage. They say that land allocation follows the patrilineal line and that land must be preserved for the children of the sons of the community. However, it is also clear that customary practices are undergoing uneven processes of change and adaptation in the face of pressure from women as well as the increasing incidence of single women establishing families of their own. The extent and scale of these changes are not known.

How will the Act affect this process of change?

Section 4(2) of the Communal Land Rights Act does not provide that rights previously reserved for men must now be shared by their wives. It provides that any old order right held by a married person is now deemed to be jointly held by his or her spouse. Land allocations to single women qualify as old order rights; they derive from (changing) customary law and practice.

The effect of s 4(2) is that once a single woman marries, her land rights will be jointly owned by her husband, to the exclusion of her children, including the children she had before her marriage. Yet in many instances custom has adapted precisely to recognise and secure the rights of children born to unmarried mothers. These children carry on the patrilineal line of the mother's father if they are not claimed into their father's line through marriage or by ceremonies acknowledging their paternity.

The wording of the section may impact negatively on the partial and uneven processes of change currently under way in rural areas. By vesting joint ownership in subsequent husbands, it formalises the very outcome that traditional leaders have been concerned to avoid and may backfire on rural women's efforts to secure land allocations for single mothers. Furthermore, it may undermine the land rights of children—both male and female—born to the woman before her marriage, and affect their relationship with their stepfather.

If the purpose of s 4(2) is to address past discrimination against women, it was unnecessary for it to have been worded reciprocally in this way. It could have provided that family land must vest jointly in wives, or in the family as a whole with both a man and a woman as nominees. It was unnecessary for land acquired by a woman to vest jointly in her husband. This means that land that women managed to acquire despite past discrimination now vests jointly in their current or future husbands. Moreover, the clumsy wording of the section means that men and women living in communal areas do not have the same options concerning matrimonial property regimes as other South Africans.

Notwithstanding the problems created by its wording, the provision is an important victory for the women's organisations that opposed the Bill. Those married women who find out about the joint vesting provision will be able to use it to protect themselves from eviction when their marriages break down or end. Because old order rights are deemed to be jointly held, registration is not a prerequisite for this protection.

The amendment to s 4(2) has far-reaching implications for existing patrilineal systems of property rights which are socially embedded in rural areas. If enforced, it would impact significantly on patterns of inheritance as well as the size and subdivision of units of land over time.

It is extraordinary that a change with such significant implications should have been introduced as a poorly drafted afterthought to head off a constitutional challenge. It raises several questions: can law change deeply embedded kinship and family structures at the stroke of a pen; how does law articulate with processes of social challenge and change; what kinds of enforcement, oversight and support are required for law to achieve its objectives and avoid unintended consequences? It will be important to monitor the implementation of s 4(2) and its intersection with the implementation of other laws, such as the Recognition of Customary Marriages Act 120 of 1998 which recognises customary marriages and deems them to be in community of property. In particular, it will be important to assess the impact of s 4(2) in relation to the problem of men denying the validity of customary marriages on the basis that the marriage process was not completed in accordance with 'custom'. The Communal Land Rights Act, by making marriage the mechanism that brings joint ownership of land into operation, may create an additional incentive for men to attempt to deny the existence of customary marriages.

WOMEN, LAND AND POWER

Power relations were the key issue highlighted in submissions opposing the Bill by structures representing women's interests. Lulu Xingwana MP, then Chairperson of the parliamentary Joint Monitoring Committee on Improvement of the Quality of Life and Status of Women, addressed the Land Affairs portfolio committee. She said women were neither respected by, nor represented in, existing tribal authorities and that to give these structures powers over land would reinforce patriarchal power relations that impacted negatively on women. She expressed concern that the Bill sent a message that would strengthen the status of traditional leaders at the expense of women's rights.

The Commission on Gender Equality submission[27] said existing traditional institutions 'are not democratic in their formation, are highly patriarchal, and historically have underpinned the subordination and oppression of women'. The submission by the Women's Legal Centre[28] criticised the Bill for failing to provide positive measures to deal with the 'systemic discrimination' practised by the institution of traditional leadership in refusing to allocate land to women.

Representatives of rural women's organisations made passionate speeches about the danger of the Bill entrenching existing inequalities in power relations. For example, Prisca Shabalala of the KwaZulu–Natal RWM described current cases of women being evicted by their estranged husbands, or husband's families, and said:

> 'If the Bill gives amakhosi power over land our suffering will become worse. We will go back to the old days—yet we have been looking forward to rights of our own. If Parliament does not hear us and does not understand that we are talking about our lives and suffering that is happening every day, then it is like amakhosi. It also does not respect us' (Govender, 2004).

[27] See the DVD with this book.
[28] See the DVD with this book.

Because of the nature of African systems of land rights and the fact that land rights derive from social relations and exist relative to the claims and needs of others (Berry, 1993, 2001; Moore, 1986), the forum in which land rights are negotiated and disputes resolved has a direct impact on security of tenure. The processes and institutions that negotiate land rights determine who gets land and who is able to retain it in the face of competing claims (Yngstrom, 2002: 33; Whitehead & Tsikata, 2003: 79). The issue of land administration structures is thus critical for women, and will have a determining impact on their access to land and the security of the rights they manage to attain.

The nature and extent of the powers given to traditional councils is discussed elsewhere.[29] Chapter 11 discusses the impact of imposing state-sanctioned structures with power to exercise land ownership functions on systems of land rights where control is exercised at decentralised levels through layered systems of authority. This chapter does not deal with the Act's broader impact on accountability and current processes that mediate power over land and people. It focuses specifically on the consequences for women of imposing traditional councils as the bodies that will administer rural land. However, it is worth noting the instructive parallel between the consequences of mischaracterising and downplaying the strength of women's land rights at family level, and that of mischaracterising and downplaying the decision-making power of family and user groups at community level. Just as overstating the land rights of men relative to those of women undermined the bargaining position of women within the family, so exaggerating the powers of traditional leaders in relation to land in the Act undermines land rights exercised at other levels of society, including at the level of the family.

What is at issue here is the relationship between how land rights are characterised and vested on the one hand, and how power and authority is delineated and exercised on the other. We argue that a key component of land rights is the ability to make decisions about the land. Exaggerating chiefly power over land downplays and undermines the strength of the rights vesting in ordinary people, just as ignoring women's land rights within the family undermines women as stakeholders and decision-makers in relation to family land and renders them vulnerable to abuse at this level.

TRIBAL AUTHORITIES, TRADITIONAL COUNCILS AND WOMEN

Past experience of the tribal authorities that will become traditional councils has not been good for women (Cross & Friedman, 1997; Mann, 2000; Meer, 1997; Small, 1997; Thorp, 1997; Oomen, 2005: 140). In most instances, women are not represented on these structures and in many rural areas women are still not allowed to speak at tribal authority meetings or in tribal courts (Bentley *et al*, 2006; Claassens, 2003; Hargreaves *et al*, 2000). This point is also made by Kindra (Oomen, 2005: 86), who describes the story of a woman who wanted to bring an

[29] See chapter 11 by Aninka Claassens and chapter 9 by Peter Delius in this book.

assault case against her husband in the tribal court but was turned away because she had no male representation. The woman was beaten to death a few days later.

A KwaZulu–Natal workshop on tribal courts attended by 250 rural women in 1998[30] raised a series of problems. In many instances, widows in mourning dress are not allowed to speak during tribal court proceedings. In some areas they are required to sit outside the fence of the court and convey their views to a male relative standing on the other side of the fence who then conveys their views to the court. This puts a widow at a serious disadvantage in family disputes that arise after the death of her husband and may result in her eviction.

Many women complained that elderly male councillors tended to identify with men in family disputes and regarded it as improper and inappropriate for women to discuss family disputes in public. Councillors often regarded women who raised land problems as troublesome and unruly, and treated their complaints as trivial. Yet councillors' decisions have a major impact on land rights. Moreover, as already discussed, many tribal authorities refuse to allocate residential sites to women, and in some provinces it is still the dominant practice that an unmarried woman will not be allocated land except, in some instances, in the name of her son.

The Traditional Leadership and Governance Framework Act provides for certain reforms in relation to the composition of traditional councils. Tribal authorities are deemed to be traditional councils but must comply with new composition requirements within a year. These require that 40 per cent of the members of a traditional council must be elected. Furthermore, 30 per cent of the members of a traditional council must be women. However, the women need not be elected; according to s 3, they may be 'selected by the senior traditional leader'. Section 3(2)(*d*) provides that

> '[w]here it has been proved that an insufficient number of women are available to participate in a traditional council, the Premier concerned may, in accordance with a procedure provided for in provincial legislation, determine a lower threshold for the particular traditional council than that required by paragraph *(b)*.'

This provision was added because of vehement protests by traditional leaders during the portfolio committee hearings to the effect that most women are not suited or prepared to be members of traditional councils.

Women who made submissions about the Communal Land Rights Bill expressed concern about the 30 per cent quota provision, which is included in both the Communal Land Rights Act and the Traditional Leadership and Governance Framework Act. They said that because the women's quota did not need to be elected, there was a likelihood that traditional leaders would select acquiescent female relatives to sit on traditional councils. They also said 30 per cent representation was too low, especially in the context of existing dynamics that undermined and silenced women. Moreover, since most people living in communal areas were women, their representation should be at least 50 per cent.

[30] The workshop was organised by the Association for Rural Advancement. It was held in Durban and convened and attended by Ngubane. Women from royal families were invited as were female tribal secretaries. They raised the same problems as the other women who attended.

The bigger issue is whether the quotas introduced by the new Acts mitigate the consequences of imposing traditional councils as land administration committees. The tribal authorities deemed to be traditional councils are the custodians and witnesses of the discriminatory status quo. They are closely identified with the very decisions and processes that they would have to challenge in order to assert women's land rights. They stand accused of disrespecting women, an accusation that is consistent with the efforts of traditional leaders during the parliamentary process to lower the women's quota to less than 30 per cent.

BROADER TENURE REFORM DEBATES

How do South African debates on women, land and power compare to those taking place in other parts of Africa? This section discusses the Communal Land Rights Act in the context of broader debates about tenure reform and its impact on women.

Currently, the two main approaches to tenure reform are land titling on the one hand, and interventions to support existing socially embedded institutional arrangements on the other. It is widely recognised that land titling programmes in many parts of Africa (Kenya is an oft-cited example) have not met their objectives (Bruce *et al*, 1994; Platteau, 1995). They have been extraordinarily expensive to implement and maintain, and have often reverted to 'informal' or customary systems. Titling *per se* does not appear to be a significant variable in relation to profit and productivity. Most important for our purposes is that time and again titling processes register exclusive rights in the name of the male household head, thereby formalising the exclusion of women. Women are treated as 'secondary' holders whose rights are dependent on, and subservient to, those of men. Even where law and policy provides for joint vesting of rights in men and women, administrative and conveyancing practices tend to favour rights being registered in the name of one male holder. Moreover, men and elites tend to capture the actual process of titling, and use it to their advantage at the expense of women (Whitehead & Tsikata, 2003: 74–9; Yngstrom, 2002: 34). A range of overview studies indicate that titling programmes have increased landlessness and vulnerability for women (Ikdahl *et al*, 2005; Gray & Kevane, 1996; Lastarria–Cornhiel, 1997).

On the other hand, customary systems have proved unexpectedly resilient, even in the face of overlaid titling schemes. According to Okoth–Ogendo (2002: 10),

> '[e]mpirical evidence now shows that whether regarded as "law" or not, indigenous norms and structures, particularly in respect of land relations, continue to operate as sets of social and cultural facts which provide an environment for the operation of state law.'

In response to the failure of titling schemes to meet their objectives, and their unintended consequences for marginal groupings, a new consensus has emerged, subscribed to by institutions such as the World Bank. It holds that for tenure reform to work and stick, it should build on the dynamics of customary systems, and recognise and support existing social institutions (Whitehead & Tsikata, 2003). Analysts such as Whitehead & Tsikata have raised concerns about this new orthodoxy. They ask about the implications for women of the 'return to the customary' and raise important questions about power relations as well as manipulated constructs of the 'customary' that favour men's interests.

Both types of approach, titling or supporting customary institutions, are likely to have major unintended consequences in contexts where existing systems of rights and power dynamics are misconceptualised or ignored. As already discussed, land titling programmes backfire on women and other vulnerable groupings when they fail to recognise the existence of family-based systems and overlapping rights in the land.

Similarly, there is much controversy about what constitutes the 'customary' and the content of customary authority (Chanock, 1991; Okoth–Ogendo, 2002; Nyamu–Musembi, 2002; Merry, 2004). Nhlapo (1995: 162) writes that although African law and custom had always had a patriarchal bias, 'the colonial period saw [this] exaggerated and entrenched through a distortion of custom and practice . . . .' He warns that

> '[p]rotection from distortions masquerading as African custom is imperative, especially for those they disadvantage so gravely, namely, women and children.'

His warning echoes that of Whitehead & Tsikata (2003: 104), who say that there are 'simply too many examples of women losing out when modern African men talk of custom'.

The Act incorporates elements of both approaches to tenure reform in that it reinforces the already distorted powers of traditional councils with land ownership powers on the one hand, and registers individual rights to family-held land on the other. It provides the worst of both worlds in one law. It ignores the reality of overlapping rights in land and disputed boundaries of land and authority, and it ignores current localised decision-making processes at different levels of society. Most important for the purposes of this chapter, it does not address the reality of unmarried women living on family-held land and may exacerbate the problems facing single women in securing land allocations from tribal authorities.

WOMEN'S AGENCY AND THE CHANGING COMPOSITION OF THE FAMILY

Advocacy for independent rights for women is often counterpoised with approaches that focus on improving the position of women within existing or customary institutions, including the family. The choice between titling on the one hand, and focusing on existing socially embedded institutions on the other, raises questions concerning whether, and to what extent, it is possible to bring new property relations into existence simply by enacting laws. These questions are especially relevant in contexts where the state has a limited capacity to implement reforms, or where laws are drafted without regard to the practical constraints of implementation.

The limits of the law in practice often mean that there is no real (as opposed to ideological) alternative to beginning with power relations in existing institutions (Nyamu–Musembi, 2002: 143–5). This does not imply that new laws are irrelevant and unnecessary—far from it. But it suggests that close attention should be paid to the nature of rights and claims as they are asserted, used and contested in practice when the laws are formulated. It also suggests that new laws should be informed by the dynamics of current practice rather than the versions of the 'customary'

advanced by male elders (Nyamu–Musembi, 2002: 144). In particular, new laws should articulate with the forms of struggle that women are engaged in on the ground.

Women have had no choice over the decades but to engage with the issue of unequal property relations. We suggest, on the basis of anecdotal accounts by many rural women, that a significant number of women now choose not to marry, and instead to have children on their own, because they regard marriage as an institution that is dangerous to their long-term security. Women in different contexts told us that they had decided never to marry after seeing female relatives evicted with nothing from the married homes they had built up over decades. Time and again we were told that married women had no option but to put up with violence and abuse because they would lose everything if their marriages ended. Some women told us that whereas during their mothers' generation there was a social stigma to having children without a husband, now their mothers advised them never to marry. These women said that nowadays women were respected for having the strength and capacity to look after their children independently.

There are, no doubt, a range of other factors that contribute to the declining rates of marriage among African women in South Africa. It seems to us, however, that women's agency in response to dysfunctionally unequal property relations should be taken into account as a factor alongside others.

As already described, single mothers are challenging tribal authority structures to allocate them land so they can establish independent households. Gradual, uneven processes of change in land allocation practice are under way. In our experience, women use a range of arguments to advance their claims. Many are couched in terms of 'customary' values. For example, that all members of the community are entitled (by birthright) to land to fulfil their basic needs and support their children; and that men are entitled to land only when they marry and establish families. Now that the structure of the family is changing and women are fulfilling the role of providing for the family, they are entitled to be allocated land on an equal basis to men with families.

Often the principle of equality is asserted, and women refer to the Constitution and new government. They say that the times and the laws have changed, and that discrimination is now illegal. In many instances, arguments about the values underlying customary systems (in particular the primacy of claims of need) and entitlements of birthright and belonging are woven together with the right to equality and democracy in the claims made.

Highlighting women's agency should not downplay the difficulties inherent in the path of going it alone. Many women do not succeed in being allocated land despite their repeated efforts. They, like Thandiwe Zondi, remain locked in family situations where they are vulnerable to the abusive behaviour of relatives who deny their land rights. Moreover, bringing up children alone, for whatever reason, in the context of the endemic poverty in former homeland areas constitutes a tough and precarious existence. Children then have only the mother and her family to turn to for support and in times of crisis. This increases their susceptibility to risk and destitution, especially in the context of the HIV/Aids epidemic.

Another form of agency is that of women living on family land who resist eviction

and assert that they have specific entitlements to fields and to be accommodated within the family homestead. Often they, too, rely on arguments that combine both custom[31] and equality. We met women who had successfully challenged their brothers' attempts to evict them on the basis that as family members they had a 'birthright' to belong. We also met widows and divorcees who had managed to hold on to their married homes despite attempts to evict them. We came across women whose parents had bequeathed them (not their brothers) control of the family home and land in recognition of the role they had long played in supporting their parents and in balancing the interests and needs of other family members.[32] Many women, however, are not so successful and continue to live in precarious and contested arrangements on family land.

ALTERNATIVE APPROACHES TO SECURING WOMEN'S LAND RIGHTS

We have argued that unequal property relations make women vulnerable to eviction and domestic violence. For these reasons alone, interventions to assert women's right to land are urgently needed. We suggest, furthermore, that the denial of women's land rights is a contributing factor in the changing composition of the African family and that this has far-reaching societal consequences, especially for children. In this context, the challenge of providing substantive equality in property relations for rural women is an urgent societal imperative that must be tackled seriously, not by last-minute amendments providing for formal equality.

As discussed, tenure reform laws often fail to meet their objectives and instead have unintended consequences, especially for women. New property relations do not spring to life with the enactment of new laws. Instead, property relations come into being by ongoing processes of human interaction taking place within the context of broader power relations that favour some and disadvantage others. While law cannot create new property relations in and of itself, it has a far-reaching impact on the power relations within which women struggle for land (Berry, 1993, 2001; Lund, 2002; Moore, 1978). We suggest that the goal of substantive equality is best served by laws and other interventions that acknowledge the context of unequal power and property relations, and seek to increase the bargaining position of women in this terrain.

[31] This is consistent with similar evidence from Zimbabwe documented by Stewart in 1998. She describes a workshop in which senior traditional leaders explained that the underlying principle of customary inheritance is that the family of the deceased, especially wives and children, should be provided for. Yet the codified 'rule' of male primogeniture is often applied in contradiction of this fundamental principle. She ascribes this to the rule-verses-principle misconception of the nature of customary law. She adds that pragmatic accommodations that uphold women's inheritance rights are more common at primary and magistrate's court levels than at Supreme Court levels where precedent entrenched 'rule-orientated' versions of customary law are dominant (Stewart, 1998: 222–25).

[32] Bikaako & Ssenkumba (2003: 249–51) also note the increasing incidence of the responsibility for family land being bequeathed to daughters rather than sons in rural Uganda. They attribute this to the perception of daughters having taken more responsibility for care of family members than their brothers.

We have described how colonial and apartheid laws hardened the already unequal terrain within which rural women operate. Registering PTO certificates exclusively in the male household head and giving men sole legal status undermined women's position within the family. Women's specific rights to parts of the family land were ignored and made subservient to those of men. Simultaneously, the routes by which women, including single women, had been able to acquire land, were outlawed.

In a parallel process, apartheid laws skewed the balance of power between traditional structures on the one hand, and families and user groups on the other. Indigenous accountability mechanisms were undermined and power over land was redirected as flowing downwards from the state via native commissioners and tribal authorities. Land rights vesting in families were not recognised in law, and were instead framed as 'permits' registered in the name of individual men. Women's land rights were made invisible relative to those of men, and especially relative to those of traditional leaders. One has only to look at the tone of the arguments by traditional leaders in response to the new Constitution and the women's quota in the Traditional Leadership and Governance Framework Bill to see how the construct of exclusive male ownership dovetails neatly with patriarchal norms. Inkosi Mpiyezintombi Mzimela (2003), Chairperson of the National House of Traditional Leaders, said of the controversy pertaining to women's land rights in the Communal Land Rights Bill:

> 'A male member of a community is expected to care not only for his own wife or wives and their children, but also for the families of deceased male members of his family, and they honour that obligation. There are no such obligations in western culture and traditions. Understandably, then, the male will have the dominant property right to go with his greater responsibility.'

At the same time, and in response to much pressure and pain, customary systems have shown some flexibility in adapting to the increasing numbers of families headed by single women. Moreover, despite apartheid laws, systems of family-based rights remain prevalent and some women do manage to assert and secure their land rights within these. It is important to pay attention to the dynamics and terms of women's claims and struggles so that women can be supported at the intersection of unequal property relations.

Strengthening use rights

If government had chosen to place its emphasis on strengthening use rights as opposed to old order rights, it could have bolstered women's land rights and created conditions more conducive to users being able to hold family and community structures accountable. A law that defines and secures use rights would strengthen the position of women within the family and within broader community structures. This is not an argument in favour of the individualisation of land rights or exclusive ownership (although individual ownership by women is important in a range of situations). Rather, in the context of rural areas where there are a myriad of overlapping and nested rights, it seeks to balance group and individual rights within a framework that provides special protections for the rights of women—both because women are the primary users of rural land, and in order to address the

consequences of past discrimination against them. This would also be more consistent with pre-colonial systems of land rights that recognised the strong rights of women to arable land and to 'house' property within the extended family.

For use rights to be able to hold their own against PTO certificates and allocations endorsed by tribal authorities, it is necessary that the law define and protect them explicitly.[33] Moreover, the protection should not come into being only on registration because registration is generally a slow and contested process, and often captured by elite interests. Instead, existing use rights would have to be protected by statute on a blanket basis.

While securing use rights is unlikely to be sufficient in some contexts and in the long term, it is a critical starting point for asserting and protecting women's land rights during processes of formalisation and change. Use rights, however, do not solve the problem of access for those who do not yet have land. Other measures are necessary to support women in their struggles to be allocated land. Such measures need to address, rather than entrench, the power dynamics that currently work to belittle and exclude the claims made by women.

Oversight and support

Because of unequal power relations and the difficulties poor rural women have in accessing courts, rights set out in statutes are effective only if they are complemented by measures that assist women to assert their rights. The 1999 draft Land Rights Bill that was rejected in favour of the Communal Land Rights Bill, provided for locally based land rights officers with the authority to intervene where decisions about land abrogated rights protected by statute. The Bill provided that transactions in family land were valid only if the majority of family members agreed and the benefits were distributed fairly. Family members who were cut out of the process could call on the officer to review the validity of the transaction. Similarly, decisions about land allocation (by whatever structure) were required to treat men and women equally, and women could appeal to the land rights officer to review the validity of the decision if it abrogated the law.

CONCLUSION

When Thoko Didiza took over the Land Affairs portfolio in May 1999, she rejected the draft Land Rights Bill as an embodiment of the 'nanny state'.[34] She said women with problems could litigate and use the equality provisions in the Constitution.

Many of the rural people who engaged in the non-governmental consultation process about the Communal Land Rights Bill in 2003 interpreted the Bill as an expression of government's intention to dump its responsibility towards rural

[33] The Communal Land Rights Act refers to 'usage' in the definition of 'old order rights'. Some people have interpreted this to mean that current use rights are protected by the Act. Claassens (2005) has argued that in the context of the Act, 'usage' means customary practice as opposed to use. This is made clear by the way the word is used in s 4 of the Act. Moreover, the Act provides no definition of use rights, nor mechanisms to assert them against written and witnessed old order rights.

[34] Ministry of Land Affairs meeting attended by Claassens in mid-1999.

people. They said that transferring the title of contested and poverty-stricken areas to rural owners was a way of backing out of government's responsibility to sort out the mess and provide services to rural people. They pointed to the problems of service delivery and infrastructure development on privately owned land and said that, faced with a choice between title deeds and development, they would rather have development.

It is beyond the mandate of the courts to intervene in policy decisions such as the nature of the state's responsibility to people living in former homeland areas. However, the Act does more than withdraw from an unequal terrain. It reinforces the power of one side against the other, and introduces measures that are likely to make categories of people, such as single women, more vulnerable. Because tenure security is guaranteed by the Constitution and the courts have interpreted equality to encompass substantive equality, these particular choices have legal as well as political ramifications.

Laws are powerful at a symbolic level, regardless of whether they are implemented or not. People act within the constraints of local power relations, which are in turn significantly affected by the stance of government. A key concern raised during the hearings of the Land Affairs portfolio committee was that the new laws would harden the terrain within which rural women struggle for change, and that whereas traditional leaders had been relatively receptive to pressure while their status was unclear, now they would revert to the arrogance and abuses of the apartheid era when they had been sure of government support. Rather than being a serious attempt to support women in the struggle for substantive equality, the Act is the expression of a pre-election deal between traditional leaders and government that reinforces versions of custom and chiefly authority that are dangerous to the interests and struggles of rural women. The hard-fought battle by the women's lobby resulted in an amendment that will assist married women, but the wording does not deal with the underlying reality of family-based rights. Nor does it solve the problems faced by single women.

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8

Custom-building freehold title: the impact of family values on historical ownership in the Eastern Cape

By Rosalie Kingwill

INTRODUCTION

This chapter discusses testimonies collected during the course of field research[1] in two black settlements under freehold title in the Eastern Cape: Rabula, a rural area in Keiskammahoek district situated 30km from Kingwilliamstown; and Fingo Village in Grahamstown. In both cases, properties were surveyed in the mid-19th century[2] and ownership registered in the deeds office. The system of freehold title has thus persisted for roughly 150 years. Both areas are commonly associated with their private land ownership arrangements due to the rarity of freehold titles that have survived in African areas over the long term. The cases shed light on the legacies of these land titling exercises, and in so doing raise questions about the current policy approach of the Department of Land Affairs in its programme to extend titling not only to urban townships but also to 'communal' areas, as encapsulated in the Communal Land Rights Act 11 of 1994.

The evidence presented in this chapter rests primarily on detailed family histories of land ownership. To date the sample size in Fingo Village is thirty-two case histories and in Rabula eighteen.[3] In addition, a number of other stakeholders were interviewed and documentary evidence perused. A study on land tenure in

[1] The research is still in progress and more detailed testimony is yet to be collected. The author wishes to acknowledge the assistance of translator Sonwabo Sixaba.

[2] A total of 320 properties were surveyed in Fingo Village in 1856, and 186 properties (some since subdivided) in Rabula between 1865 and 1870. There are several titled communities in the rural areas of the Eastern Cape as it was Cape colonial policy in the 19th century to extend titling to black rural settlements. In urban areas, titling tended to be on an individual basis. Fingo Village is unusual in that the land was surveyed and titled *en bloc*.

[3] There is some unevenness between the evidence presented in Fingo Village and that in Rabula, partly because the research is more advanced in Fingo Village and partly because of the differential impact of titling on the two areas.

Keiskammahoek district from 1949 to 1950 by Mills & Wilson (1952) provides comparative evidence from an earlier era.

Communities titled over a long period were chosen for this study. This was because an exploration of titled localities can turn up valuable insights into the effects of surveying discrete parcels of land and registering them in the name of individuals in a context where previously the concept of title did not exist. Titling in the South African context implies that security of tenure can only be achieved when ownership is formally recognised upon the issuing of registered title deeds. Legal enforcement rests on three institutional pillars: the surveying and subdivision of land into parcels; conveyancing of land transfers; and registration of ownership in the deeds registry. This interpretation of ownership derives its legal direction from the common law.

The insights that emerge from the case studies raise questions as to whether tenure security is in fact enhanced by titling. African holders of freehold titles, released to some extent (but not entirely) from the grip of racially exclusive 'native administration' and 'tribal authorities', were freer to administer their properties according to evolving social and economic circumstances than those in officially regulated communal areas. The findings of this chapter show that freeholders adapted titling to their peculiar needs and continued to apply norms and practices based on customary principles of property management. This conclusion confirms the prevalence of a parallel concept of land ownership in predominantly black settlements that derives its moral and practical content from socially embedded norms and practices. In black freehold areas, the concretised[4] property relationships between various associated members of families or lineages are more relevant in defining ownership[5] than currency of title deeds. The legal provisions of the deeds registration system are consequently ignored, or only sporadically observed, in order to incorporate safeguards felt to be lacking in the formal documented system. An example is the desire to limit the tenure insecurity of those members of the family who are not registered in the title deeds.

Titling efforts have long been dogged by registry information that is not current. However, in the past this phenomenon was kept from view through segregated deeds and administrative processes. The result has been substantial mismatches between local property management and the formal system of registration. In particular, property is regarded as family property. Ownership of land does not imply the conferral of exclusive proprietary powers on any one person or set of persons within the family. However, the aim of freehold title is precisely to create such powers in the face of norms and practices that attempt to limit such powers. This creates tension, uncertainty and administrative confusion when property is transmitted.

The gendered dimensions of titling are of particular concern. Registration in the

[4] Von Benda–Beckmann *et al* (2006: 16–22) distinguish between categorical and concretised property relationships—the former depicting the legal–institutional forms, the latter the actual social relationships.

[5] Ownership in this chapter denotes 'people who regard themselves as owners' rather than ownership that is confirmed through the registration of a name or names in the deeds registry.

name of one owner formalises the exclusion of some family members by skewing decision-making powers in favour of male owners, and rendering the property vulnerable to sale and its occupants to eviction. Sales of property tend to affect women and children disproportionately, as it is at this point that Western practice and customary law (in its past official codified variant) intersect to create an aggregated set of circumstances that favour male ownership. This phenomenon is a key reason why more attention must be focused on the mismatch between law and practice, especially in the context of tenure reform initiatives that have as their stated aim the securing of tenure rights of the most vulnerable in society.

The evidence indicates that local norms and practices are under increasing strain as the market starts to penetrate and municipalities implement their mandate to provide infrastructure, services, housing and local development plans. Since these processes are reliant on the formal status of property ownership, the tensions are paradoxically exacerbated under conditions of rapid development. The cases discussed in this chapter show that the stresses and strains are more pronounced in Fingo Village where these factors are greater. In particular, the potential for intra-family disputes and evictions is significantly increased, resulting in contested ownership when property changes hands.

The findings also raise questions about the neoliberal hypothesis that the holding of immovable property through title leads to the capitalisation of the asset and provides a platform for the poor to leapfrog into greater economic security (De Soto, 2000). The evidence supports the findings from research in Africa and other emerging economies, for example, Latin America, that reveal the generally questionable performance of titling in achieving these aims, and show how titling programmes are reshaped by surviving customary practices.

The evidence suggests that law reform should pay closer attention to existing norms and practices, and build on these rather than ignore and attempt to replace them. This in turn requires a critical examination of assumptions about the nature of current legal forms of registered ownership.

PATTERNS AND RECORDS OF LAND OWNERSHIP IN FINGO VILLAGE AND RABULA

Fingo Village is a township or suburb of Grahamstown. It is distinguished by long-held freehold tenure rights and large plots. Houses, some showing features of Victorian architecture, are more spacious than those in nearby black townships and are surrounded by more vegetation. However, other differences are not immediately discernible: service delivery was negligible in the past, and poverty and crumbling infrastructure are ubiquitous.

Rabula, a rural area in the Keiskammahoek district of the former Ciskei, features private freehold ownership of surveyed arable allotments surrounded by common property. Homesteads are strung along the perimeter of the arable plots in several scattered localities. Title-holders are referred to locally as *notengas* (those who bought) or 'farmers', not 'freeholders' or 'title-holders'. Under institutional reforms carried out by the African National Congress government, municipal service provision has focused on the 'closer settlements' within Rabula where residents have occupational rights but not title. In the past, there was a conspicuous

difference in social status between the *notengas* and the untitled, but the recognition of the latter's long-term tenure under new land laws, coupled with municipal servicing, has shifted the power relations between the village settlements and freehold areas. Now some of the offspring of freeholders choose to live in the villages.

The state established the village settlements for landless people who had previously lived dispersed on the commonages[6] which, in terms of the original conditions of title, were intended for the exclusive use of the title-holders. This exclusive use was challenged by later policies and laws that allowed the state to assert authority over commonages, even in freehold areas. There remain unresolved tensions, however, between the villagers and freeholders around access to the commonage and its land use, with the latter pressing their former claims to ownership. Freeholders continue to refer to the villagers by the disparaging term 'squatters' to underline their self-identity as the authentic owners.

The growing class of landless people in freehold and other titled areas was one of the consequences of titling and demonstrates the differential impact on family members. Some of the landless were family members of title-holders who, in spite of family protections, lost their rights over time, for example, through intermarriage or disinheritance.[7]

With respect to spatial characteristics, the plot sizes in Fingo Village have remained stable, around 1 000 m^2, which is large by any urban standards. In Rabula, by contrast, the original surveyed arable plots varied greatly from around 3,5 to 37 ha (Mills & Wilson, 1952: 62). Though the formal surveyed boundaries have changed very little, there is evidence of a great deal of informal subdivision of the surveyed land in Rabula. This means that related families have in some cases built separate homesteads on lineage land under a single title and have divided arable land among siblings. It has been rare for properties to be formally subdivided through surveys and registration in Rabula, and in Fingo Village this has been resisted altogether.

The issue of ethnic identity is not pursued here, except to mention that most of the original title-holders in Fingo Village and Rabula were identified as Mfengu.[8] Respondents testified, however, that through sales and intermarriage, the Mfengu element among present owners has been considerably diluted. The differences in status in the past between Mfengu landowners and non-titled Xhosa appear to have

[6] Rabula was identified as a 'released area' in terms of the First Schedule to the Native Trust and Land Act 18 of 1936. This meant that whites were no longer permitted to acquire land there after 1936. The South African Native Trust (later known as the South African Development Trust) subsequently bought up all land under white ownership in Rabula and used it to settle the landless under a form of tenure known as 'trust tenure', in theory a non-heritable right widely regarded as the most insecure form of tenure for blacks under apartheid. Such cases were converted to Permission to Occupy certificates in more recent times, ironically, after these were no longer regarded as a valid form of tenure.

[7] However, the majority were workers, sharecroppers or tenants of the freeholders.

[8] This chapter does not engage with the ongoing debate as to the origins of the Mfengu, rather resting the issue on people's own testimonies of identity.

been all but forgotten as far as ethnic markers are concerned. This is all the more interesting because the original collective identity in these settlements was linked to self definition involving a distinction in social status between Mfengu and other black groups. This has been replaced by a broader, less ethnically defined identity and by a shared African past.

Most of the families interviewed acquired their properties through informal inheritance.[9] This means that land was transmitted to family members without formal transfers having been conveyed and registered. Nearly two-thirds of those interviewed in Fingo Village indicated that their properties had devolved to the present owners through inheritance, while in Rabula all owners in the sample acquired their properties through family transmission. In Rabula, most owners can trace family ownership of three generations or longer on their present properties. No sales were reported during the current generation. In Fingo Village, the lineages are shallower due to more frequent changes of ownership, but nevertheless one-third of the sample is linked to an unbroken family history of three generations or longer on the properties. One-third of the sample acquired the land through transactions that involved a change of ownership, and in many of these cases ownership is contested. Many view the land in terms of a collective heritage even when the evidence contradicts this.

In Fingo Village and Rabula, property passed through men and women (though all original grantees were men). In Fingo Village, one-third of those who inherited land identified a female family member as the owner from whom the property had devolved. In Rabula, though the original owners were identified as males, both daughters and sons have rights to family property. It was reported by some families that women's land is not regarded as heritable. Here the custom is for female-owned land to return to a woman's natal family upon her death, though she can maintain her use of the land during marriage. Mills & Wilson nevertheless provide historical evidence of both male and female transmission. Nearly 17 per cent of those owning land at the time of their study (1949 to 1950) were daughters or 'matrilineal descendants' of a previous owner. According to the authors (1952: 52–3, 133), 'a considerable amount of freehold land has been inherited by, or through, women', though the proportions indicate continued male predominance over property. The ownership of land by women, and in some cases its passage through females in freehold contexts, nevertheless stands in sharp contrast to communal land under the control of 'native administration' where tight regulation prevented passage of land to and through women during the 20th century.[10]

The prevalence of unofficial transmission means that registration is not regarded as the dominant proof of ownership. Two-thirds of the Fingo Village sample produced documentation other than title deeds to prove ownership. Where title deeds were produced, most were not current (that is, not registered in the names of present owners).[11] This should not suggest that title deeds are seen as unimportant.

[9] 'Inheritance' hereafter is used to denote either official or unofficial/undocumented inheritance.

[10] See chapter 7 by Aninka Claassens and Sizani Ngubane in this book.

[11] A deeds office search has not yet been conducted to verify the exact number of title deeds that are not current.

On the contrary, the physical form of a title deed is much revered. Owners, however, do not generally see the lack of currency of title deeds as threatening their ownership. More recently, proof of currency has been needed for the purposes of qualifying for on-site Reconstruction and Development Programme (RDP) houses in Fingo Village, which has made the issue topical.

Many other kinds of records are produced to prove ownership. The most common are Certificates of Appointment indicating the family member appointed as the responsible person or executor of an estate under laws of property succession and, in the case of Fingo Village, municipal bills for services. Another record is correspondence pertaining to the updating of title deeds under a special provision of the Black Administration Act 38 of 1927[12] in terms of which commissioners were appointed to investigate, adjudicate and transfer titles in situations where titles had fallen out of currency. As early as the 1920s, the government was aware of the growing incidence of 'defective titles' resulting from non-registration of transfers.[13] The Act provided commissioners with powers to adjudicate ownership and make awards, on the basis of which the registrar of deeds was empowered to issue Substituted Deeds of Grant. In terms of the Land Titles Adjustment Act 111 of 1993, titles adjustment commissioners currently have similar powers. Where claimants are indigent, they may be exempted from having to pay for these services. In other words, the scale of 'non-compliance' by African people necessitated a state-subsidised system of adjudication as an alternative mechanism to conveyancing.

There is evidence of a number of commissions having been appointed in Rabula and Fingo Village. In Fingo Village these sat regularly—in the 1940s, 1960s and 1980s, indicating consistency with generational cycles. In almost all individual cases investigated in Fingo Village, there is evidence of an award by a commissioner.

Thus most transfers have been effected, not through the usual system of conveyancing, but through a system specially set up to transfer titles where owners have neglected to do so. Despite this (somewhat desultory) state intervention, evidence from both study sites suggests a continued general disregard for formal transfer and registration of property. Only four out of thirty-two cases in Fingo Village had uncontested or unproblematic ownership combined with a current title deed. In Rabula there is less contestation, but most title deeds are not current. Only one in the sample was in the name of a current owner.

Incidence and impact of 'informal' recognition of ownership

The lack of currency of title deeds affects Fingo Village and Rabula differently. In Fingo Village it affects, firstly, municipal billing for service provision. Most owners are in arrears so properties cannot pass transfer even if conveyancers are consulted. Secondly, provision of other services such as state housing and extension of credit is difficult to obtain in the absence of registered up-to-date title and this affects, thirdly, the functioning of the property market. In Rabula, the low level of service

[12] Parts of which have been repealed. The remainder is in the process of repeal.

[13] The Vos Commission was appointed in 1922 to investigate the state of titles in black surveyed areas (Report on Native Location Surveys).

provision by the municipality and the lack of an active land market in the surveyed areas[14] defuses the potential problems associated with non-current title deeds. Disputes are less prevalent and more able to be resolved at the family level. Mills & Wilson (1952: 132) also distinguish between the *de jure* and *de facto* position, noting that 'the legal position in Rabula is chaotic' on account of the failure to affect legal transfers.

In the case of Fingo Village, the problems are compounded because municipal services must be billed. The billing system is in disarray since bills are generally sent to the registered owners of properties, who are usually deceased. The municipal official responsible for the administration of bills for rates and services remarked that as it is not legally possible to 'prosecute a dead person', the municipality cannot recoup the arrears without the formality of registered ownership. Charging the occupiers (the actual consumers) for current services has begun to supersede the old system, but arrears never get resolved unless an owner or buyer is motivated to pay them.[15] It is, however, impossible to buy or sell the property formally without 'good title', and similarly impossible to obtain credit using property as security or to have a subsidised house built on one's property.

In Rabula, it is well understood in the community which family lineages own which land, and within families, who owns which fields. To the extent that there are disputes about ownership, these are intra-family issues. Family ownership is more stable than in Fingo Village and there appears to be little sign of the emergence of an active property market in the surveyed areas, even informal. While alienation of land by a family member is theoretically possible, there would be severe social sanctions curtailing such action. Arable land is owned by specific individual family members (male and female) within families—and it is here that ownership between family members changes and where conflicts may emerge. Mills & Wilson (1952: 57) graphically describe how families effected subdivision of arable land through local custom. Though not formal in terms of legal prescripts, subdivisions were locally formalised during the course of ceremonial occasions. These were public events where the new ownership arrangements were witnessed locally. Headmen often acted as masters of ceremonies, and various forms of markers were used to denote the new boundaries, for example, white flags, furrows, trees or grass verges. These practices have waned. There is now more emphasis on intra-family agreements, written or verbal.[16]

Land accumulation has not been a significant factor in either Fingo Village or Rabula, and evidence shows that owners have difficulty in asserting ownership over properties where they do not reside. In the Fingo Village sample, only three

[14] There is, however, an active informal land market for new sites in the trust villages, one of which is situated along the tarred road to Keiskammahoek and growing rapidly. The freeholders strongly contest this phenomenon, regarding all common land as their collective and exclusive property.

[15] Interview with Elliot Mani, Makana Local Municipality, 11 May 2006.

[16] Many respondents in Rabula and Fingo Village profess the intention to make wills though in practice there is still reticence due to the implications, discussed under 'succession and gender' in this chapter.

respondents had accumulated more than one property. In Rabula, Mills & Wilson (1952: 55) record that 'all men who could afford to do so' purchased extra properties for their sons when land was still available. There are consequently multiple title deeds associated with some family lineages, although this is not common. Since properties seldom came onto the market during the 20th century, the practice discontinued. 'There is no evidence of speculation in freehold lots,' observed Mills & Wilson (1952: 48) of Rabula in earlier times. 'While informants maintained that land is a good means of investing money, none of them could understand the suggestion that money could be made by speculating in land. Land is something to be kept for one's children.'

The evidence in both studies suggests that there is a considerable mismatch between people's practices with regard to recognition and transmission of property, and the administrative processes expected at the formal legal–institutional level. The visible level of disjuncture lies in the land administration records themselves. The most obvious manifestation is the lack of currency of title deeds and the prevalence of disputes where ownership has changed hands. The findings present an outward appearance of administrative anarchy. Officials and lawyers tend to regard the indifference to legal procedures as the result of ignorance, poverty, lack of education or indiscipline. A closer look into the world of property as seen through the eyes of the owners and residents reveals a different picture entirely.

'Problems' ascribed to lack of familiarity with legal procedures are overshadowed by family histories that present a more complex social reality. Though varied, these stories mesh to show a collective pattern of disjuncture between local community norms and practices and the official system. The emerging patterns suggest that the reasons for the phenomenon are multi-faceted and that some have persisted for a long time. There is more consistency in local approaches to land administration than the official eye would see.

LOCAL UNDERSTANDINGS OF OWNERSHIP, AUTHORITY AND SUCCESSION

Respondents in both Rabula and Fingo Village articulate an understanding of property as essentially 'family property' subject to a range of family obligations—as opposed to property that can be alienated by a single owner with dominion over the property. The idea is becoming increasingly nuanced as family forms change, as municipal services and state housing become more widely available and as market forces begin to penetrate. Although a 'first generation' purchaser of a property is relatively free to behave as a 'proprietor', once property passes to the next generation it becomes subject to family obligations and moves towards 'family property'. This is widely considered to be a non-marketable asset.

'Family property helps to keep the family together,' according to Letitia Siziwe Mnyamana of Fingo Village,[17] who is a vehement upholder of the importance of family entitlement to her property. She says she would transmit the property to her children

[17] Interview 9 June 2006.

> 'because this is their home, bought by their fathers who passed away. They were born here and grew up here . . . . We call it family property because sometimes someone is disabled or unemployed. They can come back to that home. If a son or daughter [falls on hard times] you will take them in, even my grandchildren . . . .'

Bongani Makuzeni of Rabula,[18] voicing a general sentiment regarding alienability, said: 'Land will never get sold. That is the convention in Rabula . . . . It will carry on [like that] forever. It is eternal.'

Although an emerging tension is manifesting in Fingo Village in instances where some family members desire more independence from the restrictions of family property, the cases that came to light showed that some entrepreneurs who want to deal in land for business purposes nevertheless feel constrained to act in the interests of the family good.

Institutional layering

Family property is sustained by various institutional layers. At the innermost level, important decisions concerning property are made within extended families with almost no reference to the formal rules of property transmission. There are family norms about what is permissible or acceptable. Nowhere are these written down, codified or legally sanctioned, but the practices are well understood in the community and recur at scale. According to Makuzeni: 'Registering is just a formality. Underneath the formality the family works out its own arrangements.'

Offsetting nucleated or lineaged property is a collective community consciousness of land long held. Family property, though individualised, is linked to the broader community through social ties and a strong sense of place that cannot be traded through the market. In Rabula, community members are connected through the shared use of common grazing land and other natural resources. The local community could be said to constitute an intermediate institutional layer sustaining family property. In Fingo Village, this operates at a level of moral imperative rather than on an organisational basis. There are no local structures making and implementing rules. Rather, at the community level, property is governed by broadly agreed principles shared among a substantial number of families. Social sanction is ostracism rather than legal enforcement.

In Rabula, in keeping with other black rural areas, there is a level of recognised local authority above the family. Historically, this layer was represented by headmen and sub-headmen under a regional tribal authority. The institution of headmanship is conventionally associated with powers of land allocation (or at least oversight thereof) in 'communal' areas. In freehold areas one would assume that there would be limited scope for the involvement of such an institution since individual titling supposedly confers decision-making on individual owners. Indeed, headmen were not involved in decisions concerning the surveyed property. Owners' relative independence from headmen in this regard is confirmed by Mills & Wilson (1952: 134) of the earlier period. Headmen nevertheless played a mediating role between the community and government, between the community and outsiders, and between community members with regard to common property.

[18] Interview 14 July 2006.

After headmanship was abolished in the former Ciskei, headmen were succeeded by elected civic organisations. In Rabula, this structure mainly concerns itself with the non-titled village settlements, for example, new applications for land. There is currently a great deal of support among residents and owners for headmen to be reinstated. The reason cited is generally a need to manage the commonage over which title-holders struggle to enforce some measure of control, and also to re-establish a direct link with regional or central government, widely believed to have been compromised under the municipal system. Rabula residents tend to reflect nostalgically on their perception of a once-thriving agricultural past, associated with robust government assistance. The acceptance of the institution of headmanship in Rabula produces further evidence of the extent to which individual 'private' property is seen to be circumscribed by local public and shared responsibilities. There is nevertheless no direct association between headmanship and family property transmission.

The outer level of ownership concerns the outward representations of property. Titles represent the face of tenure to the official world, and in some limited cases to the private market when land changes hands. Title deeds are the reference point for ownership (even when not physically in possession) and, moreover, give Fingo Village and Rabula a distinctiveness which the residents value. There is an apparent paradox in that, despite the seeming collapse of land administration systems supporting title, titles are valued as a symbol of property ownership.

What titles do not do is encourage regular registration, thereby safeguarding ownership and the passage of property through legal transfers, which is the main function of property registration in the formal system. Titles in some ways do the opposite: they project a sense of shared family past and a common interest in the future, a fulcrum around which family ownership turns. In this sense, title deeds represent a symbolic centre around which members define their relationship to the family and provide a link between the family and the outside world, as well as to the past. Seen in this light, it is in some senses advantageous to have the name of a common ancestor on the title deed from whom genealogies can be traced, rather than a current owner who may behave as a proprietor.

Preference for titles is couched within an understanding of security of tenure that relates to local approbation of ownership rather than to registration. Although a threatened forced removal of Fingo Village title-holders from 1970 to 1980[19] temporarily shook their faith in title deeds, the trauma is generally seen as an aberration of the apartheid state. But title deeds are valued in themselves: the physical title deed is usually seen as embodying ownership. Conveyancing is generally poorly understood among title-holders and there is a common misconception that it is the physical form of the title deed that confers ownership rather than the registration in the deeds registry.[20] This perception is expressed when exchanges are contested or when buyers and sellers emphasise the importance of 'handing over the title deed' as a ceremonial, witnessed performance sanctioning the sale and legitimating the new owner.

A similar performance is described in pre-registration European land adminis-

[19] Fingo Village was declared a Coloured Group Area in 1970.

[20] See the discussion by Claassens on Rakgwadi in chapter 11 of this book.

tration systems where transfer was sanctioned by the handing over of a symbol of the investiture in a new owner (Kleyn & Borain, 1992: 88–9). It is also similar to new forms of public witnessing of sales recorded by researchers in KwaZulu–Natal where the moment of transaction is the important step, and hence local witnesses provide public recognition, rather than registration (Rutsch, 2004: 6). In Rabula, the sub-division of property among the children of title-holders is similarly a ceremonial event, accompanied by feasts and formality.

The emphasis on local public acknowledgement of ownership rather than registration means that 'defective' title deeds are not seen to jeopardise ownership. There is nevertheless growing discomfort as other relationships with the local authorities become increasingly reliant on currency of tenure status, for example, in order to regularise billing for service provision, acquire subsidised housing or resolve ownership disputes.

Succession and gender

The disjuncture between the legal–institutional forms and norms and practices is most visible when viewed through the window of property succession.

Contrary to the certainty occasioned by the act of registration, in Fingo Village and Rabula the principle of negotiation is rooted in the way succession to property is expected to occur: to isolate a single individual as an owner with powers to transact is seen to flout this basic principle of open-endedness. The closest approximation of a defined owner is the concept of a 'responsible person', a concept that permeates people's articulation of property *management* rather than property ownership. A responsible person is usually designated by the family to fulfil the function of managing the property on behalf of all its co-owners (the recognised family members).

Flexibility is needed to ensure that the responsible person protects the integrity of the family and maintains the property for future generations. If he or she does not live up to the task, the family is free to appoint another regarded as more responsible. 'The law cannot produce a person to represent the home,' according to Winston Mabusela.[21] A responsible person is required to act in the interests of the entire family and does not have proprietary rights to exclude family members from the property: he or she is validated by family consent rather than by a title deed. 'One person is the responsible person. That doesn't mean they can sell. Property belongs to the whole family who decide.'[22] When pressed for a Xhosa word to capture the meaning of this concept, Gertrude Kade[23] of Fingo Village used *umgcini*, meaning 'keeper' (other respondents also used the word 'housekeeper'). She explained that to say 'I am the keeper of this house' did not clash with the concept of 'I am the owner; this is my property'. She continued, 'It is the custom that even though this is my property, I do not have the right to sell it.' The English term most resonant with the concept is 'custodian', which captures both the physical keeping of the house ('someone [who] is looking after the house, and

[21] Interview in Fingo Village, 15 March 2006.
[22] Interview with Bulelwa Cintso in Fingo Village, 9 May 2006.
[23] Interview 9 June 2006.

repairs and maintains it on behalf of the family') as well as the responsibility for caring for the young and aged, and for ensuring that bills are paid so that services can be delivered. Edith Mpande[24] said the title of 'responsible person' was *earned*.

Many other examples suggest that it is not age, gender, birth status, wealth, education or position in the family that are in themselves the criteria to represent the family, but commitment and capacity. Personal attributes such as permanent domicile, sobriety and stability count. In Rabula, where large extended families live on the property, the children of siblings might be chosen in preference to one's own children if they are willing to live on the property permanently. These principles suggest a more nuanced understanding of the role of representation than older customary systems, where historically the position and gender of the person who assumed responsibility for the homestead were crucial. In this respect, customary norms appear to be changing in response to new socio-political imperatives.[25]

The evidence suggests that women are increasingly taking control of property, or at least sharing the responsibility with men. The high incidence of females appointed as custodians in Fingo Village suggests that women are seen to be more reliable as insurance against sale of family property; men are regarded as more likely to engage in spontaneous or impulsive sales, or to get indebted to microlenders who may take over the property. These findings suggest that there is a growing recognition of women as *de facto* successors to property.[26] This phenomenon poses a significant challenge to the previously entrenched legal–institutional models and perceptions that favoured devolution through men. Historically, men were more likely than women to be formally appointed as 'heirs' to the estate, even where the drawing up of wills in freehold contexts allowed for female devolution. Mills & Wilson (1952: 51–2) found in Rabula at the time of their study that in the rare cases of wills having been formally prepared, daughters were seldom appointed heirs, and that 'men generally consider that women should not [formally] inherit land'.

Documentary and verbal evidence in both study sites show, nevertheless, that daughters are successors to property, whether registered or not, indicating that property transmission to or through women has been accepted in both Fingo Village and Rabula, though male power over property still predominates. Several women said that in the event of registering title, they would want to add their names to those of their husbands, and in some cases, add those of their children as well. Some women in Fingo Village have indeed done so.

Prior to a change in the law in 1927, black marriages by Christian or civil rites were deemed to be in community of property in terms of which property was divided equally between offspring, male and female, unless otherwise stipulated. After 1927,

[24] Interview 4 May 2006.

[25] Some respondents in Rabula referred to the responsible person as *usokhaya*, meaning 'father of the home' or 'head of family'. This is by implication a male position. The term was also used occasionally in Fingo Village, particularly with reference to the person acting in his capacity as 'host', during family ceremonies for instance. The more usual word for 'head of house' in Fingo Village is *umnini-mzi* (from the Xhosa word *umzi* meaning house), a term also used in rural areas.

[26] See chapter 7 by Claassens & Ngubane in this book. The authors refer to comparative material from Zimbabwe and Uganda illustrating similar changes.

intestate property was inherited (as in the case of customary marriages) according to 'native law and custom', which established the right of male primogeniture.[27] The legal switch lowered the rate of transmission to and through women, although Mills & Wilson (1952: 51–2) maintain that land continued to be informally subdivided in Rabula in contravention of the rule of primogeniture, and that some females pressed their claims to land. Racially specific laws governing property succession have since been outlawed, as will be discussed later in this chapter.

The family concept of ownership is most aptly represented by the word 'belonging'. People *belong* to the extended family; property *belongs* to the whole family; and family members *belong* to the family land. Ownership functions to maintain family bonds, promote interaction and protect the family. It would be counter-intuitive to confer proprietary powers of alienation and control in defined individuals.

Mills & Wilson (1952: 48, 56) observed similarly of the earlier period in Rabula:

> 'The land is looked upon essentially as a means of ensuring one's own security, and that of one's children, and is bought for that purpose . . . . [Title-holders] are not willing to allow the title deeds to be transferred to the name of any one of a group of heirs, as doing so would give him control over the whole lot.'

Devolution by will, although not common, increasingly looks away from the traditional norms (both in terms of Western and customary practice) of appointing the eldest male as heir or successor. Several respondents would like to leave their property to all their children. Nofele Gumanda of Fingo Village[28] wants to leave her property to all seven of her children in a legally drawn-up will, but the oldest, a daughter, will be appointed the responsible person. The Madinda[29] family, also of Fingo Village, want their youngest sister, Siziwe, appointed and registered.

Although some properties have devolved through wills, many respondents were uncomfortable with this notion. Succession is regarded as something to be resolved by the living, not the dead: 'The children will decide whose name it must be registered in. The parents mustn't decide.'[30] A colleague who recently purchased property for his family in Fingo Village said he doubted his parents would leave a will, and that it would be uncomfortable to discuss succession within the family. 'My siblings are female and they might get married and move into their own places. But whoever chooses to stay will become the custodian.'[31] In other words, it is impossible to predict the circumstances that might arise or change in the next generation. Mills & Wilson (1952: 51) found that wills were rare in Rabula, and even when wills had been left, it was considered unjust for one heir to 'eat the inheritance alone'.

[27] The system established thereby was that land was inherited by a man's senior son and then passed to the latter's senior son, and so on. Failing direct male heirs, it passed to collateral male kinsmen in an order laid down in the so-called Tables of Succession promulgated in terms of the Native Administration Act 38 of 1927.

[28] Interview 10 May 2006.

[29] Interview 10 May 2006.

[30] Interview with Khuza Qenge, Fingo Village, 9 March 2006.

[31] Interview with the Seti family, Fingo Village, 18 April 2006.

The idea that a responsible person should have certain personal attributes and responsibilities clashes fundamentally with the idea of formal inheritance of the property through the pre-selection of an appointed heir or heirs. Such attributes cannot be predicated on wills; nor can division of material property substitute for the role of a caretaker and property manager.

The discussion of 'heir' in the Constitutional Court judgment in the case of *Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 alludes to these nuances in understandings of property succession. The dissenting judge, Ngcobo J, quoting Bennett, suggests that the concept of 'succession' encapsulates the customary practice of succeeding to a *status* in the family and is thus more in keeping with customary understanding of property succession than 'inheritance', which has more to do with inheriting material property (*Bhe* in paras [76], [80], [158]–[159], [167]–[175]).

According to Mlungisi Makuzeni,[32] in Rabula the eldest son is still referred to as *indlalifa*, the customary law term for the person who succeeds to the status of family head. However, Makuzeni said that while the first-born son retained this status, the management of the property could be left to the son most in touch with the property physically, an adaptation that has arisen from the high mobility of family members.

There are, however, cases where the formal legal procedures are preferred. Edith Mpande, originally from Kimberley, and her husband (who waived his claims to other family property in Fingo Village) adopted her sister's daughter as the couple were unable to have their own children. Their property is registered in the names of husband and wife. They are leaving it to their adopted daughter in a will that has been formally drawn up. Mpande does not want other family members in Kimberley, whom she believes did not care for her, to 'interfere with my [daughter's property] . . . . People now look after the person who cared for them . . . .' The will states:

> 'In the event of one of us predeceasing the other, the first dying of us bequeaths his/her entire Estate, . . . to the survivor, provided that upon the death of the survivor of us, the entire Estate of such surviving spouse shall devolve upon our adopted child, Joy Phumeza Mpande. We direct that our Joint Estate bequeathed to . . . Joy . . . shall be free of her husband's marital power and shall be exclusive property with which she may deal freely in the event of her marriage.'

This case is unusual in several respects: the presence of a will and the clear identification of an heir with legal power of alienation. The case demonstrates a counter-norm to the principle of family co-ownership with its implied multiple claims by all family members. This is what Mpande has been at pains to prevent.

In spite of the resistance to formal procedures of documentation, most respondents adhere to the concept of 'titles' within the more nuanced understanding described. 'It is better to have a title deed,' says Khuza Qenge. 'There are times of argument and then we must reach agreement.' That sentence portrays the way in which two previously different concepts of property have been collapsed into a distinctly hybrid form of ownership.

[32] Interview 16 May 2007.

Family rights

In keeping with the more processual approach to succession, family membership is understood as a process of active engagement rather than a uniform set of rules. Rights are kept active through ongoing participation in family affairs and by contributing to the physical maintenance of the home and caring for the young and aged.

Of great significance are ritual family ceremonies. Most respondents stressed the importance of family property for hosting family ceremonies; and conversely, the importance for family members to record their family 'belonging' by attending them. Acquiring family property has a major symbolic and practical significance in demonstrating capacity to host family occasions and in so doing become a repository of family unity. Mills & Wilson (1952: 133) observe too that 'freehold . . . tenure tend[s] to hold together lineages'. This concept of active participation is very different from the concept of an heir who could conceivably be completely removed from the property and family in time and space. That would be unthinkable in Fingo Village or Rabula.

A claim to property by a family member who has long departed from the family home and maintains no contact would not be regarded as legitimate, though it would be unsettling, even more so if there had been tenuous contact. In such cases the claimant is told that he or she is 'free to come here and build on the property'.[33] There are no spatial constraints to that solution. There is room on most properties to build additional houses, even though it may not be the solution the claimant seeks. This answer is a *strategy* to enforce the norm. The norm is that all family members have rights of co-ownership congruent with the degree to which physical and supportive links with the property have been maintained, in contrast to a system of inheritance that is not place or time specific.

Seen through this construct, it is understandable how rights can be obtained over time by children born out of wedlock, adopted children, friends and even tenants who live with the family and contribute to its reproduction by taking care of the members and maintaining the home.

Tensions and trade-offs

In summary, the following norms can be identified: all family members have rights; the rights of those who live at home and maintain contact are strongest; land is not ordinarily alienable; succession relates to management of property rather than to partible inheritance; the responsibility for maintaining family property is undertaken by a caretaker or custodian identified by the family; property is important in holding together extended families; and registration in the name of particular persons poses risks to the property.

The norms are challenged by changing circumstances as well as the legal–institutional environment, giving rise to strategies in which heirs are not commonly identified in wills; the qualities required for the role of caretaker are becoming progressively more important as the risks of exposure to the market increase;

[33] Interview with the Albany family, Fingo Village, 11 April 2006.

women are increasingly undertaking the role of caretaker as they are seen to be better insurance against loss of the property, less likely to cause the eviction of family members and more able or willing to maintain the property; registration is often avoided; and families continue to fall back on the tactic of retaining the name of a deceased ancestor on the title as a protective mechanism against unilateral sales.

Legal powers to transmit, sell, cede or lease property in the face of social norms that restrict these powers cause the strongest tension between law and practice. Sales of land in Rabula were in former times associated with foreclosures resulting from defaulting on loan repayments. However, the practice of formal mortgage slowly discontinued as the risks became known. Nowadays the land is not used as security for raising loans. The situation is different in Fingo Village. Though mortgaging is generally unknown, individuals raise small loans from microlenders and are sometimes forced to sell their freehold plots to repay them. Two microlenders in Grahamstown have properties in Fingo Village and are constantly on the look-out for property to buy and sell. They also act as informal agents. In both study sites, respondents were familiar with cases where family land had been lost through indebtedness and respondents are aware of the associated risks.

There are also counter-norms manifested when some family members want more freedom to deal in land. Those who realise their powers to alienate through registration sometimes assert their legal muscle by evicting family members and selling properties. The lingering resentments by those who are dislodged affect family relationships for generations and in many cases spill over into open disputes with the purchasers.

The pressure to register current owners is increasing in Fingo Village. A clearly discernible strategy to manage this tension and act as a safeguard is to register the land—or express the intention to do so—in the name of husband and wife, or multiple family members (including women). This solution, however, has been found to pose problems inter-generationally when membership changes through deaths, marriages and births.

The cases discussed next, mainly drawn from Fingo Village, demonstrate the social and administrative tensions that result from the application of these norms, and some of the strategies that have emerged to manage them.

CASES DEMONSTRATING LOCAL NORMS AND EMERGING STRATEGIES

Internal evictions, gender and succession

The Tyini family of Fingo Village

The Tyini family was evicted from the family home by a first cousin named Gladman, the son of their uncle Bertie. Gladman had not lived on the property since 1956. He owned a brick-and-cement house in another township in Grahamstown. The family property had been registered in the name of their common grandfather, Jackson. Bills continued to be made out in his name even after his death. The registration of the property in Jackson's name made the cousins and elderly mothers (sisters of Jackson) complacent, and they continued to occupy it along with some tenants. The registration in the name of an antecedent was not

seen as evidence of insecure title (as might be implied by the common law), but rather it served, in terms of the norms around family property in Fingo Village, to confer rights on all Jackson's children and grandchildren.

The Tyini family was unaware that their cousin had succeeded in selling and transferring the property to the brother of a prominent lawyer in town—that is, until a day in 1999 when a lorry pulled up alongside the house with building materials. The family was given three months to 'pack up and go'. When family members offered resistance, the new owner delivered lawyer's letters 'warning us if we continue to swear [*sic*] [stay] we will be arrested'.[34] One branch of the family, a mother and her daughter and grandchildren, are now renting rooms elsewhere. Clearly still traumatised, mother Nqabisa and daughter Sindiswa said they had repeatedly confronted Gladman, who claimed he could do as he liked with the property as he was the *mdoda* (man). Sindiswa explained:

> 'He felt he had the authority to sell the property because of his manhood powers . . . the way we were kicked out was merciless. They demolished the house and took the zincs [iron sheeting]. We are still bitter about it because now we have to pay rent and the only income is my mother's pension. We preferred to live there. Now we are moving around Grahamstown from place to place *soeking* [looking for] a place. The son [landlord] might want this place at any time . . . . [Gladman] doesn't have an excuse; he is a drunkard; he doesn't care . . . . The one who bought the property is a moneylender. Gladman drinks a lot and got into debt with him so the sale was to pay for the debt, but we doubt he got much out of the sale . . . . We think [the new owner] paid R6 000 plus the arrears of R2 000.'

The Xhayimpi family of Fingo Village

Lilian Kate[35] (family name Xhayimpi) is regarded as the present 'custodian' of the family property. In terms of the common law, her nephew, Archibald Xhayimpi, will inherit the property from his mother, Nompumelelo, Lilian's sister, who died without a will. Nompumelelo was the oldest adult in the family and the title was registered in her name. A deeds search revealed that it is still registered in her name. The family was relieved to learn this as Archibald had insinuated that the property had already been transferred into his name. Prior to that, it was registered in the name of David, the sisters' uncle; and after him, his wife, who passed it to Nompumelelo. The family expected in terms of custom that after Nompumelelo's death the 'responsibility' function would fall on Lilian, the next youngest sister. The family claims this was discussed with Nompumelelo and agreed to prior to her death. Lilian is therefore regarded as the present custodian of the property. She is seen as the 'responsible person' who manages the household affairs, including the bills.

Archibald, who does not live on the property but has his own house elsewhere, realised his power in terms of the law and went to lawyers who confirmed his status as 'heir' to Nompumelelo. An eviction notice was served on the Xhayimpi family and they were notified that they had to vacate the property within a month. The

[34] Interview with Sindiswa Tyini, 15 June 2006.
[35] Interview 8 August 2006.

legal notice refers to family members as 'tenants'. The family had learned of its vulnerable position six months earlier and consulted the Legal Resources Centre (LRC). The family suspects that Archibald intends to sell the property. In terms of the Intestate Succession Act 81 of 1987, Archibald, as the eldest child of the registered owner, has a clear right to inherit the property of his mother. The LRC notified Archibald's lawyers that it intends contesting the case.

The Madinda sisters of Fingo Village

The Madinda sisters[36] were anxious to prevent their family property from falling into the hands of their eldest brother, who had already squandered a property in another township. He acquired his own property with the assistance of his employer, Rhodes University. The sisters were relieved when a deeds search revealed that the property was still registered in their deceased father's name. Four of the sisters have acquired properties elsewhere (three of which are RDP houses in a new township), but continue to live on the family property—'to secure it' as they are worried that 'if we move now it might fall in the name of our brother'. They realise that he has some leverage in terms of both the law and older traditional notions of transmission: 'He is able to bully because he is the eldest male.' They decided to register the property in the name of their youngest sister, who is seen to be the best insurance against loss of the family property.

This example shows how the family property is typically distinguished from newly acquired properties that are a mark of material success and mobility. Family property has significance as a symbol of family unity to which all members continue to have access, regardless of changing circumstances towards nuclear family properties within extended families. RDP and other township plots are a quarter of the size of the Fingo Village properties, a factor that may influence the strategic importance of the Fingo Village plots as a bulwark against future misfortunes, for grandchildren or the elderly.

Key points

Cases of internal eviction and family rights raise questions as to whether occupiers who are locally regarded as co-owners but have no registered rights do have rights in terms of customary law. Customary systems have been legally invisible (that is, lacked legal legitimacy) in freehold areas where title has been considered to supersede customary law. Title is administered in terms of the common law and related statutes that provide clear formulas in terms of which specific people are designated as owners or heirs. These prescriptions clash with concepts of family rights as determined by family attachments and obligations through lived experience.

The Xhayimpi case is an example of local understanding and practice that brings to the fore new interpretations of evolving customary law in contrast to the codified variant which would have appointed Lilian's eldest son rather than Lilian herself as the heir to the property. The discussion of 'heir' by the Constitutional Court in the *Bhe* judgment (in para [76]) raises the question of whether the caretaker function

[36] Interview with Margaret Madinda and siblings, 10 May 2006.

does not supersede the rights of heirs to alienate family property. A finding of this nature would have serious ramifications for the administration of freehold title in similar cases.

Contested ownership: family property versus market forces

'Property doesn't move easily in Fingo Village. It is difficult to get the consent of the whole family with regard to buying and selling.'[37]

Guza v Tshezi[38] *in Fingo Village*

Mabel Guza[39] bought a second plot next to her main residence. The purchase went through the formal processes and the title deed is currently in her name. Now Babalwa Tshezi, the granddaughter of the original owner, is reclaiming the land on the grounds that the seller had no right to dispose of family property. Tshezi[40] says she and her siblings grew up 'believing that Wood Street was [their grandfather] Elijah's family's property . . . . Mrs [Guza] had no right to Wood Street . . . .' Tshezi has made representations to various authorities (the municipality, the magistrate's court and the township administration) to reverse the sale. She claims to have been 'researching' the matter for the past three years. She has also sought legal assistance from the Legal Aid Clinic and arbitration from the township administration. On each of these occasions, Guza has been summonsed. She in turn claims that the arbitrators at the township administration refused to accept that her title deed was valid (of particular irony given that it is one of the few current title deeds around).

What appears to have happened is that Elijah Tshezi ceded the property to former tenants who had looked after him in his old age. The tenants, originally from Peddie, were well respected people in Fingo Village. When they later returned to Peddie and Kingwilliamstown they sold the property to Guza, who had been their neighbour and long-time acquaintance. Guza has been assured by lawyers acting for the sellers that the property is legally hers, but she is nevertheless anxious as the granddaughter has been quite threatening.

This example points to the perception in families that land is held for them. It also reinforces the circumspection which people have about allowing non-family members to get too close to the family and the growing concern for careful selection of the caretaker. 'There is fear that whoever becomes custodian can easily sell the property,' according to the Seti family. Interestingly, Tshezi did not want the property herself but planned to sell it and use the proceeds of the sale to renovate her present house: 'I wanted to sell Wood Street and fix up my house at M Street which is *vrot* [rotten] and leaking.' This shows how people's actions sometimes contradict their testimonies about the non-saleability of land.

[37] Interview with Simpiwe Seti, Fingo Village, 18 April 2006.
[38] Not their real names.
[39] Interview 15 March 2006.
[40] Interview 9 May 2006.

Hogu v Matshaya[41] *in Fingo Village*

Ten years ago Nomonde Hogu's[42] brother, Xanti, reportedly an alcoholic, 'sold' the family's undeveloped second plot to a well-connected man in Grahamstown. The siblings' deceased father had left a (possibly unofficial) will whereby the two properties were to be inherited by all four of his children. There were clear rules in the family that 'no one should sell the property without consulting the whole family', according to Nomonde. The properties are currently registered in the deceased mother's name. The buyer had drawn up a deed of sale and had induced—in Nomonde's eyes—her aged mother to sign unknowingly. He evicted a family member who had been living in an informal dwelling on the property and had been using the plot for grazing and kraaling his cattle. Xanti was the youngest in the family, aged in his thirties at the time and the only surviving male. The buyer opened a savings bank account in Xanti's name where he deposited the purchase price of R6 000. Nomonde still has the savings book. It reveals that Xanti drew the full R6 000 between 14 May and 5 September 1996.

Ten years later, the purchaser is still desperately trying to register the property. The family is confident he will not succeed: 'That's why [my parents] made the will—for rainy days,' says Nomonde. The buyer, Enoch Matshaya,[43] claims the sale failed to go through because the mother died before the transfer had been registered. However, five lawyers' letters in his possession suggest that conveyancers never obtained the owner's signature; it was merely applied to a possibly inauthentic deed of sale. The buyer is upset that Nomonde will not sanction the transaction, and claims that Xanti is willing to hand over the title deeds.[44] According to Nomonde, these are 'under lock and key' with her lawyers. Matshaya alleges that she has not approached him to claim the property, nor offered to repay the purchase price. In the meantime, she has lost effective use of the property for ten years.

'Cold War' in Rabula

A Rabula man sold his wife's property after her death in a move aimed at preventing her family from reclaiming the land, says one of the woman's male descendants. According to local custom, the property was expected to revert to the woman's natal family upon her death, meaning that neither her husband nor her children could inherit it.[45] The new owner, a white person, later sold it to the South African Development Trust. Several generations later, both the husband's family and the wife's family are trying to reclaim the land. There is considerable tension between the families, reported by Mdumiso Magenuka,[46] the wife's descendant, as a 'Cold War'.

[41] Not his real name.
[42] Interview 22 June 2006.
[43] Interview 21 June 2006
[44] As already indicated, conveyancing is not well understood in Fingo Village and the 'handing over' of the title deed is thus misconstrued as signifying the passage of the property.
[45] This custom was confirmed by some other respondents, but needs further exploration in relation to patrilineal and matrilineal succession systems.
[46] Interview 20 July 2006.

RECONCILING PRACTICE WITH LEGAL FORMALITY

An interesting example of local adaptability and of practical bridge-building between custom and statutory law demonstrates a potential model for reconciliation between social norms and practice on the one hand and formal legal procedures on the other.

Historically, local practices in titled areas were in some cases backed by a parallel official process of appointing a family member to represent the family in the distribution and administration of a deceased estate. Estates were overseen by either the Master of the Supreme Court or by a magistrate. In the case of intestate estates, the administering agent was determined according to whether the deceased had been married in terms of the civil or the customary law. In terms of the Black Administration Act, the magistrate had powers to appoint a family administrator in terms of 'native law and custom' if the deceased had been married by customary procedures or was unmarried.

A Certificate of Appointment was awarded to an identified family representative to

> 'represent the intestate estate of the late [name of deceased] and to assume responsibility for the payment of debts, the collection of assets and the general administration and distribution of property in the said intestate estate with the power on behalf of the estate to pass and receive transfer of immovable property.'

This shadow process provided a simple and cheap alternative to registration, and a reasonably effective means until now to prove ownership where documentary evidence was needed. Although not intended to convey title, the formal step of conveyancing by a lawyer is reported to have rarely occurred. Through the language of 'responsibility' and 'representation', a more familiar route of identifying a caretaker was followed in preference to registration in title deeds. An official in the Grahamstown Magistrate's Court[47] reported that in more recent times the strict rules of male primogeniture were ignored and officials were willing to appoint females. Here the approach was to consult family members and appoint whoever the family chose as representative, departing from both primogeniture and the male line of succession as required under the Tables of Succession.

The administration of estates as a means of property identification is important in showing two things. Firstly, it shows that it has not been uncommon to invoke customary law with respect to property in a titled area. Secondly, it provides an example of an official alternative to conveyancing that to some degree mirrored local understandings of succession. That it has over the years favoured male appointees, thus contributing to structural discrimination against women over a long time, is one line of reasoning that has discredited this method, as are its racially exclusive provisions.

The administration of estates of all South Africans is now governed by the Intestate Succession Act, following the Constitutional Court judgment in the *Bhe* case. The judgment acknowledges that replacement of the official customary law by statutory law may jettison some customary principles of succession—notably the

[47] Interview with M Kotze, Senior Administrative Officer, August 2004.

idea that succession has connotations of responsibility rather than material inheritance of property. However, pending the further development of 'living' customary law, this practice was considered to have lost much of its original meaning under changing social circumstances, and therefore to be secondary to the damaging effects of racial and gender discrimination which were found to be unconstitutional (*Bhe* in paras [76], [80], [96], [110], [118], [158]–[159], [167]–[175]).[48] There is a paradox in that a system regarded as illegitimate on constitutional grounds nevertheless filled a gap between the law and practice.

CONCLUSION

The case studies discussed in this chapter are concerned with the articulation between different practices and ideas about ownership. They show the extraordinary resilience of family-based, socially embedded forms of ownership which are only tangentially linked to the system of title registration. The breakdown in the formal administration of titles occurs at a scale that cannot be explained, nor rectified, by reliance on arguments that interpret the failures in terms of ignorance and poverty.

The findings show significant convergences between rural and urban case studies. They diverge, firstly, around the contestation over ownership of the common property between the title-holders and occupiers (as portrayed in Rabula); and secondly, when the impact of new forces such as service delivery, development and a nascent property market exposes severe contradictions between law and practice (as in Fingo Village). It is particularly at these latter intersections that the breakdown of formal land administration threatens tenure security. This is ironic in view of the widespread perception that freehold is well suited to urban contexts.

Both study sites reveal that freehold tenure in the African context has been subverted to accommodate ongoing customary practices which have, however, been modified to suit the changing circumstances. 'Freehold' in these contexts could be said to have evolved into a distinctly hybrid form of ownership, borrowing from both customary practices and Western legal concepts such as 'title'. From a policy perspective, these findings suggest that tenure insecurity can be exacerbated by titling. In addition, partly to manage this problem, new title-holders are likely to disregard the strict provisions of the law as they have done in Fingo Village and Rabula. This raises serious questions about the expense of implementing and maintaining a system of ownership based on the current system of registration.

Extra-legal strategies have emerged in an attempt to minimise the threat to family rights and to maximise the benefits of titles. The strategies are based on norms such as the broad acceptance of unregistered co-ownership to restrict unilateral sales by a registered owner; and unregistered subdivision of land. In some cases local practices have blended with official processes, such as the pragmatic if only partial solution of local officials validating the family's choice of the most suitable 'responsible person' to administer estates. Interestingly, this is often a woman as opposed to the man who would have been required by the application of official 'customary law'

[48] Ngcobo J dissented from this opinion, pointing out its continuing relevance (*Bhe* in para [229]).

interpretation of male primogeniture. The cases show that women, under circumstances of greater independence from legal prescripts, gained a foothold in property to a greater extent than in communal areas where property and succession were tightly controlled by the policies, laws and practices that overtly militated against women's land rights throughout the 20th century.[49]

The formal system conflates 'registered title' with 'ownership', which implies that the deficiency in communal tenure is the lack of title deeds. It has thus been relatively easy for the post-apartheid state to argue that by enlarging the concept of 'individual ownership' to include forms of 'group ownership', the pre-existing formal deeds system of ownership can be harmonised with what is seen to be the communal land context of the rural areas. What this has failed to recognise is the strong presence of a concept of ownership in customary settings that takes its meaning from a different set of premises. One of the counter-arguments is that African systems do display principles of *property*, but that these are not based on land rights coinciding with exclusive control (Okoth–Ogendo, 1989: 8). In illustrating this point, researchers explain that property is not so much a relationship between an owner and the land (or a *thing*), but rather a relationship between people *in respect of* things (Moore, 1998: 33; Lund, 2001: 158; Hann, 1998: 8). Using this definition of property, it is easier to see the commonalities between African customary tenure and 'Western' tenure, and to re-examine the role of titling and registration in denoting ownership and secure tenure.

The findings should not necessarily imply that all forms of titling and registration are meaningless and inappropriate. Rather, they suggest that a different legal and conceptual model drawing from customary meanings of ownership will be an important point of departure for property law reform if tenure security is to be achieved in practice. The Constitutional Court judgments in *Bhe* and in *Alexkor Ltd & another v Richtersveld Community & others* 2003 (12) BCLR 1301 (CC) demonstrate a potential breakthrough. In recognising, firstly, the legal parity of the common law with re-interpreted customary law, and secondly, the evolving nature of customary law taking into account changing social conditions, the judgments provide the legal potential for 'living' customary law to be recognised in cases such as Rabula, Fingo Village and others like them.

It is true that in freehold areas titling has acquired symbolic significance. However, the cases show how over time its meaning has transcended the formalities required by the law, at the same time providing a framework for creating and re-creating new public and private understandings of what ownership means—both within families and in the public consciousness. Title deeds as physical evidence are strongly associated with ownership, but for the most part unsupported by the institutional structure that underpins it.

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Legislation

Communal Land Rights Act 11 of 1994

Intestate Succession Act 81 of 1987

Land Titles Adjustment Act 111 of 1993

Native Administration Act 38 of 1927 (Black Administration Act)

Native Trust and Land Act 18 of 1936 (Development Trust and Land Act)

Part four

Traditional leaders, power and land rights

9

Contested terrain: land rights and chiefly power in historical perspective

By Peter Delius

INTRODUCTION

This chapter addresses two interrelated themes: the nature and basis of the power of traditional leaders in South African society; and the role traditional leaders played in systems of land tenure in southern Africa. The perspective is historical, with a focus on broad processes of change over time. These dimensions of traditional leadership take diverse forms in and between different southern African societies, periods and regions. However, it is possible to identify critical patterns and processes of change.

This chapter has a national focus but pays particular attention to developments in the Transvaal. The arguments are also developed within distinct historical periods. A discussion of pre-colonial realities is followed by an examination of the impact of conquest and colonial incorporation.

The impact of policy and practices set in motion by the Native Trust and Land Act 18 of 1936,[1] and the changes brought about by the Bantu Authorities Act 68 of 1951,[2] along with wider processes of political and social struggle and transformation are discussed in order to provide a historical context to contemporary realities.

The conclusion of the chapter explores some of the implications of these historical realities and dynamics for the Communal Land Rights Act 11 of 2004.

EVIDENCE

The starting point of this discussion is an account of pre-colonial realities in relation to chieftainship and land tenure. This poses evidentiary questions. Pre-colonial southern African societies were not literate. They did not produce and store written records of political and social practices or rules, which can be consulted to establish the nature of pre-colonial society. Instead a variety of other forms of evidence have

[1] Subsequently renamed and repealed. The Development Trust and Land Act was its last valid name.

[2] Renamed the Black Authorities Act.

to be consulted to attempt to construct a baseline from which to explore processes of change. However, each of these sources has limitations.

Archaeological evidence consists primarily of the material remains of societies. This can tell us a good deal about the broad way in which people lived. It can, for example, indicate the existence of political centralisation as well as patterns of land use. It is, however, less helpful with specific forms of power and tenure.

In recent years historians have drawn heavily on oral traditions—accounts about the past handed down from generation to generation. Oral traditions provide significant insights into the past, but like all stories they change with every telling. They also tend to be heavily focused on the lives and exploits of great men, particularly kings and chiefs, and have little to say about the more everyday aspects of societies. Oral traditions are powerfully influenced by contexts of debate and dispute, and have to be treated with particular caution when such conditions prevail.

Another source of evidence is the accounts of African societies produced by a range of literate observers prior to colonial conquest. Traders, explorers, hunters and, in particular, missionaries wrote accounts of African societies. In the early years of colonial rule a number of officials also wrote descriptions of African societies. All of these accounts have to be treated with considerable caution. The individuals who wrote them were outsiders with strong preconceptions, which often created cultural blinkers. These observers often had limited language capacity and engaged with a limited range of informants. These were usually drawn from the ranks of chiefs, royals and elders while the views of women, commoners and youths tended to be neglected.

Anthropological evidence has also been much used as a source of custom and a window into pre-colonial African society. However, anthropological writings often misleadingly described societies as if they had remained unchanged over long periods of time. Much of the anthropological research was undertaken from the 1930s onwards, when African societies had already undergone profound processes of change and were in the throes of further significant transformations. Descriptions of the norms and even of the practices of such societies cannot, as a result, be uncritically used as a source for past practices.

Commissions of inquiry have been a particularly important source of information on the role of traditional leaders, the nature of tenure systems and, more broadly, the context of customary law. One influential example was the Cape Native Laws and Customs Commission of 1883. Commission reports are subject to the same evidentiary concerns raised in relation to other written accounts of African societies. Commissions in the 19th and 20th centuries relied on a narrow range of witnesses—usually white missionaries and officials along with some chiefs and elders. Wider participation from within African communities was rare.

A more general problem with much of the material generated by commissions and other accounts by outsiders was that it was normative, idealised and rule centred. People were asked what should happen in a particular set of circumstances. They were less regularly asked what actually did happen, and it was even more unusual for there to be any close observation of what transpired in particular cases. The danger of this approach is that there is a considerable disjuncture in most societies between what

ought to happen in terms of social rules and what actually happens; and as large a gulf between what people say they do and what they actually do.

The perspectives shared by many of the early literate commentators on chieftainship and land tenure in African societies were also strongly coloured by particular assumptions about the nature of African societies. The understanding of chieftainship was significantly influenced by the emergence of the relatively highly centralised and authoritarian Zulu Kingdom in the early 19th century, which was by no means a general or generalisable pattern. Missionary failure to win substantial numbers of converts in Natal and more broadly also gave rise to images of subjects controlled by despotic chiefs. This rendition of all-powerful chiefs had considerable appeal to officials and policy-makers who saw themselves as the heirs to chiefly power and thus welcomed inflated versions of their authority. Especially attractive was the idea that chiefs held ultimate authority over land, and that with the coming of colonial control, this power had been assumed by the colonial state (Chanock, 2001: 282–3, 380–4; Klug, 1995; Brookes, 1927: 354–80).

The description and interpretation of rights with regard to land within African communities was also influenced by a powerful strand of social Darwinism in British 19th century official and legal thinking, which saw indigenous communities as being at a lower level of social evolution. According to this view, private property was the mark of civilisation while less evolved societies were believed to have weak communal rights. The presumed absence of more 'advanced' individual rights of ownership within African societies also provided a convenient justification for seizing the land of colonised peoples (Chanock, 1991; 1996). Both anthropologists and contemporary observers tended to interpret what they saw in terms of the Western legal constructs of property and ownership with which they were familiar.

These perspectives, especially in combination, tended to lead towards an exaggeration of chiefly power, particularly over land, and to an understatement and misconceptualisation of the rights of subjects and of the occupants and users of the land.[3]

Despite all these caveats, it is possible, by using material critically and by drawing on different bodies of evidence, to gain some understanding of pre-colonial realities. Historians have drawn from a range of contemporary materials to reconstruct chiefly and tenure systems. Oral traditions collected in the late 19th and early 20th century also provide important perspectives. Certain social anthropologists with strong historical interests have provided important insights. Of particular note is the work of individuals such as Isaac Schapera and Monica Wilson (Hunter) who conducted intensive field work in the 1930s, had a relatively sophisticated understanding of African social forms and were able to draw on the insights of individuals who had grown up in the 19th century and could clearly recall pre-colonial patterns (Ross, 1999: 15; Thompson, 1995: 26–7).

[3] For example, in a statement which represented a selective reading of the already limited evidence at its disposal, the report of the Cape of Good Hope Commission on Native Laws and Customs (1883: 40) concluded that 'the land occupied by a tribe is regarded theoretically as the property of the paramount chief; in relation to the tribe he is the trustee holding it for the people who use it in subordination to him on communistic principles'.

PRE-COLONIAL DYNAMICS

Chieftainship was an institution of considerable historical depth and pervasive geographical coverage within African societies. The Bantu-speaking population of South Africa practised mixed farming and lived under chiefly systems of government, shaped by ideas of the proper ordering of society brought by immigrants from further north in the 3rd or 4th century AD. While larger state systems emerged on the northern borders of modern South Africa, in the main, until at least the middle of the 18th century, the political units under which most South Africans lived were small, although in some areas a degree of hierarchy existed among various chiefs (ibid).

A key characteristic of chiefdoms in this region, as elsewhere in the world, was a profound tension between the forces of centralisation, which allowed individuals to build up political and economic power, and competition for authority by rivals. Thus, through time, chiefdoms constantly fragmented and reformed as factions gained power, built up strength and subsequently lost control to other groups (Hall, 1987: 63–4).

While forms of chieftainship in pre-colonial South Africa were not uniform, it is possible to identify a number of common patterns. The principle that bound members of a particular chiefdom together was the recognition of a particular chief—usually drawn from a dominant or royal lineage. Many of the subjects of the chief belonged to related lineages but some could trace no kinship connection to the royal group. Some of a chief's subjects were descended from groups who had lived in the area prior to the arrival of the chiefly lineage. Others arrived later and sought permission from the chief to settle in the area.[4]

Chiefs did not rule over atomised, isolated individuals or nuclear families. Vital to the working of chiefdoms were groups consisting mainly, but not exclusively, of kin who lived together in localised areas often described as wards. The leaders of these settlements had considerable authority over their own dependants and followers. In larger chiefdoms there could be an intervening level of political authority between the chief and homesteads, which has been variously described as consisting of subordinate chiefs or headmen. Aside from their role in land allocation—which will be discussed in detail—chiefs were responsible for providing their subjects with defence from enemies and were also expected to help them in times of economic need, assist them with rain-making, maintain proper relations with the ancestors, punish witches and resolve difficult disputes in their courts. Subjects were expected to pay tribute to the chiefs in the form of a small proportion of the produce of the fields, their herds and the hunt, and to provide labour when called upon for both military and productive purposes. In most societies there was a broad distinction between those closely related to the chiefs, who were known as royals, and unrelated groups who constituted a commoner class or category.

There are very different images of the role of chiefs in African societies. One view

[4] This account of chieftaincy draws on a wide range of sources and texts which cannot be cited here in full. Of particular importance are Delius (1983: 11–61), Hammond–Tooke (1975: 1–41), Peires (1981a; 1981b: 125–44), Hunter (1936: 378–400), Ross (1999: 15–20), Beinart (2001: 14–20), Tisani (1994) and Jingoes (1975: 127–215).

is that they were despots who paid little heed to their subjects' wishes. This view, as already noted, was often propagated by missionaries and officials. However, alternative perspectives have been put forward by commentators—including African leaders and intellectuals as well as a range of historians and social anthropologists—stressing the consultative, even democratic, dimensions of chiefly power (Chanock, 2001: 282–4).

One crucial factor which affected the nature of chiefly rule in pre-colonial Africa was the availability of land. In South Africa, as more broadly on the continent prior to colonial conquest and land dispossession, there was a relative abundance of land. The key shortage was of people. As a result, power and wealth depended on being able to build up large followings. Chiefs needed to attract and hold followers. Those who could offer material and military security as well as effective leadership gained followers. Those who were harsh, capricious and incompetent lost followers. The availability of land made it relatively easy for groups to move between chiefdoms. The evidence suggests that there was considerable movement between chiefdoms in 18th and 19th century South Africa, and that this process placed important checks on chiefly abuse of power. This mobility also contributed to cultural heterogeneity, which undermines the depiction of these communities as tribes composed of culturally homogenous populations with clear social and geographic boundaries. In fact, the populations of many chiefdoms were diverse and their boundaries porous.

Another factor which limited chiefly power was that in most cases standing armies or established police forces did not exist. A political leader who wished to use physical force against his critics or enemies depended on being able to mobilise his subjects. This could be a slow process and it provided ample opportunity for resistance. Those who disapproved of the chief's actions could simply fail to arrive when called to arms or could take their time about responding.

Chiefs did not act alone. They were advised by councillors—men highly regarded by their peers and drawn both from the ruling lineage and from subordinate groups in the chiefdom. The influence of these councillors varied. A young man who had recently assumed chiefly office could easily be dominated by his councillors. An older, more established chief often exercised considerable power over his councillors and could remove those with whom he fell out, witchcraft accusation being one method. Councillors kept chiefs informed of popular opinion on the key issues of the day and chiefs rarely acted without seeking their advice. On particularly contentious and important issues the process of consultation went even further. In many chiefdoms, gatherings of all the adult men in the community were held from time to time. These were partly used to inform the community of important developments, but they also provided subjects with an opportunity to talk back to their rulers and sometimes even to force rulers to change their policies. These public meetings are particularly well described for the Sotho–Tswana chiefdoms but they also occurred in Nguni communities.

While chiefs consulted, they were not elected to their office. In most African societies clear rules were laid down as to who should become chief. The ideal was that the eldest son of the most senior wife would become chief on the death of his

father, but there were also a number of subsidiary rules stipulating what should be done if the heir was a minor or if no heir had been born at the death of the chief.

As will be discussed further, the idea that these rules determined succession to office in pre-colonial South Africa played a key part in shaping the nature of chieftainship after African societies had been conquered. However, recent research strongly suggests that the idea that rules were necessarily successful in determining who succeeded to office in pre-colonial South Africa is fundamentally flawed.

Succession was a recurring source of conflict in pre-colonial African societies. At the most extreme, these disputes resulted in violence with the most militarily powerful contender able to take office after having defeated his rival or rivals. There are numerous examples of the most genealogically senior contender being defeated by a more junior rival. These outcomes were often shaped by the respective popularity of the contenders rather than their relative seniority. This was because military strength in part depended on popular support as reflected in the number of individuals prepared to fight on behalf of a chiefly contender. Peires (1989: 45–6) has pointed out in relation to the history of Xhosa chiefdoms that people often supported contenders of low rank against harsh or greedy rivals of higher rank.

Succession disputes were also a recurring source of fission within chiefdoms, with the defeated contender and his supporters leaving chiefdoms either to join other communities or to establish new settlements. Hammond–Tooke (1975: 31–7) for example, has stressed the 'segmentary' nature of the political systems of the Cape Nguni (including the Xhosa and Mpondo) as a result of the regularity of fission.

It was not only in instances of open conflict between rival contenders that the rules could be overturned. Comaroff (1974) and Delius (1983: 1–47, 83–107) show in relation to the history of Tswana chiefdoms that there is ample evidence of the rules of succession being manipulated to achieve results far removed from a simple application of the formal rules.

This is not to suggest that rules of succession were irrelevant. It was rare—but by no means unknown—for an individual who was not of royal blood to become a chief. Being of lower rank was clearly an impediment to succession unless the heir apparent was particularly incompetent or unpleasant. However, the idea that rules determined succession in these societies is a considerable oversimplification. Reality was more complex and allowed for competitive political processes shaped by the interplay of popularity and power to determine who acceded to high office.

The relationship between different levels of power within chiefdoms was also fluid. Powerful and popular chiefs might exercise considerable control over subordinate chiefs but weak, unpopular, inexperienced or aging chiefs might find that their subordinates paid much less heed to their wishes and instructions. The same principle applied at lower levels of the political structure, with the degree of control of subordinate chiefs and/or headmen subject to wide fluctuation.

It is also important to recognise that chiefdoms were neither uniform nor static. Especially in the 18th and 19th centuries, African societies were undergoing profound processes of change that impacted on both political form and culture. Colonial conquest and rule did not capture static societies long set in their ways, but incorporated dynamic and changing societies as well as some political and social systems that were, in historical terms, quite recently established.

One crucial development was the emergence of more centralised political systems. This was a result of the interaction of growing population, climatic change, long distance trade and mounting pressures emanating from areas of European control and settlement. For present purposes, what is significant are the changes in political structure and process that occurred.

One development was that certain chiefdoms established their dominance over other chiefdoms. Initially this consisted of little more than recognition of a loose political and ritual superiority expressed in limited payments of tribute by subordinate chiefdoms. But in some societies—for example, the Pedi Kingdom in the northern Transvaal—more systematic forms of administration were established (Delius, 1983: 11–47).

A considerably more centralised and authoritarian political system emerged out of a deep-seated process of change in KwaZulu–Natal in the 19th century (Thompson, 1995: 80–5). This was the Zulu Kingdom which, under the leadership of Shaka, established its dominance over a vast area and a considerable population. The Zulu state that emerged was set apart from earlier political systems by a number of important innovations. The most significant was the creation of cross-cutting standing regiments living in towns and headed by *indunas* appointed by the king. These men did not inherit their positions; they were appointed—often on the basis of their military prowess. Appointment on the basis of achievement made for more effective military leaders, but because the *indunas* lacked royal descent, they could not aspire to becoming kings themselves. They owed their positions to the will of the king and could be replaced by him at any time.

These innovations concentrated much more power in the hands of the Zulu king than chiefs had previously had at their disposal. They weakened the democratic elements of chiefly rule described earlier and replaced them with a more authoritarian system in which power was concentrated in the hands of the king and seen as flowing from him rather than being rooted in the will of the people. The kinds of expression of popular sentiment through mass meetings of adult men which played such an important part in other kingdoms and chiefdoms, played little part in the Zulu state. The Zulu Kingdom, in short, provided a rather different and less democratic model for the exercise of political power than that provided by many other societies.[5]

One must, however, also be cautious of overstating the impact of the Shakan system. The king, appointed *indunas* and standing regiments may, for a period, have overshadowed the older system of chieftainship but did not entirely supplant it.

Thus while it is important to recognise a reality of political diversity, it is also important to acknowledge that vital to the social and political fabric of South

[5] However, it is also possible to argue that the increased military insecurity that developed in the 19th century as a result of the activities of large states and white settlers, along with the increasing shortage of land, reduced the options for commoners within Africa societies to resist the demands of their rulers.

African society were forms of chieftainship that contained key elements of both consultation and political competition, which ensured that the interests and opinions of commoners could not easily be ignored.[6]

One of the most striking features of the process of colonisation and of the uncertain and uneven incorporation of chieftaincy (to be discussed further) is that the image of chieftainship which was seized on by white officials and legislators was based on notions of chiefly despotism stemming from a crude understanding of the Shakan system (Costa, 2000: 18). The deeper-seated and underlying forms of chiefly accountability and responsiveness, which have been discussed in this section, were by and large ignored.

As will be discussed in more detail, the cumulative impact of colonial control and subordination led to the erosion of the processes of consultation and competition that had been the lifeblood of the pre-colonial political order. As a result, elements of the form of chieftainship survived but much of the substance was lost.

LAND TENURE IN PRE-COLONIAL SOCIETIES

The relatively easy availability of land in pre-colonial Africa placed checks on the power of chiefs. But land was nonetheless a vital resource for communities whose economies depended on mixed farming—crop production and stock-keeping supplemented by gathering and hunting.

The system of landholding in these societies is often described as a system of communal tenure. This characterisation probably stemmed in part from the idea that land was held within these communities on a communistic or communal basis that, as already noted, was advanced by the Cape Native Laws and Customs Commission as well as other official sources. A corollary of this view was that chiefs were owners of the land and/or held it as trustees for their subjects (Chanock, 2001: 381). But these characterisations are misleading and partly reflect the difficulties experienced by outsiders in understanding or naming African systems, which resulted in the use of inappropriate comparison and terminology often derived from European rather than African history. While this terminology has endured, over time a much fuller picture of systems of land tenure has emerged from both historical and social anthropological research.

In African communities, rights to land came from membership of a localised kinship/residential group that in turn was part of a political unit, usually a chiefdom (Beinart, 2001: 19–20). When a chiefdom settled in a new unpopulated area, the chief, along with his councillors, would point out particular areas of land to subordinate leaders who would in turn delineate areas for ward heads who in turn would convene processes for distributing areas of land to household heads on which to build and cultivate.[7] Normally only married men were eligible for residential land. In polygamous marriages each wife would have her own field to work. Every married man was entitled to land, although the quantity and quality of land controlled by different households varied significantly.

[6] The importance of heredity and the exclusion of women and unmarried men from key political processes and offices placed significant limitations on both competition and consultation.

[7] For a useful description of this process see Schapera (1970: 193–213) and Mönnig (1967: 153–4).

When households needed additional land they would approach local leaders or headmen. Where there was no land available in the area, the local leader would approach the chief or royal council to identify suitable vacant land within the wider polity. When new groups entered an area they had to approach the chief to ask for land. Once land had been granted it was usually passed on to the next generation within the same household. As a result, in settled societies most individuals received land not directly from the chief but through inheritance, allocation through households and within localised groups formed around a core of kin. New chieftainships were also as likely to be established over pre-existing populations as over vacant land, and oral traditions suggest that a common practice was to recognise the existing rights of such groups and even to acknowledge their prior relationship to the land in key rituals within chiefdoms.[8]

Grazing land, which formed the bulk of the areas of most chiefdoms, was not as tightly controlled or clearly allocated as farming land. Grazing land was open to all who had livestock and there was no limitation on the amount of animals that a household could put out to pasture. Chiefs and lower level political leaders did, however, play a significant role in establishing the boundaries between grazing and arable land.

While these principles applied across a wide range of societies, there is evidence which suggests even greater independence of chiefly control in some areas. Among the Pondo, for example,

> '[l]and to cultivate was not allotted (*ukulawula*), but each woman was free to cultivate where she chose within her own chief's district, provided she did not encroach on any area already cultivated. The formation of the country is such that the slopes falling into river-beds are intersected with ravines. The slopes between the ravines I term a 'rib'. When a woman began to cultivate on one 'rib', even although she only turned over a few square yards, she was held to lay claim to the whole of that 'rib' and no one else might begin a field there' (Hunter, 1936: 113).

Oral evidence on practices in pre-colonial Zululand also suggests that in some instances new land could be occupied and cultivated without the express consent of the king or even local political leaders (Webb & Wright, 1979: 257; 2001: 311–15).

The historical evidence suggests that once land had been allocated to households it was very unusual for it to be reclaimed by a chief or local leader. Land was normally only taken away from households in the case of individuals being found guilty of witchcraft or as punishment for revolt against the chief. For example, it has been described how, among the Tswana,

> 'once a man . . . acquired [land] by allotment, inheritance or gift, he is normally entitled to its use as long as he is alive, and on his death the same right passes to his children. Nobody else may cultivate the land without his permission and he cannot be removed from it except in the public interest' (Schapera, 1943: 173).

Hunter (1936: 113) recorded that

> '[i]n the recognition of rights over certain arable areas, the Pondo approach more nearly the European conception of ownership. Formerly a woman had exclusive right to cultivate

[8] See, for example, Delius (1983: 14–17).

> any area which she had once turned over, no matter how long it was kept lying fallow, and an action could be brought in court against a neighbour who encroached upon a fallow field. This prescriptive right to cultivate certain areas was inherited, and the right only lapsed when all the kin left the district.'

Rights of ownership of homestead sites were equally strong. Among the Tswana

> '[a] homestead once built remains the exclusive property of the family occupying it; and is handed down from one generation to another. No outsider can lay claim to the site as long as it is being used. Even if the owners abandon it ... it remains unoccupied and undisturbed unless they allow a relative or friend to live there' (Schapera, 1970: 199).

A chief who denied his subjects additional land, or attempted to take away lands already allocated, ran the risk of quickly losing support and followers. It is thus clear that while chiefs played a significant part in administering land, there were very real limits on their powers.

As Chanock (2001: 381) has pointed out, the idea that chiefs owned the land 'owed more to the need to oppose African and European concepts and to render easier the seizing of African lands than to descriptions of actual use'.

Schapera (1970: 196) is very clear that chiefs could not be described as owning the land.

> 'Except for the portions reserved for him and his family, on more or less the same basis as everybody else, none of the land is his property: nor can he dispose of it except gratuitously and to members of his own tribe. All members of the tribe are entitled to the use of as much of the land as they need; and the tribal authorities must see to it that their claims are gratuitously satisfied.'

Hunter (1936: 112–13) makes the point even more clearly in relation to the Pondo.

> 'a chief had jurisdiction over people ... but he also had jurisdiction over land ... All this implies political overlordship (including small economic rights) not ownership in the European sense.'

It is clear that formulations suggesting that chiefs were owners or even trustees of land were shaped by a rendering of political authority as rights of property and by the imposition of European models on substantively different African realities. In particular, as Kerr (1990: 32) points out, the role played by chiefs in the process of allotting unoccupied land has often been mistaken for ownership.

Hunter's suggestion that rights over arable land approach more nearly the European conception of ownership has been taken further by Kerr (1990: 61–2) in an analysis of customary law.

> 'The right to use and enjoyment of allotted land vests in non-statutory customary law in the individual and not in the chief. One must guard against the danger of assuming that a term used to describe a right in one system of law can only be used in another system if all the incidents of the right in the first system are to be found in the second .... In customary law ... it is necessary to reiterate that the [individual's] right is exclusive; that it may be enforced against anyone who has taken the possession of the land; that it is inheritable and that it is alienable ... [I]t is a right which is "good against the world" which is the definition of a real right in South African common law.'

This is not to suggest that pre-colonial tenure rights can be equated with common-law ownership. Bennett (2004: 379) argues that it is clearly wrong to continue describing customary tenure in terms of highly specialised concepts of common law. This practice assumes that certain words, such as 'trust' and 'ownership', have universal application, whereas they are in fact historically and culturally specific.

It seems clear, moreover, that however strong tenure rights might have been in the pre-colonial era, they were not identical to the absolute ownership of the common law because they were context specific and subject to overlapping rights.[9] Thus Schapera (1970: 205) points out that

> '[t]he right to arable land is . . . not one of absolute private ownership. Other people can graze their cattle on the stalks remaining in the field once the crops have been reaped, or hunt over it; . . . .'

As in the case of chiefly power over land, it is plain that part of what bedevils this debate are the difficulties of cross-cultural translation. It is nonetheless clear that household rights to arable and residential land were strong in pre-colonial systems of land tenure. However, it must also be acknowledged that these rights existed in the wider context of the changing dynamics of power within chiefdoms.

Powerful chiefs could drive out or destroy individuals or subordinate groups that they perceived as a threat to their authority or whose resources they coveted—witchcraft accusations providing one particularly powerful instrument (Hammond–Tooke, 1975: 70). They could also expand the boundaries of their effective authority over land and other issues in relationship to subordinate leaders. Weak chiefs, insecure in their grip on power, were loath to risk unnecessary confrontation and might find rivals and subordinates establishing their control over the allocation of land. These shifting power dynamics played a part at all levels of the political system. Normative or rule-based accounts of pre-colonial systems therefore run the risk of oversimplifying complex processes in which the interplay of rules and shifting realities of power determined outcomes (Delius, 1983: 4, 58–9, 85–6; Hammond–Tooke, 1975: 69–70).

CHIEFTAINSHIP, CONQUEST AND PARTIAL INCORPORATION

During the course of the 19th century, African communities in South Africa were defeated and brought under colonial control. One immediate question that faced their new rulers was what to do with the chiefs who had previously ruled these societies. The eastern Cape was the first area in which these issues were confronted. The initial thrust of policy was to break down the power of chiefs and to institute forms of direct rule with white magistrates playing a pivotal role. The colonial authorities saw chiefs as obstacles to progress and potential fomenters of revolt. There was also no formal recognition of customary law and new African subjects fell under the wider colonial legal system although in practice communities continued to regulate their own internal affairs to a considerable extent (Brookes, 1927: 12–98).

[9] The overlapping nature of tenure rights is addressed in detail by HWO Okoth–Ogendo in chapter 4 and Ben Cousins in chapter 5.

A rather different model developed in Natal where a weaker settler presence and the limited financial resources available to the colonial administration led Theophilus Shepstone to develop a system of indirect rule. Chiefs were recognised and incorporated as the lowest rung of the administrative system. Customary law was also recognised provided that it was not 'repugnant to the general principles of humanity' (Costa, 1999: 45). This system of indirect rule was not simply recognition of pre-existing political realities. During the period of Zulu and Voortrekker dominance, many chiefdoms had disintegrated and/or fragmented. It was Shepstone who gathered these people into 'tribes' and appointed men as 'chiefs' to rule them. These chiefs sometimes had been leaders of African communities but often their appointment was primarily the result of Shepstone's preferences rather than any traditional legitimacy. As Webb has pointed out: '[a]dministrative necessity led to improvisation: where hereditary chiefs could not be found commoners were appointed to the office' (Welsh, 1971: 20).

Any idea that 'a chief was a chief by the people' (Jingoes, 1975: 171) was also vigorously dispelled and legitimacy was clearly established as coming from above. The lieutenant governor was defined as the 'supreme or paramount chief with full powers to appoint all subordinate chiefs, or other authorities among them' (Mamdani, 1996: 63–5). In matters of succession to chieftainship, the government's word was final. As Welsh (1971: 118–26) has pointed out, chiefs became enmeshed in a web of bureaucratic authority, were made central to a widely hated system of forced labour and became increasingly reliant on government salaries. Customary law was also codified in Natal in a manner that enshrined chiefly despotism and patriarchal power (Mamdani, 1996: 64).

As the Cape Colony expanded its control over neighbouring African communities, especially through the annexation of the Transkei, the commitment to direct rule within a common legal framework weakened. The consequence was the emergence of a hybrid system containing elements of direct and indirect rule, which became known as the Transkeian system. The commitment to breaking down the power of the chiefs remained, and the region was divided into districts which were demarcated with limited regard to pre-existing chiefly boundaries. A white magistrate was appointed to preside over each of these districts. The districts were in turn subdivided into locations with approximately thirty to a district, and over each was placed a headman appointed by the administration and under the authority of the magistrate. In the majority of cases the headmen were drawn from the ranks of subordinate chiefs and ward heads in the pre-existing political order, although in some areas—notably Fingoland—commoners singled out for their loyalty were appointed.

In law these positions were appointed and subject to bureaucratic rules of censure and dismissal, but in practice, succession to office was very often inherited. Chiefs were not incorporated in this new structure of administration although over time they were increasingly given some official recognition and limited stipends (Hammond–Tooke, 1975: 77–8). Recognition was afforded to customary law but only where it was not deemed to be 'repugnant' to civilised standards, and the permitted judicial role of chiefs and headmen was considerably reduced. No chief or

headman was permitted to decide any criminal case and even in civil cases their role was merely one of arbitration.

The Transkeian and Natal systems were the dominant poles of 'native policy' in South Africa prior to Union in 1910. In the 19th century Transvaal, it was infamously made clear that there should be no equality in Church and State between white and black, and little attention was paid to the niceties of policy formation. British annexation from 1877 to 1881 resulted in some influence of the Natal system reflected in Law 4 of 1885 (Z). The state president adopted the mantle of the supreme chief and a system of native commissioners was created. Provision was made for the recognition of chiefs although none was formally recognised until after 1910. However, a limited number of more powerful chiefs were accorded *de facto* recognition. The Act also included ambiguous formulations on the role of custom.

In the Orange Free State no recognition was given to customary law, and chiefs were not formally incorporated into administrative structures (Costa, 2000: 24–5).

In the aftermath of Union there was a drive towards creating a more uniform administrative structure that found expression in the Native Administration Act 38 of 1927.[10] This Act set out to define a distinct administrative and legal domain for Africans drawing on a highly authoritarian understanding of chiefly rule as a model. Echoing the Natal system, ch I s 1 of the Act opened with the declaration that the 'Governor General shall be the supreme chief of all the natives in the provinces of Natal, Transvaal and the Orange Free state'. This supreme chief was given a range of powers to which even the most powerful ruler in pre-colonial South Africa could never have aspired, and it permitted him to devolve these vast powers to any administrative official. It also bestowed on the supreme chief the right to rule over all Africans by the simple device of issuing proclamations.

Under the Act, the governor general could recognise or appoint any person as a chief or a headman in charge of a tribe or location, could depose any chief or headman and was authorised to define their powers, duties and privileges. But the Act also recognised the role of heredity. Regulations issued under the Act defined the positions of appointed chiefs, recognised chiefs and headmen, and prescribed a long list of duties designed to ensure control over the rural population. Among other things they were required 'to allot in a just manner land for arable and residential purposes' (Rogers, 1949: 12).

The Act also recognised 'Native law and custom' as the legal medium for resolving disputes in which 'the interests of Natives' predominated. Chapter 4 of the Act instituted a segregated system of native commissioners' courts, provided for the chiefs to be authorised to hear civil cases and established an appeals procedure.

The 1927 Act was thus a significant step in a longer process of the incorporation of chieftainship and its redefinition as an instrument of administration with power devolved from above. This legislative and administrative transformation was bolstered by an evolving system of customary law that entrenched the powers of the

[10] Renamed the Black Administration Act.

supreme chief and supported a highly authoritarian interpretation of chiefly powers (Chanock, 2001: 282–90). Growing land shortages—the consequence of land dispossession in the 19th century and the miserly provision of land for African settlement in the 20th century—also considerably reduced the room for manoeuvre of the subjects of chiefs. Succession disputes, which in the past had partly been shaped by the ability of candidacies to mobilise popular support, were increasingly determined by the ability of individuals to win the support of white officials and experts (Comaroff, 1974).[11]

It might be imagined that such a thoroughgoing and top down transformation of chieftainship would have effectively severed the roots of chiefly support and popular accountability. But the image of systematic control conveyed by legislation and regulation belied the more complex realities on the ground. Moreover, the office of chieftainship was fundamental to ordinary people's attempt to sustain social and cultural continuities and to generate ideologies of resistance in the face of the deep dislocation brought about by colonial conquest and economic transformation.

Particularly important in this regard was the creation of a pervasive system of migrant labour that dominated the lives of most rural communities in the 20th century. In the first half of the century, most migrants remained wedded to a rural lifestyle of farming and raising cattle. They did not want their children to grow up in the city or their wives to live there. They saw cities as violent, dangerous and disease-ridden places dominated by white power and culture and infested with criminals. While migrant workers lived lonely, harsh and dangerous lives in the urban areas, they could nonetheless look forward to the prospect of returning to rural communities at the end of their contracts or on retirement, having some land to cultivate and livestock to herd. Preserving this continuity and protecting a space in which they were free of the direct white domination and control they experienced in the cities became an important priority for many rural people. Chieftainship was seen by many as a vital part of both the continuity with the past and the freedom from white control that they were determined to defend. Continued rule by chiefs was perceived as being vital to preserving a measure of economic, political and cultural freedom/autonomy, and in most instances as being infinitely preferable to direct rule by white officials.

This conception of chieftainship generally survived the colonial incorporation, if in varying degrees. This was possible partly because the incorporation process was far less pervasive and systematic than a reading of legislation and policy may suggest. Many chiefs were not officially recognised. Even the 'official' chiefs frequently enjoyed little more than token recognition from the state with limited effective responsibility or remuneration. These chiefs remained, to a significant extent, dependent on the continued support of their subjects—not least of all in order to secure an income. They relied on the tribute paid by their followers, especially the £1 paid by migrants on their return home. And they received fines and fees paid by parties who brought disputes to their courts. Although chiefs were formally denied criminal jurisdiction and were given limited civil jurisdiction, in practice in many

[11] The ethnography division of the Department of Native Affairs established in 1925 played an increasingly important part in determining the outcomes of succession disputes.

parts of South Africa chiefs' courts continued to hear both kinds of cases. They played a key role in central social processes such as initiation. Chiefs also continued to have an important religious role—linking society to powerful royal ancestors, performing key rain-making rituals and protecting the society against witches (Delius, 1996: 9–50, 76–138; Mayer, 1980: 1–67).

While chiefs who were appointed and paid by the state were more clearly integrated into a colonial administrative structure, many continued to depend on subjects for tribute and fees and were, in turn, expected by them to serve their interests in a wide variety of ways. These chiefs straddled contradictory positions (Hammond–Tooke, 1975: 218).[12] Two different administrative systems merged in the offices they held. These chiefs were at once part of a colonial and bureaucratic system driven and defined from above, and a system still informed by values rooted in pre-colonial practices and political legitimacy, and which was sustained in part by people's desire to keep colonial control at bay. Appointed chiefs had to try to juggle the demands of these two systems. As long as neither side made demands for significant or far-reaching changes, they were able to do so, if with different degrees of skill and success. But from the 1930s onwards many chiefs found themselves under increasing pressure from the colonial state and this placed increasing strain on their relationships with their subjects.

COLONIAL CONTROL AND LAND TENURE

A central issue facing the system of native administration that was constructed in the late 19th and early 20th centuries was what to do about systems of land tenure. The assimilationist, direct rule policies that were initially pursued in the Cape Colony found expression in attempts to individualise tenure through the introduction of quitrent[13] systems although this was far from pervasive. Chiefs were stripped of their role in the process of land allocation. The function was formally vested in magistrates although in the main it was actually performed by appointed headmen.

Outside the Cape Colony much less attention was initially paid to tenure reform, although some attempts were made to extend the Glen Grey Act 25 of 1894 (C) to parts of the Transkei. Over most of the reserve areas of South Africa pre-existing forms of land tenure continued into the colonial era although they were modified in various ways. In the Transkei, as in the Cape Colony, chiefs were shouldered aside and their role in the land allocation process was placed in the hands of magistrates, although the headmen of the various locations actually allotted lands in their respective areas subject to the confirmation of the magistrate. While officials proclaimed that they reproduced traditional practice, important changes were introduced which considerably reduced both the security and flexibility of the tenure systems. Hunter (1936: 113–14), for example, described how among the Pondo

[12] They were in what anthropologist Max Gluckman has described as an intercalary position. See Hammond–Tooke (1975: 218).

[13] Annual rent paid to the state.

> '[o]n . . . annexation . . . land became the property of the Crown. The exclusive right to cultivate certain arable areas is now granted through magistrates. Rights of cultivation are inalienable. On the removal or death of the grantee the area reverts to the Crown, but the widow retains the right to cultivate fields which she cultivated as a wife, and in re-allotting the fields first claim is given to the eldest son of the deceased if he does not already have his full quota of land. Land left uncultivated may be forfeited. This law is enforced where there is a shortage of arable land.'

As pressure on land grew in the areas reserved for African occupation, the system became even more rigid and more discriminatory against women. Single women, unless they could demonstrate 'justifiable family obligations', were ineligible to apply for land and usually could only retain access through marriage, while married men always received preferential access to land (Evans, 1997: 199–200).

In Natal the allotment of lands for arable and residential purposes was placed in the hands of chiefs subject to the right of the native commissioner to intervene where 'abuses' existed. While these chiefs, as already noted, were subject to a host of regulations, overall the level of intervention in tenure arrangements was less marked than in the Transkei and the Cape (Rogers, 1933: 107–9).

In the Transvaal reserves, 'communal' systems also continued to operate and no attempt was made to displace chiefs. However, a growing land shortage did lead to increased pressure to reallocate uncultivated land. In addition, some disputes did end up in native commissioners' courts (Harries, 1929: 53–4). But until the1930s, in reserve areas, systems of land tenure retained considerable autonomy from official control.

Systems of tenure were also reshaped by the process of colonial incorporation (and in Natal, codification) of customary law, which tended in particular to enhance the rights of male household heads and to downgrade the rights of both married and single women (Simons, 1968: 187–91, 261–70). But despite the changes introduced by colonial administration, systems of 'communal' tenure proved considerably more flexible than individualised systems and—especially important for the way they were viewed by many rural residents—were better able to absorb growing pressure on land. For example, a study conducted in Keiskammahoek area between 1947 and 1951 showed that landlessness was lowest with communal tenure and highest with individual tenure (Evans, 1997: 200).[14]

The colonial administration of communal tenure also allowed considerable scope for corruption. By the 1920s in Pondoland some headmen demanded and received a fee for each piece of land they allotted and by the 1940s this practice had become widespread in the Transkei (Hammond–Tooke, 1975: 136–7). There are also reports of chiefs and headmen using their powers to accumulate considerable landholdings and to reward their kinsmen and supporters. For example, in 1916 the magistrate at Umzimkulu reported that

> '[t]he best ground was . . . taken up years ago, and it would seem that the Chiefs and Headmen were at that time extremely liberal in regard to the acreage allotted to their followers, especially the favourites, relatives and those who paid them well' (Chanock, 2001: 389).

[14] See also Mills & Wilson (1952: 129).

The accumulation of land by an older generation closely connected to chiefs and headmen meant that younger married men found it increasingly difficult to secure land (ibid).

INTENSIFYING STATE INTERVENTION: THE NATIVE TRUST AND LAND ACT AND THE BANTU AUTHORITIES ACT

By the 1920s official concerns were mounting about the conditions in the reserve areas. The 1932 Native Economic Commission predicted disaster in these areas if drastic steps were not taken to prevent soil erosion. The main causes of soil erosion were identified as unscientific techniques of soil cultivation and overstocking. This formed an important backdrop to the framing and implementation in 1936 of the Native Trust and Land Act. This Act defined released areas and allocated the lion's share of 5 028 000 morgen to the Transvaal. The Cape was allocated 1 616 000 morgen, Natal 526 000 morgen and the Orange Free State 80 000 morgen.

One of the main features of the Act was the establishment of the South African Native Trust (SANT) into which were merged a number of previous trusts and in which was vested all Crown land which had been reserved or set aside for the occupation of 'natives' and all Crown land within the scheduled or released areas. The 1936 Act also extended the possibilities of government by proclamation afforded by the 1927 Native Administration Act, allowing the governor general to make regulations, among other things, to 'prescribe the conditions on which natives may hire or occupy land held by the Trust' and for the 'prevention of soil erosion' (ch I s 48).

The Native Affairs Department was particularly determined that land purchased by the SANT 'would be allotted and occupied by natives in such manner that it will not be ruined by malpractices but will be properly farmed without its carrying capacity overtaxed' (Smit, 1937: 7). As noted earlier, the bulk of this additional land acquired by the trust was situated in the Transvaal. Much of it comprised absentee landlord-owned farms in the northern and eastern regions of the province. Many of the residents on this land had occupied it for generations and suffered little interference in their lives, save for annual visits by rent and tax collectors. There had been very little attempt by external agents to modify or manage systems of land tenure, or the nature of chiefly authority.[15] This state of affairs changed with the establishment of the SANT.

The policy to be followed by the SANT was initially set out in Proclamations 31 and 264 of 1939 and 116 of 1949 and was variously known as betterment, reclamation or rehabilitation. These proclamations provided for the demarcation of residential, arable and grazing areas as well as various improvement measures including fencing, diversion banks, contour banks and stock limitation. One of the most significant aspects of this new order was the changing locus of effective control over land. While in communal areas white officials had exercised an often loose oversight as regards systems of land tenure effectively managed by chiefs,

[15] For an extended discussion see Delius (1996: 76–107, 139–171).

headmen and other leaders within African communities, the trust system gave them a central role. They had wide powers to allot, determine the size of, or cancel allotments of land for arable and residential purposes. The cultivation and use of land 'was subject to such rules, orders, notices and directions or prohibitions as the Native Commissioner, in his discretion may deem fit to impose' (De Wet, 1995: 44). He was entitled to demarcate, redefine, reallocate and transfer land, and harsh penalties could be imposed on any individuals who flouted his authority. The new trust system strictly limited tenants' security of tenure and their ability to transfer or bequeath rights in land. This system was also marked by a strong reluctance to allocate land to widows and single women (De Wet, 1995: 39–57).[16]

Some provision was made for a process of consultation with chiefs and headmen, and, initially, attempts were made to win community support for the introduction of these measures. But over time the system became increasingly coercive. As a result, chiefs and headmen found themselves operating within a system in which effective control was wielded by white native commissioners, agricultural officers and their African assistants. Chiefs became instruments of policies which were determined by logic and priorities external to the society, and which most rural residents saw as profoundly invasive and destructive. Popular rejection of this system fed into a series of rural revolts that began in the Northern Transvaal in the 1940s when attempts were made to impose trust controls on farms purchased by the SANT, and followed across the country in the wake of attempts to impose betterment.[17]

The policy shifted over time and one crucial area of discussion was the advisability of dividing the rural population into permanent industrial workers based in villages and full-time farmers with access to land and livestock. This approach was reflected in the recommendations of the Tomlinson Commission but the rejection of the core report by the government put an effective end to the debate. In most reserve areas the conservationist agenda which had initially informed policies gave way to the cynicism of 'stabilisation, loose planning and rapid resettlement' that was designed to accommodate as many families as possible as the population soared with tightened influx control, forced removals and large-scale movement from white farms. The mounting land shortage that resulted saw allotments of land growing steadily smaller and from the 1960s onwards new settlers in many areas were not allocated arable land, were required to dispose of their livestock and were placed in 'closer settlements'.[18] Research conducted in the 1980s on 'trust tenure' showed it to be a rigid and inflexible system under which residents had least control over land, were most insecure and suffered the highest degree of landlessness—over 50 per cent in areas of the Transkei and Transvaal (Cross, 1991: 79–80).

Thus the overall impact of SANT control was initially to marginalise the role of chiefs and headmen in the administration of land, and to intensify the scale and scope of direct intervention by a range of white officials and their African assistants

[16] See specified proclamations. See also Delius (1996: 76–107, 139–171) and Delius & Schirmer (2000: 719–42).
[17] Ibid. See also Lodge (1983: 261–94).
[18] Ibid.

in tenure relationships. However, the mounting resistance that officials encountered in their attempts to implement 'betterment' and 'rehabilitation' led some to rethink the role of chiefs.

In 1945, for example, state ethnologist NJ van Warmelo argued that

> '[t]he one thing that the chiefs have seen very clearly is that on Trust Land, chiefs and all they stand for have been relegated to a position of minor importance. The inference obviously for them is that the Trust and all its works are not a good thing' (Delius, 1996: 78).

He urged that greater recognition and material reward should be given to chiefs. This was a view widely shared by chiefs and expressed particularly vocally by chiefs in the Transkei in the 1940s (Evans, 1997: 216–18).

This orientation received a considerable boost in 1948 when the National Party won the general election and set about developing the system of apartheid. The Nationalist government was determined to achieve an even more comprehensive system of racial separation, especially in the cultural and political spheres. It viewed the reserve areas as a distinct domain for African society and asserted that chieftainship was the central and authentic institution within African society and could provide the foundations for the creation of a separate political system.

In line with this view, in 1951 the Bantu Authorities Act was passed. This Act became a cornerstone of the apartheid system. After a long history of ambiguity about the role of chiefs, and inconsistency and partiality in terms of the recognition of chiefs, the Act began a systematic process of incorporating chiefs into the administrative system. The system involved tribal authorities that were, at least in theory, based on historical chiefdoms as well as regional and territorial authorities. While traditional practice was used as the justification for the structure of the tribal authorities, in reality changes were introduced to make chiefs less dependent on their subjects.

A tribal authority was defined as a chief-in-council. While in the pre-colonial period councillors in many societies were partly selected on the basis of popular support and achievement and/or representing significant subgroups, now the majority were appointed by the chief and some by white officials (Hammond–Tooke, 1975: 208–9). The ethnography section of the Department of Bantu Affairs controlled decisions regarding which individuals to recognise as chiefs.

Over time many more chiefs were brought into the system than had previously enjoyed recognition. In Transkei the number of recognised chiefs, for example, doubled to sixty-four and headmen were made subordinate to chiefs. In Sekhukhuneland, the heartland of the Pedi Kingdom, the number of recognised chiefdoms increased from three to fifty-four. The stipends paid to chiefs were significantly increased.

All of these developments in practice lessened the dependence of chiefs on their subjects and strengthened the hand of the state (Evans, 1997: 251–4; Delius, 1996: 140–1).

When the scheme was first introduced some chiefs were opposed to it on the grounds that it would undermine popular legitimacy and support for chieftaincy. However, some chiefs were supportive of the idea, not least of all because they had been pressing for decades for wider recognition, more power and better pay. These

chiefs initially had to act cautiously because there was widespread popular hostility to the system. Migrant workers and people living in rural areas believed that the system would turn chiefs into instruments of control, and would make them unresponsive to the needs of their subjects. They were particularly concerned—with good cause—that Bantu authorities would be used to ensure that chiefs would drive ahead with hated betterment schemes against the wishes of their subjects. As a result, the attempt to impose Bantu authorities led to a wave of revolts in the early 1950s and early 1960s, which spanned the Northern Transvaal and the Eastern Cape. However, this resistance was crushed with considerable force and by the end of the 1960s the Bantu authority system had become pervasive in rural South Africa (Delius, 1996: 76–138; Lodge, 1983: 261–94).

The imposition of the system of Bantu authorities, often in the face of considerable popular opposition, ensured that the balance between popular support and legitimacy and bureaucratic control from above swung in the latter direction. Individuals who were ready to co-operate with the new order replaced individual chiefs who proved reluctant to accept the new system—often for fear of alienating their subjects. In some cases relatively junior chiefs who were prepared to support the system where promoted over the heads of more senior chiefs who resisted it.

In one particularly dramatic case in the Transvaal, the Pedi Paramount refused to accept the establishment of a tribal authority. In response the Department of Bantu Affairs went to the subordinate chiefs and offered to recognise them as independent chiefs if they accepted the new system. This eventually led to the creation of scores of new chiefs, many of them held in open contempt by their subjects (Delius, 1996: 140–1).

Chiefs' position as instruments of control was compounded by the pivotal role they played in the system of influx control that was central to the apartheid system. Whereas previously men had to go to white magistrates/commissioners to be issued with passes to leave rural areas to seek employment in the cities, this responsibility increasingly was devolved to chiefs. This gave chiefs considerable power. If a subject refused to pay tribute or obey orders, a chief could refuse him a pass and thus make it much more difficult for him to find work.

Chiefs' new powers and backing from an increasingly coercive state allowed them to make increasing demands on the time and money of their subjects. These subjects, especially women and children, were expected to undertake long hours of labour on the chief's fields or in his household. A variety of levies were imposed on subjects. These included money for cars, houses and bridewealth payments for the chief. More community-oriented levies were also imposed—levies for building schools, clinics and tribal offices. But in many cases these funds were misappropriated by chiefs and councillors, and communities found that, despite paying levies for years, the community coffers were empty. Chiefs also increasingly demanded gifts and bribes for providing any service to their subjects. Provision was made under the Bantu authorities system for proper tribal accounts to be kept, but in most cases tribal financial records were in a shambles or non-existent. The apartheid state was prepared to tolerate this situation in order to maintain chiefly support, and high levels of maladministration and corruption eventually became pervasive in the homeland systems built on the foundations of the Bantu authority

system in the 1970s (Delius, 1996: 139–71; Hammond–Tooke, 1975: 206–15; Evans, 1997: 270–1; Maloka & Gordon, 1996: 40–3; Van Kessel & Oomen, 1997: 566–9).

The increasingly heavy demands of chiefs produced mounting resentment among many subjects. However, this resentment was not transferred to the institution of chieftainship. Some chiefs continued to attempt to serve the interests of their subjects as best as they could under the new dispensation. One view was that while individual chiefs had become incompetent and corrupt, chieftainship remained a vital institution. However, by the 1980s the younger, more educated generation in the rural areas who had grown up listening to their parents complaining about the incompetence, oppression and corruption of chiefs was more inclined to argue that the institution of chieftainship should be abolished. There were also mounting tensions in some areas between chiefs and civic organisations and women's groups. In the 1980s, in the context of the nation-wide youth-led uprising particularly in the Northern Transvaal, youths rose in revolt and demanded that chiefs mend their ways or resign from homeland structures. Some insisted that chieftainship should be abolished. But even in the ranks of the youth there was no clarity as to the role that chiefs should play in the future. As a result, by the end of the 1980s there were considerable differences of opinion and debate within rural areas about the position of chiefs. There was also a strong regional dimension to these views with support for chieftainship being much stronger in some areas than others (ibid).

BANTU AUTHORITIES, BOUNDARIES AND LAND TENURE

The process of establishing tribal authorities involved a comprehensive attempt to demarcate tribal boundaries. Section 2(2) and (3) of the Bantu Authorities Act stipulated that a tribal authority should be 'established in respect of the area assigned to a chief or headman of the tribe or community in question' and that the relevant areas had to be made known by notice in the *Government Gazette*. In the 1950s and the 1960s scores of these notices were gazetted.

This process of allocation was profoundly influenced by the broader context of resistance to Bantu authorities.

Tribal authorities were ultimately established throughout the reserve and trust areas. Groups who readily accepted the establishment of tribal authorities were often allocated land claimed by groups who had resisted the system.[19]

Some resistors found that when they finally agreed to the establishment of a tribal authority their domains had been substantially diminished. Others, like the Pedi Paramountcy, found that land which had been bought with funds collected through tribal levies and registered 'in trust' had been allocated to tribal authorities which had been established in defiance of both the Paramount and the opposition of the majority of the population in the areas affected (Delius, 1996: 18, 118, 141).

According to Crais (2002: 154–5), in Pondoland, where Chief Botha Sigcau supported the introduction of Bantu authorities, he was delegated the power

[19] This observation is based on the author's extensive fieldwork in Limpopo Province in the 1980s and has been confirmed for the Transkei by William Beinart who has undertaken research on and fieldwork in the Transkei over the last 30 years.

> 'to reorganize much of Pondoland in to the various tribal authorities . . . . He split up clans and, at least in one case, "recommended a commoner as head of a tribal authority where there was a chief . . . ." Under Bantu Authorities the paramount attempted to extend his power, especially in Lambasi [a previously independent area] in part by claiming large amounts of land for grazing his "royal herds".'

It is clear that the 1951 Bantu Authorities Act did not confer rights of ownership to land but only defined an area of political jurisdiction.[20] Tribal authorities were not given explicit land allocation powers under the Act but were given, in s 4(1)(*b*), the 'powers, functions or duties conferred or imposed upon its chief or headman under any law, as are in accordance with any applicable Black law and custom, or in terms of any regulations . . .'.

Complex effects resulted from the establishment of a more authoritarian form of chieftainship through Bantu authorities in a context of high levels of in-migration into reserve and trust areas as well as mounting land shortage. However, a broad tendency was for chiefs to use their enhanced power and reduced popular accountability to attempt to assert greater control over the allocation of land. They were able to expand their access to land and to provide their closest supporters with better quality land. They were also able to benefit from increased payments demanded from old and new subjects for allocations of both arable and residential land. Overall the changing context and balance of power within chiefdoms in this period had the effect of further weakening the security of land tenure that commoner households and localised groups had previously enjoyed (Delius, 1983: 142–7; Letsloalo, 1987: 43–81; Cross, 1991: 72–3; James, 1987: 132–52).

Substantial processes of coerced in-migration also heightened the levels of political and ethnic diversity within areas of chiefly authority. In many instances these changes created tensions and conflicts. For example, part of Dinkwanyane chiefdom based on the farm Boomplaats in the Lydenburg District of the Transvaal had resisted resettlement until they moved to Jane Furse in Sekhukhuneland in 1960 where they settled within the area of the Madibong chiefdom. They were a predominantly Christian community and found themselves being derided by their traditionalist neighbours. Individuals who attended the meetings in the chiefdom were jeered at and reminded of their status as refugees. They also struggled to get access to arable land and according to Mulaudzi (2002: 81–3) some of those who did

> 'gave up on farming as jealous members of Madibong village would drive their livestock into the fields where they would feed on the Dinkwanyane's crops. In response to complaints about such a disregard for property, livestock owners in Madibong argued that the fields were in fact grazing land belonging to their grandparents.'

In this instance, as in many others,[21] 'the wider community' provided very little protection for the rights of a distinct minority.

By the late 1960s the Bantu authorities system was firmly entrenched. In the context of the administrative hubris that accompanied the era of high apartheid, an

[20] Department of Land Affairs Memorandum JG/6/3/2/736, A Barkhuizen to A Claassens, September 1997.

[21] See, for example, Delius (1983: 25, 185).

ambitious attempt was made to overhaul and systematise land regulations. Proclamation R188 of 1969 was issued under the 1927 Native Administration Act and the 1936 Native Trust and Land Act. The drafter of the legislation argued that the regulations were 'to very large extent the enactment of indigenous (customary) law' (Budlender & Latsky, 1991: 122). In practice they were far from such an expression. Ownership of the land continued to be vested in the SANT, and all trust land in a district or area was placed under the control of the relevant Bantu Affairs commissioner. These commissioners were, however, obliged to consult with chiefs and headmen in the exercise of their powers (Proclamation R188 of 1969: clauses 5, 19(1) 47(3)*(a)*). Customary law and pre-colonial practice did not feature the specific forms of tenure for which the proclamation provided—quitrent in the case of surveyed land and permission to occupy in the case of unsurveyed land. The regulations also imposed various conditions—for example, beneficial occupation; one man, one lot; and plot sizes of four morgen or less—which were unknown in pre-colonial practice. In addition, the powers given to the minister and his officials to appropriate land and to suspend, terminate or cancel quitrent title or Permissions to Occupy (PTOs) far exceeded anything that chiefs could aspire to in pre-colonial societies (ibid).

The regulations are a powerful statement of the extent to which official forms of tenure had departed from the logic and practice of land tenure in African societies prior to colonial incorporation. They also showed very little understanding of the way in which tenure relations had evolved on the ground in the 20th century and as a result managed to represent neither past nor present practice. The impact of these regulations on administrative practice across the country appears to have been uneven but the issuing of PTOs for both arable and residential land became a pervasive reality on trust land. While the Bantu Affairs commissioners formally played a pivotal role in this process, in some areas this authority was effectively devolved to chiefs and headmen and contributed to their growing power.[22]

CONCLUSION

This chapter has outlined interrelated patterns of change in the institution of chieftainship and patterns of land tenure in the reserve areas in the modern history of South Africa. Systems of land tenure and the role of chiefs in relation to these have been fundamentally transformed over this period.

In the 19th century, partial sources and the blinkers created by a combination of racism and social Darwinism as well as embedded Western legal constructs led to caricatured representation of African systems of land tenure which exaggerated the role of chiefs and diminished the rights of lower levels of political authority and households.

With colonial conquest, ownership of the land was vested in the state and systems of landholding underwent diverse processes of change, partly conditioned by attempts to individualise tenure in some areas and to impose highly interventionist trust tenures in others.

[22] For a fuller discussion see Delius (1997), Lahiff (2000) and Oomen (2000: 30–1).

Forms of customary tenure also continued to evolve in many areas according to the interplay of the internal dynamics of these systems and changing contexts.

Chiefs continued in many areas to play a role in land allocation processes although in some places and periods headmen took over this function entirely and in all instances white officials were formally in control although in reality often had limited effective power.

The role of chiefs in land allocation was also influenced by mounting land shortages and the increasingly authoritarian nature of the institution, which made chiefs less responsive to the interests of their subjects and created opportunities for coercion and corruption.

In this context the Communal Land Rights Act has a number of significant implications. It envisages a fundamental shift in the location of ownership of land from the state to communities. It is informed by a notion of absolute ownership which is at variance with the system of overlapping rights to land which existed within pre-colonial systems and which partially survived in the 20th century in evolving systems of customary tenure. It provides that if a community has a recognised traditional council, the powers and duties of land administration shall be exercised by that council.

This represents a substantial shift from previous systems in which these powers were formally vested in officials, although usually in consultation with traditional leaders. It also represents a potential shift from practice in communities in which systems of communal tenure involve decisions about land management and allocation being taken at lower levels of political authority and by households. This shift in the location of ownership and authority over land creates the potential for traditional leaders to expand their control over land.

However, where there is not a recognised traditional council, the Act specifies that the members of the land administration committee must be persons not holding any traditional leadership position. This alternative provision also implies a major shift in the location of authority over land in that it does not allow for the partial role for traditional authorities in land allocation which many played in recent history.

The Act states in its preamble that it is designed to give effect to s 25(6) of the Constitution of the Republic of South Africa, 1996 which states:

> 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled . . . to redress.'

For many rural people, the Communal Land Rights Act falls short of restoring the degrees of security of tenure which existed prior to colonial conquest, and even through the 20th century in varying degrees in different parts of the country, as rural populations sought to resist centralised control over land tenure and administration.

The vesting of land in communities potentially undermines the rights of occupants and users which, as has been pointed out in this chapter, were strong in pre-colonial times and which survived in varying degrees over the 20th century.

Installing traditional authorities as administrators of communal land would provide control without the checks and balances that existed on chiefly power in

land-abundant pre-colonial systems. It also does not provide effective recognition of the overlapping levels of authority over land which existed in these systems and which endured to some extent in modified systems of communal tenure under colonial control, as they do today.

At the heart of that system it places traditional councils, which have lost a good deal of popular support and accountability in modern times. It is by no means clear that quotas for elected and female members of these councils are sufficient to restore to traditional leadership the levels of popular accountability that existed in pre-colonial times. The continuing assumption that genealogical position is the key determinant of succession to chieftainship which is rooted in colonial policy and practice precludes processes of political competition and mobilisation which shaped the nature of chieftainship in pre-colonial times.

Installing traditional authorities as administrators of communal land does not cater for a reality in which, over time, populations of particular tribal areas have become extremely diverse both because of the sometimes arbitrary definition of boundaries and large-scale removals/migration from black spots and white farms from the 1950s. The position of minority groups is potentially undermined by location of power at the level of the traditional authority as an expression of the community as a whole.

The assumption that recognised traditional authorities are coterminous with communities also does not acknowledge the extent to which tribal authority boundaries were manipulated to favour pliant groups and to penalise those who resisted key aspects of the apartheid system.

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10

Chiefs and the ANC in South Africa: the reconstruction of tradition?[1]

By Lungisile Ntsebeza

INTRODUCTION

This chapter explores the relationship between the African National Congress (ANC) and traditional authorities, or chiefs, in South Africa with specific reference to the processes that led to the promulgation of two pieces of legislation—the Traditional Leadership and Governance Framework Act 41 of 2003 and the Communal Land Rights Act 11 of 2004.

For most of the first decade of its rule, the ANC-led government showed indecision as to how it would extend democracy to rural areas falling under the jurisdiction of traditional authorities. The South African Constitution, which is based on liberal principles of representative government, recognises the hereditary institution of traditional leadership without clarifying the precise roles, functions and powers of traditional authorities in a liberal democracy. This task is left up to legislation.

After many hesitations, Parliament passed the two Acts mentioned above, which give some degree of clarity to the position of traditional authorities in South Africa's democracy. These laws make concessions to traditional authorities, effectively resuscitating the powers they enjoyed under the notorious Bantu Authorities Act 68 of 1951.[2]

As will be explained in this chapter, the Traditional Leadership and Governance Framework Act establishes traditional councils. The much-hated tribal authorities created under apartheid will be the foundation for the setting up of these councils. The Communal Land Rights Act recognises these traditional councils as having the authority to administer and allocate land in the rural areas.

In other words, after nearly ten years of prevarication, the ANC-led government has given powers to traditional authorities on basically the same lines as its

[1] This chapter has its genesis in ideas also discussed in the penultimate chapter of Ntsebeza's book Democracy Compromised: Chiefs and the Politics of Land in South Africa (Originally published by Brill Academic Publishers, 2005 and then republished by the HSRC Press, 2006).

[2] Subsequently renamed the Black Authorities Act.

predecessor, the apartheid state. To the extent that traditional authorities could assert their authority in the past, this was based on their control of the processes of land administration and allocation at the level of local administration and tribal authorities. Traditional authorities abused their powers precisely because they were unaccountable to their constituencies. The powers they will enjoy under the two Acts mentioned perpetuate this apartheid legacy.

This chapter attempts to explain how it came about that the ANC-led government endorsed the authority of a notorious institution. Against a background of continued tensions between traditional authorities, civic organisations and elected councillors, this chapter will focus on the development of policy and legislation on rural governance in a democratic South Africa. The reaction of traditional authorities and dynamics on the ground will also be explored. As indicated, particular attention will be given to processes leading to the promulgation of the two controversial pieces of legislation.

THE ANC AND THE RECOGNITION OF TRADITIONAL AUTHORITIES

Given the struggles waged by rural residents against tribal authorities and their incumbents, the recognition of the institution of traditional leaders in the interim Constitution in 1993 (and the final Constitution in 1996) must have come as a shock to many observers. Why would an organisation such as the ANC, which had fought for a democratic unitary state, embrace the institution of traditional leadership with its notorious record under apartheid?

I will argue that three closely connected factors help to explain the re-emergence of traditional authorities as a political force from the early 1990s. First, to the extent that the ANC had policies towards traditional authorities, these were highly ambiguous and ambivalent. The establishment of the Congress of Traditional Leaders in South Africa (Contralesa) is a good example and will be discussed in detail. A second key factor is the role of Inkatha in KwaZulu–Natal, especially in the bloody conflict involving the United Democratic Front (UDF) and ANC in the 1980s and early 1990s. Of particular importance is how the ANC and the then ruling National Party (NP) perceived the importance of the Inkatha Freedom Party (IFP) in the final political settlement. Lastly, one needs to take into account the political and economic context within which the South African political settlement was taking place, and which was in many ways influenced by global and continental trends.

ANC POLICIES ON TRADITIONAL AUTHORITIES UP TO THE ESTABLISHMENT OF CONTRALESA

The position of the ANC towards traditional authorities has always been ambivalent. When the ANC was formed in 1912, traditional authorities were among its founding members. However, from the 1940s onwards, when the ANC started becoming a radical organisation under pressure from the Youth League and its communist allies, two broad schools of thought began to emerge. Some in the ANC supported traditional authorities who were critical of government policies. Others, influenced by communists, argued that the institution belonged to a feudal

era and needed to be replaced by democratic structures. Govan Mbeki represented the latter.[3]

Overall, however, the ANC was inclined towards a strategy of wooing 'progressive' traditional authorities rather than establishing alternative democratic structures to replace them in rural areas. Indeed, the ANC was exceptionally weak in the rural areas and never managed to establish a coherent programme aimed at building alternative democratic structures there.

The role of traditional authorities received renewed attention within the ANC after the liberation organisations were banned. The main issue was how the organisation was to relate to people such as Chief Mangosuthu Buthelezi, who worked within the apartheid structures. Again Mbeki, incarcerated on Robben Island, was the leading figure in cautioning against working with them. It appears that Nelson Mandela, on the other hand, was the main proponent of a strategy of co-operation.[4]

There seems to have been less debate among ANC and South African Communist Party (SACP) members in exile at this time. According to Mbeki (1996: 92), exiled members 'encouraged Buthelezi to establish a political party in his homeland along the lines of Chief Victor Poto Ndamase's Democratic Party in the Transkei'. Mbeki (ibid) adds that the exile position 'met with strong opposition from the ANC's internal membership in Natal'—people who were in the thick of things.

The role of traditional authorities in the liberation struggle also cropped up when the internal struggles in South Africa started shifting to rural areas in the mid- to late 1980s. The dominant internal resistance organisation in this period was the UDF, largely regarded as an internal, aboveground wing of the then banned ANC and SACP. Like the ANC, the UDF was urban orientated. Van Kessel (1993, 1995, 2000) has argued that the UDF was poorly organised in rural areas. Whether this was in fact the case or not, the UDF evolved a radical position on traditional authorities when it began to target rural areas in 1985. This contrasted sharply with the position of the ANC in exile and some members on Robben Island.

The General Secretary of the UDF, Patrick 'Terror' Lekota (who became Minister of Defence in 2006), categorically and unambiguously stated that chieftaincy is 'a dying institution' (Van Kessel, 1995: 173, quoting the South African Students Press Union). Lekota clearly represented the Govan Mbeki position. The 1986 National Working Committee of the UDF resolved that 'organisation [in the Bantustans] must be intensified and tribal structures should be replaced with democratic organisations' (Van Kessel, 1995: 173). However, as will be shown, the UDF's position would radically change.

The formation of Contralesa in 1987 again brought to the fore the issue of the ANC's policy on traditional authorities. Contralesa was officially launched on 20 September 1987 by the group of traditional authorities opposed to the declaration

[3] See Mbeki (1984: 47).

[4] See Mandela (1995). At a personal level, Buthelezi and Mandela corresponded with each other; and Buthelezi ostensibly refused 'independence' because of the continued incarceration of Mandela.

of apartheid-style independence in KwaNdebele. Harassed by the apartheid state, these traditional authorities saw the UDF as an organisation that could give them protection, and help them to organise other traditional authorities (Oomen, 1996: 49). It appears from an account by 'T Zuma'[5] (1990) in the *African Communist* that the ANC/SACP in exile and the South African Youth Congress (Sayco), under the influence of Peter Mokaba, played a prominent role in the formation of Contralesa. According to Zuma (1990: 68), Sayco 'had a significant influence in the formation of Cotralesa' [*sic*].[6]

The apparent contradiction in UDF policy towards traditional authorities can be partly explained in terms of the uneven and ambiguous relationship between the ANC and UDF. The ANC, unlike the UDF, was not keen to write off traditional authorities, preferring to categorise them as progressive or collaborationist.

The establishment of Contralesa was clearly informed by the ANC's ambiguous and expedient policy towards traditional authorities. By this time, it is important to note, the UDF was 'in considerable disarray' (Van Kessel, 1995: 174). The national state of emergency declared in June 1986 had resulted in the detention of many political activists while others had gone underground or fled the country. Leading members of the UDF who had articulated a policy on traditional authorities, among them Lekota, had been detained even earlier and were facing charges in a marathon trial in the town of Delmas. Mokaba, Sayco leader at the time, was not detained—much to the surprise of some commentators.[7] Mokaba, as already stated, played a leading role in the formation of Contralesa.

It is thus not surprising that the ANC celebrated the formation of Contralesa and saw it 'as continuing the heroic role of the chiefs who were part of the ANC' (Zuma, 1990: 70). The ANC urged a Contralesa delegation that visited it in Lusaka on 24 February 1988 'to spread itself into the whole of South Africa, organising all patriotic chiefs who are longing for a political home' (ibid). Clearly, and despite their experiences with Buthelezi, the ANC in exile still relied on 'patriotic chiefs' as their main representatives in rural areas in preference to establishing their own alternative structures.

THE POSITION AFTER THE ANC'S UNBANNING IN 1990

Since its unbanning in 1990, the ANC policy on traditional authorities has been, as before, difficult to pin down. Oomen argues that traditional authorities have never been officially denigrated in ANC documents. In support of this position, Oomen (1996: 101) quotes Mandela on the occasion of his release from prison on 11 February 1990: 'I greet the traditional leaders of our country—many of you continue to walk in the footsteps of great heroes like Hintsa and Sekhukhune.'

By 1991, says Oomen (ibid), it was common to hear traditional authorities being mentioned by some ANC leaders as part of the coalition of forces struggling for

[5] The name Zuma here appears to be an pseudonym.

[6] Mokaba also attended the launch.

[7] Sayco was launched at the height of repression, in March 1987, after the declaration of the national state of emergency in June 1986. For an account of Mokaba's dubious role in politics, see Evans (2002) and Ngobeni (2002).

national liberation—alongside 'black workers, students, the rural poor, professionals and black business-people'. However, an attempt to clarify the role of traditional authorities was made in 1992 when the ANC formulated its policy guidelines:

> 'The institution of chieftainship has played an important role in the history of our country and chiefs will continue to play an important role in unifying our people and performing ceremonial and other functions allocated to them by law. The powers of chiefs shall always be exercised subject to the provisions of the constitution and other laws. Provision will be made for an appropriate structure consisting of traditional leaders to be created by law, in order to advise parliament—on matters relevant to customary law and other matters relating to the powers and functions of chiefs. Changes in the existing powers and functions of chiefs will only be made by parliament after such consultation has taken place' (quoted in Oomen, 1996: 103).

These policy guidelines spelt defeat for the Mbeki position on traditional authorities outlined earlier. But some ANC members, including constitutional expert Albie Sachs (1992: 77–82), never envisaged that chieftainship and chiefs, as hereditary authorities, would play a primary role in local government and land administration. Sachs suggested that there would be a growing tendency towards creating democratically elected councils to work with chiefs and chieftainesses in local administration. In other words, the role of chiefs and chieftainesses would be subordinate to that of elected representatives. How this arrangement was to be put into practice was never spelt out.

Sceptics such as Maloka (1995: 43), writing in the SACP organ, the *African Communist*, warned that although there were 'genuine and dedicated chiefs' who might play an advisory and ceremonial role in elected local government structures, other chiefs 'survive on the fringes of our society through clientelism and coercion'. Maloka, though, did not provide any evidence as to the identity of these 'genuine and dedicated chiefs' or say on what grounds he based his claim.

Houston (1997: 129) has suggested that the UDF influenced the ANC position. He says the campaigns of the 1980s made 'many of the Front's members . . . aware of the role of traditional leaders in the homeland system, leading to a rejection of this institution by the urban-based membership of the UDF'. When the UDF disbanded in 1991, many of its members not only joined the ANC and the SACP, but occupied high-ranking positions in these organisations. The political culture of these new members had been shaped by, among other things, opposition to tribal authorities.

Van Kessel (1993: 612) is more perceptive:

> 'The legacy of this extraordinary period of youth mobilisation in the 1980s gave the ANC a difficult start after its unbanning in February 1990. It could not simply build on the foundations laid by the UDF, which in the rural parts of the Northern Transvaal had become largely associated with rebellious youth.'

Given the role of the UDF in the formation of Contralesa, I would be inclined to share Van Kessel's cautious position.

The ANC policy guidelines on traditional authorities were formulated in the midst of the political negotiations of the early 1990s, which led to the first

democratic elections in 1994. Despite attempts to involve traditional authorities, by March 1993 they were not an integral part of the negotiation process. Buthelezi was a critical factor in this situation. He demanded separate delegations for his KwaZulu government and his king. When this was not granted, Buthelezi and the king pulled out of the process.

At this time, however, both the NP and ANC considered that 'the institution of traditional leaders is still relatively widely supported, especially in rural areas where they fulfil an important government function at local level' (Henrard, 1999: 397). According to Oomen (1996: 56), the ANC and NP saw traditional authorities as 'important vote brokers'. By this time the question of non-racial elections was squarely on the cards and votes counted. I challenge the assumption of the ANC and NP that traditional authorities were 'widely supported'. What cannot be disputed, though, is that in areas where traditional authorities were feared, some rural residents could be intimidated to vote for a candidate preferred by a traditional authority.

The ANC guidelines suggested a ceremonial and advisory role for traditional authorities. Contralesa rejected this notion and began to put pressure on the ANC. The election of Chief Phathekile Holomisa seems to have been critical in this regard. Holomisa became president of Contralesa after the murder on 25 February 1991 of its first president, Chief Maphumulo.[8] It was during Holomisa's reign that Contralesa pushed for the recognition of traditional authorities and their institutions, as opposed to municipalities and elected councillors, as the primary level of government in rural areas.[9]

THE ROLE OF THE IFP IN THE RECOGNITION OF TRADITIONAL AUTHORITIES

While traditional authorities in other provinces were opportunistically jumping on the bandwagon of the ANC, a different picture was playing out in KwaZulu–Natal. Here the earlier support for Buthelezi from some ANC leaders was superseded by a fall-out between him and the ANC. According to Govan Mbeki, relations between the two soured in 1979 when Buthelezi broke a secrecy pact between an ANC delegation led by Oliver Tambo and one by Inkatha led by Buthelezi. When the ANC-oriented UDF was established in 1983, tensions flared between supporters of the new organisation and those of Buthelezi. This led to a bloody conflict which lasted through most of the 1980s and the first half of the 1990s.

Buthelezi and his supporters never joined Contralesa. In fact, they displayed a great deal of hostility towards the organisation. The election of Chief Maphumulo of KwaZulu–Natal as Contralesa president angered Buthelezi, who described Contralesa as an organisation attempting to 'thrust the spear into the very heart of Zulu unity' (Zuma, 1990: 72). In September 1989, a few months after Maphumulo's election, Buthelezi summoned a meeting in Ulundi of all traditional

[8] After prior attempts on his life, Maphumulo was shot dead at his home in Pietermaritzburg by assassins. No one was apprehended.

[9] The author has shared many platforms with Holomisa, debating the role of traditional authorities in a modern democracy.

authorities in KwaZulu–Natal, including King Goodwill Zwelithini. Buthelezi called on them to 'close ranks and rejoice in our unity and to tell Inkosi Maphumulo to go to hell' (ibid). The king is reported to have added his voice to the attack on Maphumulo (ibid).[10]

In July 1990, Inkatha transformed itself from a cultural movement into a political party, the IFP. This party later formed a conservative alliance—the Concerned South African Group (Cosag)—with the Conservative Party, Lucas Mangope's Bophuthatswana and Oupa Gqozo's Ciskei. Attempts to involve the IFP in the multi-party talks that resumed in March 1993 were foiled when the party walked out of the multi-party negotiating process citing marginalisation of the IFP and its allies. This meant that Cosag was not part of the resolution that recognised traditional authorities. It therefore came as no surprise that the IFP rejected the interim Constitution passed on 18 November 1993. By this time, the IFP was making demands for more powers to be granted to the provinces, even suggesting 'self-determination' bordering on secession for KwaZulu–Natal.

The ANC and the NP saw the rejection of the interim Constitution by the IFP as a threat to the first democratic elections. Consequently, on the eve of these elections in 1994, several concessions were made to ensure the participation of the IFP in particular.[11] These included increasing the powers of provinces and the recognition of the Zulu king. In this regard, the ANC and NP undertook to recognise and protect the institution, status and role of the constitutional position of the King of the Zulus and the Kingdom of KwaZulu, which would be provided for in the provincial Constitution of KwaZulu–Natal (Henrard, 1999: 400). Thus, six days before the elections, the IFP's participation was ensured.

THE CONTINENTAL AND GLOBAL CONTEXT

The recognition of traditional authorities in South Africa cannot be divorced from the general re-emergence of traditional and customary authorities on the African continent in particular. This resurgence is often associated with the advent of multi-party democracy and decentralisation in the early 1990s. Countries that were initially hostile towards traditional authorities found themselves recognising the institution. Mozambique is a pertinent case. When Frelimo came to power in 1975 and introduced a Marxist–Leninist state, it immediately abolished the institution of traditional leadership in that country. Some scholars and commentators argue that in doing so, Frelimo drove most traditional leaders into the camp of the opposition Renamo, which proceeded to wage a civil war against Frelimo in the 1980s and early 1990s. When Frelimo succumbed under the pressures of neoliberalism, and accepted multi-party democracy and decentralisation in the 1990s, it recognised the institution of traditional leadership. However, like the ANC, Frelimo was ambivalent about the status of traditional authorities.[12]

[10] See also Calland (1989).

[11] Apart from the IFP, there were white, right-wing parties who wanted, among other things, to establish a Volkstaat or ethnic state for Afrikaners. This chapter will only consider the IFP.

[12] For the Mozambican case see Dinerman (2001), Bowen (2000), Libombo (2000) and Pitcher (1996).

It is noteworthy that during the Mozambican civil war there was evidence that Renamo was mobilising traditional authorities, and that the ANC had offices in that country and closely witnessed these events. In fact, in ANC discussions about Contralesa and how the party should relate to traditional authorities, reference was made to the Mozambican experience, clearly showing that the ANC was drawing lessons. The ANC leadership did not, however, situate its reading of the Mozambican experience within the specific context of South Africa. While similarities between the two countries cannot be denied, it is equally short sighted to overlook the differences. If it was true in the case of Mozambique that rural residents supported traditional authorities, for whatever reasons, there was clear evidence in South Africa by the late 1980s and early 1990s that the legitimacy of these authorities was seriously questioned.

The global context in the early 1990s, when the ANC was entering into political negotiations, must also be taken into account. The late 1980s and early 1990s was a period of triumph for the forces of global neoliberal capitalism in that the end of the Cold War spelled the demise of the Soviet Empire as well as the rise of capitalism as the dominant system in the world. This left organisations such as the ANC, which had drawn support and inspiration from the Soviet bloc, virtually stranded.

At the outset of political negotiations, the ANC's main programme was the Freedom Charter, a programme with socialist aspirations, including the notion of nationalisation of the main means of production. In an age dominated by neoliberal capitalism, the Freedom Charter was an anachronism. By 1994, the ANC had succumbed to neoliberal pressures. Its election manifesto was based on the Reconstruction and Development Programme (RDP), a contradictory document incorporating elements of neoliberalism and social democracy. When the ANC came to power in 1994, it pushed to the back burner the developmental aspects of the RDP and gradually leaned more heavily on neoliberal principles, culminating in the introduction in 1996 the Growth, Employment and Redistribution policy framework. There were, as Marais (1998) argues, tensions within the ANC, but the conservative forces won the day.

In summary, traditional authorities in South Africa gained recognition in the interim Constitution largely as a result of political expediency. On the one hand, the ANC was keen to gain the backing of Contralesa and its supporters. On the other hand, the ANC simultaneously confronted, and made concessions to, the IFP. This had little to do with the situation on the ground. For its part, the ANC seemed to think that the coexistence between democracy and traditional authorities was possible in a democratic South Africa.

CONSTITUTIONAL GUARANTEES FOR TRADITIONAL LEADERS

As a result of various factors outlined in this chapter, traditional authorities, particularly those in Contralesa, were in the end party to Resolution 34 adopted by the National Negotiating Council on 11 November 1993. In terms of this resolution, the following points, among others, were agreed upon:

'■ Traditional authorities shall continue to exercise their functions in terms of indigenous law as prescribed and regulated by enabling legislation.

- There shall be an elected local government, which shall take political responsibility for the provision of services in its area of jurisdiction.
- The (hereditary) traditional leaders within the area of jurisdiction of a local authority shall be *ex officio* members of the local government.
- The chairperson of any local government shall be elected from amongst all the members of the local government' (National Negotiating Council, 1993: 49).

Thus traditional authorities managed to secure guarantees in the interim Constitution, albeit of a subordinate position to those of elected bodies. It was also agreed that the principles and values contained in the interim Constitution would not be undermined in the final Constitution. In this regard, a series of 34 constitutional principles was endorsed. The final Constitution had to comply with these principles (Henrard, 1999: 380). With regard to traditional authorities, Constitutional Principle XIII stated:

> 'The institution and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied in courts, subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.'

Some commentators see the ANC's support for the recognition of traditional authorities in the interim Constitution as *quid pro quo*—a reward for their political support. Henrard (1999: 398) cites Richard Sizani, at the time Deputy Director General of the Ministry for Provincial Affairs and Constitutional Development, as having asserted that traditional authorities managed to secure significant guarantees in the interim Constitution. On close analysis, however, these guarantees are not as strong as they initially appear. The recognition of existing traditional authorities and their practices applies only in situations where they are not repugnant to the provisions of the Constitution and existing legislation. In addition, Resolution 34 has a strong bias in favour of elected local government; traditional authorities would only be *ex officio* members of the local government.

RURAL DYNAMICS IN POST-1994 SOUTH AFRICA

Conditions on the ground after 1994 in many rural areas under traditional authorities demonstrated just how difficult it would be to accommodate them in a democracy. While the Constitution recognised the institution of traditional leaders, their roles, functions and powers were not spelt out. This led to much confusion as well as tension on the ground.

Elected councillors were introduced after the local government elections in 1995 and 1996 as part of the attempt to extend democracy to rural areas. Some of the functions of these democratically elected structures, such as the promotion of state-led development in rural areas, had previously been performed by traditional authorities. In the absence of clear-cut functions for traditional authorities, taking some functions away from them was surely going to be a recipe for chaos.

Most of the tension revolved around confusion about the land allocation function. This was particularly true in cases where civic structures and traditional authorities had more or less equal support. Prior to the promulgation of the Communal Land Rights Act, the laws governing the allocation of land in the rural

areas of the former Bantustans had not been repealed. In this regard, the Constitution was clear that existing laws would remain in force until they had been replaced by appropriate legislation. In terms of the existing laws, an application for land could only get legal recognition if it bore the stamp of the relevant tribal authority and other relevant signatures.

However, reality on the ground was different. Many rural residents, rural councillors and South Africans assumed that the newly elected councillors would take over the vital function of land allocation. After all, control over land had been the cardinal issue in rural struggles of the early to mid-1990s. An example drawn from the Xhalanga district in the Eastern Cape illustrates this point. When the Integrated Development Plan (IDP) for this area was being drawn up in 1999, the issue of who was responsible for land allocation arose. Although interviews and minutes of meetings suggest that, on the whole, there were no tensions between elected rural councillors and the representative of traditional authorities, there were animated discussions when it came to the question of land administration.

It appears that the representative pointed out that tribal authorities were still responsible for land administration. This claim was strongly challenged by rural councillors. The explanation of the representative of traditional authorities was simple and highlighted the lack of clarity regarding land administration in the countryside: 'Nothing is clear. Government has indicated that land allocation will be the function of the TRCs [Transitional Representative Councils]. However, at the moment this has not happened. Most areas still use the old method.'[13] The IDP committee never resolved this issue. A committee member said that one of the reasons why the matter was not discussed further was because 'it was seen as divisive'.[14] The committee could not resolve the issue given the government's ambivalence towards the role, functions and powers of traditional authorities.

Residents and rural councillors got a rude shock when it transpired that the old apartheid laws were still in place. Government officials still use, with minor adjustments, the apartheid procedure and do not recognise elected councillors as having the powers to allocate land. The extent of the confusion surrounding land allocation in rural areas, the dilemma of rural residents and the unclear role of government officials are captured in comments by Mr Jama, a rural resident of an area called Sifonondile and who is sympathetic to the South African National Civic Organisation (Sanco):

> 'This is the reason why we still use chiefs. Rural councillors run in circles. This makes us a laughing stock and divides us. People will tell you: "Go to your rural councillor, you won't succeed." You end up going to the chief, even if you did not want to. At the magistrate's offices they ask you about the stamp [of the tribal authority]. If you do not have the stamp they will say: "Don't waste our time." The land issue is complex. There is a struggle between Trep Cs [elected rural councillors from the Transitional Representative Council] and the headman. The former brought electricity and telephones, but land is in the hands of chiefs. You are forced to be flexible (*kufuneka ubemvoco*) otherwise you won't get your benefits. When we wanted land for pre-schools we were told to go to the headman,

[13] Interview with headman Zantsi, Manzimahle, 9 September 2000.
[14] Interview with Mr Liwani, Cala, 11 September 2000.

> something that made the headman boastful. Sometimes you may have spoken badly about the headman, and you end up bowing down to it, as it is often necessary that you get what you want. With chiefs and headmen it takes a few days to get what you want, whereas with rural councillors it takes months, and even then you end up not succeeding.'[15]

Residents of Sifonondile were divided into supporters of the headman on the one hand, and civic structures and rural councillors on the other. In this area, civic structures under the auspices of Sanco demarcated land and allocated plots to supporters. Those who were allocated plots, however, were not granted Permission to Occupy (PTO) certificates as the government officials did not recognise their process. It is partly this dilemma to which the informant refers.

Jama's view also says something about the performance of rural councillors. It is clear from interviews with many rural inhabitants across gender and generation lines that there had been a high level of expectation that a post-1994 'developmental' local government would transform people's lives. By the end of the transition period in 2000, however, rural councillors had lost the confidence of ordinary rural residents. Apart from the inability of elected councillors to facilitate the legal occupation of land in rural areas, there were other causes of disgruntlement, for example, the lack of delivery of even basic services such as water and road maintenance.

DEMOCRATISING RURAL GOVERNANCE 1994–9 AND 2000

For almost 10 years, the ANC-led government of national unity was ambivalent about the role of traditional authorities in South Africa's democracy. When the Local Government Transition Act 209 was promulgated in 1993 to establish transitional structures, no provision was made for rural areas in the former Bantustans. Although the NP was still in power at the time, the ANC was a strong force in the promulgation of this Act. In urban areas, the Act established negotiation forums made up of representatives from civic organisations and municipalities.

It can be argued that the reason for the silence in 1993 on the form of local government in rural areas could have been that urban-based civics under Sanco dominated the National Local Government Forum, which was influential in the legislation drafting process (Mayekiso, 1996: 237). However, it could equally be argued that the ANC was trying to maintain a balancing act by ensuring that it did not alienate its support from either traditional authorities or activists. Under no pressure from its constituencies to resolve the discrepancy, the ANC comfortably drew support in the 1994 election from both traditional authorities in Contralesa and rural inhabitants organised by civic organisations.

A significant step taken by the new government in its attempts to democratise rural local governance was to separate the functions of local government and land administration, thus undoing a major legacy of apartheid which had been to concentrate and fuse power in one authority—the tribal authority.

With regard to local government, the division between the rural and the urban

[15] Interview with Mr Jama, Cala, 9 September 2000.

was abolished in the sense that municipalities made up of elected councillors were extended to all parts of the country, including rural areas under traditional authorities where municipalities had not previously existed. This was in line with the 1993 interim Constitution and the 1996 Constitution, which stipulated that municipalities made up of elected councillors had to be established throughout the country. As will be seen, various attempts have been made to phase out tribal authorities as the land administration and allocation authority.

Local government in post-1994 South Africa went through two phases: a transitional phase between 1995 and 2000 followed by the establishment of fully-fledged municipalities in December 2000. Amendments in June 1995 to the Local Government Transition Act rectified the silence about the form local government would take in rural areas. These amendments focused specifically on local government in rural areas and provided for a two-level structure consisting of a district council at sub-regional level and a range of possible structures at local (or primary) level.

Following the demarcation of municipal boundaries in 2000, new municipalities were established. A model amalgamating several urban and rural municipalities was adopted. This resulted in the creation of fewer—and geographically larger—municipalities. The number of municipalities was drastically reduced from 834 (in the period between 1995 and 2000) to 284. The number of councillors was also reduced, meaning that fewer councillors would be responsible for larger municipalities.

The Constitution and the White Paper on Local Government (MPACD, 1998) define post-1994 local government as 'developmental' local government, involving integrated development planning. This requires municipalities to co-ordinate all development activities within their areas of jurisdiction (Pycroft, 1998: 151). Developmental local government thus seeks not only to democratise local government by introducing the notion of elected representatives even in rural areas, but also to transform local governance with a new focus on improving the standard of living and quality of life of previously disadvantaged sectors of the community (Pycroft, 1998: 155). In addition, it requires that citizens should actively participate in development initiatives in their areas.[16]

Democratising land administration after 1994 was an integral part of the process of tenure reform in rural areas. Attempts to empower rural residents by involving them in decision-making processes on land issues were given a boost in April 1997 with the launch of the White Paper on South African Land Policy (DLA, 1997). This document announced its 'key areas of concern' as the 'rights in land' of the people living in rural areas. It provided a guide for the legislative process that would define the land tenure rights of rural people and a system of land administration. The document draws a distinction between 'ownership' and 'governance'. In terms of para 5.13.2 of the White Paper (1997: 93), 'the Tenure Reform programme will separate these functions so that ownership can be transferred from the state to the communities and individuals on the land'.

[16] See s 152(1)*(e)* of the Constitution; ANC (1994: 2–3); Ntsebeza (1999: 2001).

By the beginning of 1998, the Department of Land Affairs had developed principles that would guide its legislative and implementation framework in former homeland areas. The principles emphasised that where land rights 'to be confirmed exist on a group basis, the rights-holders must have a choice about the system of land administration, which will manage their land rights on a day-to-day basis' (Thomas *et al*, 1998: 528). In addition,

> 'the basic human rights of all members must be protected, including the right to democratic decision-making processes and equality. Government must have access to members of group-held systems in order to ascertain their views and wishes in respect of proposed development projects and other matters pertaining to their land rights' (Thomas, Sibanda & Claassens, 1998: 528).

THE ROLE AND REACTION OF TRADITIONAL AUTHORITIES

Clearly, both the Ministry for Provincial Affairs and Constitutional Development as well as the Department of Land Affairs intended to subject traditional authorities to a system that would make them more representative and accountable to their communities. Not surprisingly, these moves by the ANC-led government drew fierce criticism and resistance from Contralesa. The post-1994 government policies and laws were closing the ideological gap between members of Contralesa and traditional authorities sympathetic to the IFP (Ntsebeza, 2002; 2004).

In the run-up to the first democratic local government elections in South Africa in 1995–6, the IFP and Contralesa began to work together. Traditional authorities from both these groups challenged the government in the Constitutional Court over the issue of establishing municipalities throughout the country, including rural areas. Contralesa President Holomisa, also an ANC Member of Parliament, took an increasingly defiant stand towards the ANC. He called for a boycott of the first democratic local government elections.

While the initial collaboration of traditional authorities was around local government, it is clear that the main issue uniting them was their opposition to the notion of introducing new democratic structures. Traditional authorities agree with government that land in the rural areas of the former Bantustans should not be the property of the state, but they reject the idea that where land is held on a group basis, the administration thereof should be transferred to democratically constituted and accountable structures. Traditional authorities strongly argue that the land should be transferred to tribal authorities—which, it has been argued here, are undemocratic and unaccountable. Transferring land to tribal authorities would legally exclude ordinary rural residents from vital decision-making processes, including land allocation.

Before considering the response of government, it is useful to go through the land allocation process under tribal authorities.

The process of allocating land started at a local, sub-headman level and ended with the issuing of a PTO by the magistrate or district commissioner. In theory, a person (usually a man) who wanted land would identify an area and approach people in the neighbourhood to establish if there were other claimants and to solicit

support. If the land was available, the applicant would approach the sub-headman of the ward in which the property was situated. The sub-headman then called a ward general assembly (*imbizo*) to offer people an opportunity to comment on the application. If there were no objections, the sub-headman would submit the application to the headman of the administrative area.

The headman would verbally verify that the general assembly had been called and that no objections had been lodged. The headman would also establish whether the applicant was a married, registered taxpayer. In this regard, the sub-headman had to produce a receipt issued by the magistrate as proof. If the applicant could not do so, the headman would have to accompany the applicant to the magistrate's office where he would be duly registered. The applicant could not go to the magistrate's office without a headman or the chief.

Upon production of the receipt, the headman would normally grant the application. This was seen as a formality. As one headman[17] stated: 'As a headman, I accept and respect the decision of the sub-headman.' The headman would then submit the application to the tribal authority. This was also seen as a formality. The tribal authority completed the application form that was submitted to the district commissioner. The application form had to be signed by the chief, councillors and the secretary of the tribal authority. Only at this point was the applicant expected to pay an application fee to the tribal authority in order to augment the funds of the latter. This was the only fee the applicant was supposed to pay.

In practice, however, the system of land allocation was complex and often did not adhere to the letter of the law. The main problem was how to monitor the system and ensure that those charged with authority were accountable. In most cases, traditional authorities were upwardly accountable to the government rather than to the rural residents. This was because the apartheid and Bantustan regimes had given traditional authorities such powers that they were feared rather than respected by their communities (Ntsebeza, 1999; Delius, 1996). This made it extremely difficult for ordinary rural residents (particularly if they were elderly and therefore more passive) to hold traditional authorities accountable.

Traditional authorities exploited the lack of checks and balances. There were basically two forms of violations: allocating land without going through the procedure; and illegal taxation. Traditional authorities abused their power by charging applicants unauthorised fees in the name of the 'rights of the great place' (*iimfanelo zakomkhulu*). These fees included alcohol, poultry, sheep and sometimes an ox. This practice reached its zenith in the early 1990s when cottage sites were illegally allocated to whites along the Wild Coast in the old Transkei. These were dubbed 'brandy sites' as it was imperative that applications be accompanied by a bottle of brandy. It was standard practice in some parts that rural residents needed to present the sub-headman with a bottle of brandy or some suitable gift when making land applications (De Wet & McAllister, 1983: 50). Furthermore, in a number of cases, traditional authorities allocated land directly to rural residents, bypassing the district commissioner. These rural residents were consequently not issued with a PTO.

[17] This headman asked to remain anonymous.

Research in the Wild Coast in the late 1990s shows that these abuses of power continued well into the new democracy (Ntsebeza, 1999). Traditional authorities and their appointees or representatives continued to illegally allocate land along the coastal area even at the time of investigations by the independent, statutory Heath Special Investigative Unit. A major part of the problem was, as has been shown, the difficulties in resolving land administration functions. For as long as uncertainty continued, unaccountable tribal authorities remained the official structures.

THE RESPONSE OF GOVERNMENT UP TO 2002

Policy and legislation in the immediate post-1994 period appeared on the whole to have been driven by a commitment to extending participatory and representative notions of democracy to rural areas. An expression of this approach was the promulgation of the Regulation of Development in Rural Areas Act 8 of 1997 by the Eastern Cape legislature. This Act sought to divest traditional authorities of all their development functions and transfer these to elected councillors. This, of course, was in line with new functions of local government.

However, from the end of 1997, the pendulum seems to have swung in favour of traditional authorities (Ntsebeza, 2002; 2004). The White Paper on Local Government published by the Ministry for Provincial Affairs and Constitutional Development in March 1998 makes broad and sweeping statements about the possible role that traditional authorities can play. Traditional 'leadership' is assigned 'a role closest to the people'. On the issue of development, a task that has been added to local government by the Constitution, the White Paper states that traditional leaders have played an important role in the development of their communities and adds that this should continue.

The recommendation in the White Paper that 'the institution of traditional leadership' should 'play a role closest to the people' flew in the face of the ANC's 1994 election manifesto, the RDP, which was emphatic that democratically elected local government structures should play this role. The White Paper thus marked a major shift in government policy, and has grave consequences for the possibility of democracy in rural areas.

Similarly, the Constitution explicitly adds development functions to democratically elected local government structures. Yet the White Paper recommends that traditional authorities should continue performing these tasks. Moreover, the statement that traditional authorities played an important role in development among their communities must be viewed with suspicion since no evidence is adduced to support this statement. Existing evidence shows that traditional authorities were never directly involved in development projects. These projects were implemented by government line-departments. Where traditional authorities acted as a link between government departments and their communities, research has shown that they were often corrupt. An example is the illegal taxes imposed by traditional authorities in the process of land allocation.[18]

The role of traditional authorities was the subject of much discussion and negotiation in the run-up to the second democratic local government elections in

[18] See also Ntsebeza (1999; 2004).

December 2000. This issue contributed to the postponement of the date for the elections. After a series of meetings between the government and traditional authorities, the government made some concessions. The first significant one was the amendment to the Municipal Structures Act 117 of 1998 which was successfully rushed through Parliament shortly before the elections. The amendment increased the representation of traditional authorities from 10 to 20 per cent of the total number of councillors. Further, traditional authorities would not only be represented at a local government level but also at a district and, in the case of KwaZulu–Natal, metropolitan level. However, traditional authorities would not have the right to vote.

This concession seemed to have encouraged traditional authorities to ask for more. They rejected the 20 per cent increase, wanting nothing short of an amendment to the Constitution. They wanted municipalities to be scrapped in the former Bantustans in favour of apartheid-era tribal authorities as the primary local government structures. Traditional authorities have claimed that President Thabo Mbeki had promised them, in word and in writing, that there would be no tampering with their powers. If anything, they would be increased.[19] On his part, Mbeki has neither denied nor endorsed this claim.

The response of government was, for the second time in as many months, to present a Bill to Parliament to amend the Municipal Structures Act. The Bill did not address the central demand of traditional authorities—the scrapping of municipalities in rural areas in favour of tribal authorities. It merely sought to give local government powers to delegate certain powers and functions to traditional authorities. In addition, a range of peripheral duties would be assigned to traditional authorities. Predictably, traditional authorities rejected the Bill and threatened to boycott the 2000 local government elections. They also threatened that there would be violence in their areas if their demands were not met. The Bill was subsequently withdrawn on a technicality. It would seem that the president made some undertakings, given that traditional authorities eventually participated in the election.

This vexed issue of the role of traditional authorities in a post-1994 democratic South Africa has been handled and negotiated in an intriguing manner. In so far as local government issues are concerned, traditional authorities fall under the Department of Provincial and Local Government. In practice, though, traditional authorities have submitted almost all their requests to the Office of the President. They seem to think that the Minister of Provincial and Local Government is not as favourably disposed towards them as the president. Alternatively, this might be a deliberate strategy to pit the president against the minister.

In the Department of Land Affairs, meanwhile, shifts in favour of traditional authorities were also taking place in the area of land administration. We have seen in this chapter that a guiding principle of the department was that where land was held on a group basis, the holders of land rights would have a choice about the system of land administration. However, when Thoko Didiza replaced Derek Hanekom as Minister of Land Affairs, she disbanded the drafting team of the Land Rights Bill

[19] I have not been in a position to get a copy of this presidential statement.

she had inherited from Hanekom and unveiled, in February 2000, her 'strategic objectives' regarding land tenure and administration in rural areas. With regard to land administration, she committed herself to building on 'the existing local institutions and structures, both to reduce costs to the government and to ensure local commitment and popular support' (Walker, 2005: 311).

By August 2002 there was no clarity as to how the question of land administration would be resolved in rural areas. Neither was it clear how the issue of the role of traditional authorities in local government would be handled. The promised amendment to the Municipal Structures Act had not been finalised. A draft amendment published on 20 November 2000 for public comment seemed to propose a trade-off rather than amending the Constitution. The draft amendment gave traditional authorities control over the allocation of land in so-called communal areas. According to clause 1 of the Bill, referring to s 81(1)*(a)* of the Municipal Structures Act,

> '[d]espite anything contained in any other law, a traditional authority observing a system of customary law continues to exist and to exercise powers and perform functions conferred upon it in terms of indigenous law, customs and statutory law, which powers and functions include—*(a)* the right to administer communal land . . .'

What this amendment fails to grasp is that it is not within the competency of the Department of Provincial and Local Government to give traditional authorities the power to allocate land. At any rate, it is not clear what happened to this draft amendment. The promulgation of the Traditional Leadership and Governance Framework Act and the Communal Land Rights Act seem to have rendered the amendment irrelevant.

RESOLVING THE QUESTION OF THE ROLE OF TRADITIONAL AUTHORITIES

One of the problems facing government was that although an attempt was made to separate the powers concentrated in the hands of tribal authorities and allocate these to various departments—in this case the Department of Provincial and Local Government and the Department of Land Affairs, there was little communication between these departments. For example, interviews with some senior Land Affairs officials suggest that the Department of Provincial and Local Government did not consult them when proposing the amendment to the Municipal Structures Act giving traditional authorities powers to allocate land. Yet the task of deciding who should allocate land in rural areas is the competency of the Department of Land Affairs. A significant feature of the 2003 legislative process is that once co-operation between the two departments did take place, a trade-off was quickly clinched.

Section 21(2) of the Communal Land Rights Act reads: 'If a community has a recognised traditional council, the powers and duties of the land administration committee may be exercised and performed by such council.' This gives enormous and unprecedented powers to a structure with a majority of unelected members. This is particularly the case with regard to the allocation of land.

We have seen that under the colonial and apartheid systems, the final authority in the form of issuing permits to occupy land in communal areas lay with magistrates

and later district commissioners. The 2004 Act makes traditional councils supreme structures when it comes to land allocation. This means that they will be decentralised and, indeed, despotic in so far as they will be unaccountable.

According to reporter Christelle Terreblanche (2004), the Act was amended to include giving traditional councils power over land shortly after a meeting involving then Deputy President Jacob Zuma, King Zwelithini and Buthelezi, leading to speculation that the amendment was a deal.

TRADITIONAL AUTHORITIES AND THEIR RESPONSE TO THE AMENDED ACT

For the first time in more than ten years, traditional authorities have given their overwhelming support to new legislation.[20] The chairperson of the National House of Traditional Authorities, Chief Mpiyezintombi Mzimela (2003), supported the new draft of the Communal Land Rights Bill with these words:

> 'The Communal Land Rights Bill aims to restore to rural communities ownership of the remnants that they occupy of land that the colonial and apartheid government took from them by force—giving the communities registered title, so that it cannot happen again.'

Traditional authorities have, however, also given an indication that the push for a constitutional amendment may not be over. According to Mzimela (ibid), '[o]ur communities wish to govern their own areas and want traditional communities to constitute the local government, not a fourth tier, but part of the third tier.' He averred that the institution of traditional leadership is the 'only institution that does not have its powers and duties set out in the Constitution', an 'omission' which he urged should be 'rectified' (ibid).

It is important to note that, in the past, traditional authorities insisted that there should be a constitutional amendment making them the primary local government structure in rural areas. The 2003 Traditional Leadership and Governance Framework Act has avoided the desired constitutional amendment and still recognises municipalities made up of elected councillors as the primary form of local government in rural areas. However, the establishment of traditional councils has arguably given traditional authorities more powers than elected councillors. As already stated, one of the central theses of this chapter is that traditional authorities derive their authority and support from their control of land allocation. This was the case particularly under apartheid and, it seems from the latest developments, it will be case even in the post-1994 South African democracy. A question that forces itself on us is how to explain government's shifts over time.

WHY THE SHIFT IN FAVOUR OF TRADITIONAL AUTHORITIES?

There is little doubt that since the early 1990s, traditional authorities have exploited the ambivalence and hesitations in ANC thinking and practice with regard to their role. Traditional authorities have waged concerted campaigns and lobbied

[20] As we have seen, disagreements between traditional authorities and government about their role in a democracy go back to the political negotiation period in the early 1990s.

government, including bypassing official channels, to ensure a place in the emerging democracy. To achieve their objectives, they have used resources made available to them by the government, such as the Provincial Houses of Traditional Leaders and the National Council of Traditional Leaders. Chiefs in Parliament—Holomisa and Nonkanyana for example—have used their position there to advance the interests of their constituency.[21]

The collaboration between traditional authorities in Contralesa and the IFP has further strengthened their positions. The ANC has found itself having to nurse its relationship with Contralesa in order not to lose the support of traditional authorities and their followers. The ANC also seems to be reluctant to strain relations with the IFP, especially given the history of political violence in KwaZulu–Natal in the 1980s and early 1990s. In this regard, Lodge has argued that government accommodation of traditional authorities was

> 'a compromise to avert a threatened boycott of the first general elections by the Inkatha Freedom Party if the institution was not recognized and protected in the constitution. If it was not for the pressure from the IFP, the institution would have been destroyed by now ... Rather than abolishing it, the ANC is creating legislation conditions through local government that will allow for the gradual phasing out of the institution which is done to avoid resistance from traditionalists ... the ANC has become more tactful and has recognized that abolishing the institution will cause serious political conflict in the country' (quoted in Dladla, 2000: 15).

Given the passing of the two pieces of legislation in 2003 and 2004, it is difficult to agree that legislative conditions for the gradual phasing out of the institution and its incumbents are in place. Further, it is a moot point whether winning over the support of traditional authorities does in practice ensure winning over their rural constituency. Moreover, it is not clear whether the strategy of resorting to violence on the part of the IFP would work in conditions where the party is no longer getting support from the police and army.

Between 1994 and 1999, most non-governmental organisations (NGOs) and social movements which were land based or concerned with rural development aligned themselves with the democratic government. Some of their leading activists took up positions in government departments. However, poor delivery in terms of the land reform programme, in particular land redistribution, has divided NGOs and social movements into two broad categories. One group prefers not to rock the boat but to continue working within existing government policies. The other argues that the limits of the existing policy should be exposed and pressure put on government to re-visit and change such policy where necessary. None of these NGOs has so far come out with a clear and coherent strategy on how to challenge existing policies and mobilise rural residents. Apart from a mobilisation in 2003 led by the Programme for Land and Agrarian Studies and the National Land Committee against the Communal Land Rights Bill, civil society has not been as organised as traditional authorities. Without a strong and organised voice, rural inhabitants are going to find it hard to influence government.

[21] This is from various conversations I have had with them from 1996. However, it has not been possible to hold formal interviews with these chiefs, with the exception of Nonkanyane in 1996.

The poor performance of elected councillors over the last decade appears to have strengthened the position of traditional authorities and headmen. One senses this in the interview with Jama quoted earlier. The poor performance of these councillors should be viewed against the expectations of rural people that a developmental local government would transform their lives. Some of these expectations had been fuelled by election promises. By the end of the transition period in 2000, rural councillors had lost the confidence of these residents. The burning issues in most rural areas in the former Bantustans, apart from land for residential purposes, are poor infrastructure, especially water and roads. After 10 years of democracy, the water and road crises have not been solved. On land allocation, the one key area where rural councillors could have delivered, the Communal Land Rights Act has robbed them of the opportunity.

The impact of rural councillors has been further weakened by the fact that they are few in numbers and are expected to cover large, scattered and often inaccessible areas. Moreover, the low budgets for rural programmes, land reform and local government make it difficult for government to employ new and competent staff who would enhance government capacity.[22] In this regard, it could be argued that government tribal authorities are less demanding than setting up new structures. The big question is where this puts rural residents regarding democracy, and how, in wooing traditional authorities, the ANC could dismantle tribalism and the Bantustans. Indeed, tribalism is inherent in the recognition of separate chieftaincies (Hendricks & Ntsebeza, 1999: 99–126).

CONCLUSION

Traditional authorities, despite their despotic role as an extended arm of the apartheid regime and abuse of their land allocation powers, have won recognition in the South African Constitution. But more than that, the Traditional Leadership and Governance Framework Act and the Communal Land Rights Act have extended their lease on life by granting traditional councils, which are dominated by traditional authorities and their appointees, unprecedented powers in land administration. These laws have effectively resuscitated the powers enjoyed by traditional authorities under the notorious Bantu Authorities Act of 1951.

This chapter has addressed two integrally related questions about traditional authorities: how, despite their role in the apartheid state's project of 'indirect rule', traditional authorities have not only survived up to the post-colonial/apartheid era, but have won unprecedented powers in rural governance; and how they derive their authority. On the subject of the linkage between chieftaincy and the land question, control of the land allocation process has been emphasised.

It has been shown here that recognition of the institution of traditional leadership was by and large influenced by political and reconciliation considerations rather than by popular support. The recognition of the institution was part of the highly political arena of choosing and consolidating alliances between elites to the exclusion of ordinary rural people and ignoring realities on the ground. At this level,

[22] See Mingo (2002), Lahiff (2001), Adams, Cousins & Manona (2000).

rural residents, mainly youth, were involved in running battles with chiefs and headmen.

The ANC had hoped that traditional authorities would accept a secondary, ceremonial role after 1994. Organisationally thin on the ground in rural areas, the ANC had hoped that 'progressive/comrade chiefs' (Claassens, 2001) would embrace the ANC policies of democratising rural areas on the basis of being offered a non-political ceremonial role. Such assumptions were shattered by rejection of this role, not only by the IFP but also by Contralesa. Traditional authorities wanted, if anything, to be the primary structures of local government and land administration in rural areas. They remain opposed to the transfer of land to democratically constituted structures and argue that land should be transferred to tribal authorities.

Much more organised than civil society organisations, and exploiting government resources at their disposal to organise themselves, traditional authorities have won a remarkable victory on the question of land allocation. This means that while rural residents enjoy the same citizenship rights as their urban counterparts in that they elect their councillors, on the vital issue of land allocation rural people become 'subjects' in that decisions are taken by traditional councils dominated by unelected traditional authorities and their appointees.

This raises critical questions about citizenship and the nature of democracy in South Africa. Mamdani (1996: 34) has proposed that 'dismantling' the 'clenched fist' of tribal authorities entails

> 'an endeavour to link the urban and the rural—and thereby a series of related binary opposites such as rights and custom, representation and participation, centralization and decentralization, civil society and community—in ways that have yet to be done.'

To what extent has post-1994 South Africa succeeded in this 'dismantling'? The ANC-led government has opted—despite internal differences and the dubious history of traditional authorities—for the coexistence of traditional authorities with elected representatives.

The promulgation of the Traditional Leadership and Governance Framework Act and the Communal Land Right Act must surely be viewed with great concern. Implementing these laws will, at least in areas such as Xhalanga, amount to imposing chiefs on an unwilling population, along much the same lines as the introduction of tribal authorities. Policy-makers, politicians and scholars focusing on policy issues must be sensitive to historical and current empirical evidence when defining a role for traditional authorities. Arguments that the institution of traditional leadership is essentially democratic and 'resilient' to changing political contexts should be grounded in real historical contexts.

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(Interim) Constitution of the Republic of South Africa 1993

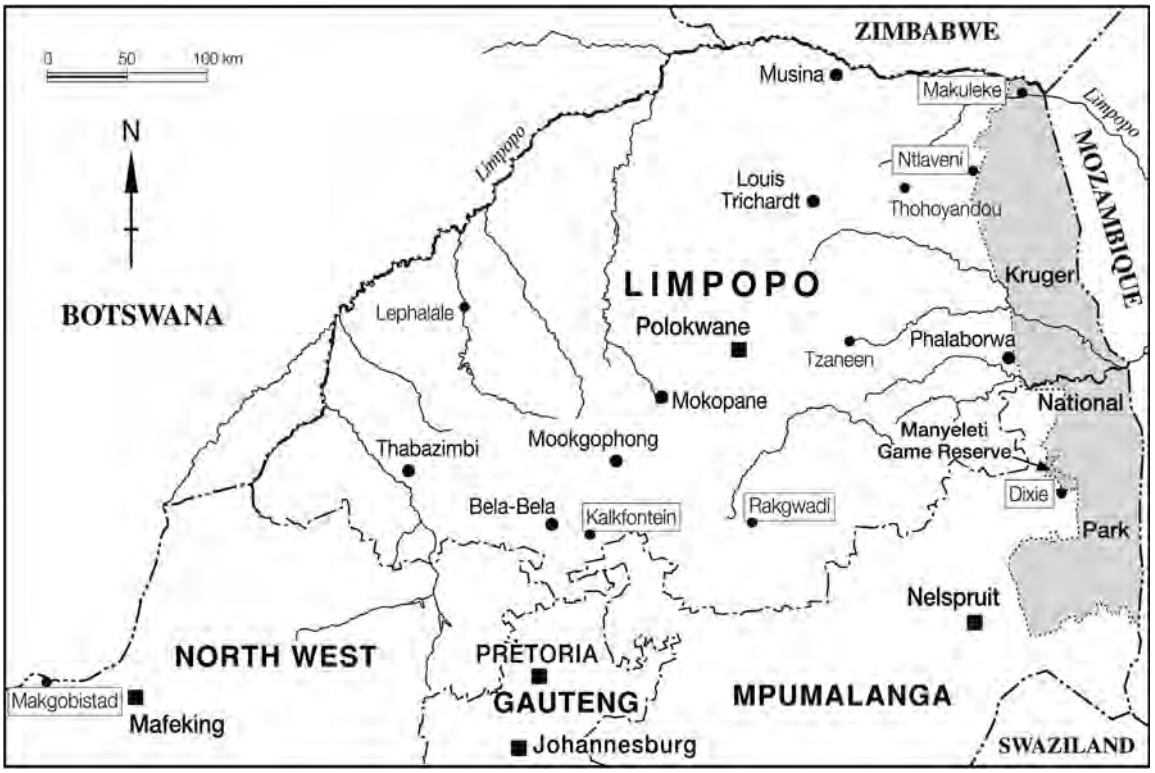
Constitution of the Republic of South Africa 1996

Local Government Transition Act 209 of 1993

Municipal Structures Act 117 of 1998

Regulation of Development in Rural Areas Act 8 of 1997 (Eastern Cape)

Traditional Leadership and Governance Framework Act 41 of 2003



Map 1: Locator map of northern provinces showing Kalkfontein, Dixie, Makgobistad, Makuleke, Ntlaveni and Rakgwadi.
Prepared by John Hall, May 2008.

11

Power, accountability and apartheid borders: the impact of recent laws on struggles over land rights

By Aninka Claassens

INTRODUCTION

Section 25(6) of the Constitution of South Africa states that

> '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

Section 25(6) recognises the discrepancy between established practice and occupation on the one hand, and the legal vulnerability resulting from past discriminatory laws and practices on the other. It seeks to protect and legally secure the land rights of the many millions of people who have occupied land over generations, despite discriminatory laws that prohibited them from doing so or put their occupation 'outside the law'. Forced overcrowding makes it impossible to secure all existing land rights *in situ*. The reference to 'comparable redress' enables the provision of additional resources to deal with severe overcrowding and situations of contested overlapping land rights.

The Communal Land Rights Act was enacted in 2004. Its stated purpose is to provide legal security of tenure or comparable redress. However, the Act has been highly contested, including by many who are its supposed beneficiaries. Its passage through Parliament was controversial and the constitutional validity of the Act is currently being contested in the courts.[1] This chapter seeks to explain the nature and significance of these challenges to the Act. In particular, it suggests that while the Act purports to uphold 'custom and tradition', it in fact entrenches colonial and apartheid versions of chiefly power that undermine systems of land rights operating at layered levels of society. The implications for security of tenure are discussed.

The Constitution recognises customary law as well as the institution, status and

[1] *Tongoane and others v The Minister of Agriculture and Land Affairs and others* (TPD 11678/06, pending).

role of traditional leaders according to such law. Recent Constitutional Court judgments criticise codified customary law as the product of colonial and apartheid distortion (*Moseneke & others v The Master & another* 2001 (2) SA 18 (CC)). The judgments warn of the dangers of viewing indigenous tenure systems through the common law lens (*Alexkor Ltd & another v Richtersveld Community & others* 2003 (12) BCLR 1301 (CC); *Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1). The judgments find that the content of customary law must be established by reference to the evolving 'living law' practised on the ground. A key issue in the litigation challenging the Act (and in broader debates about land rights and chiefly power) is how to establish the content of living customary law.

The case studies discussed in this chapter[2] demonstrate disputes between chiefs and rural residents over the issue of 'proper' custom and precedent. Ongoing contestations in rural areas about the content of custom, authority and law highlight questions about which of the versions of custom put forward by different parties constitute the 'living law'. Another problem is the overlay and residual influence of old apartheid laws on current practice. Many of these laws have remained in operation since 1994 and are only now in the process of being repealed. Most fall foul of constitutional requirements of racial and gender equality. As the case studies indicate, practices that derive from these old laws are constantly challenged and renegotiated. Finding and defining 'living law' in these fluid processes of challenge, change and adaptation is not straightforward.

This chapter examines, through the prism of disputes about decision-making processes, the dynamics of ongoing contestations over the content of land rights, custom and authority in 'communal areas', and how law affects and is affected by these. It will examine, on the one hand, the content of land rights and the scope of authority over land as set out in the Act, and on the other, how land rights are asserted by rural people in disputes concerning land. Despite centuries of colonialism and apartheid, key features of 'outlawed' indigenous property systems remain remarkably resilient, and apartheid constructs of land rights and chiefly power are hotly contested. The impact of past apartheid laws and interventions is clearly apparent, but also limited in important respects.

The case studies indicate that even while law works to entrench and privilege particular versions of authority and property, it cannot freeze practice and shut down contestation. A key focus of the chapter is how different levels of authority and decision-making within rural society articulate with one another in relation to land, and how national policy and law affect this terrain of 'local' interaction.

The legal case challenges the validity of national law in terms of its impact on rights protected by the Constitution. Because of the centrality of questions of customary law in determining the content of land rights and the scope of chiefly authority, and because the Constitutional Court has found customary law to be 'living law', the outcome of the litigation is tied back into the messy reality of contested and evolving property relations in rural areas. The difficulties and opportunities presented by this particular articulation between national law, local practice and the Constitution will be discussed.

[2] Two of the case studies—Makuleke and Mayaeyane—are discussed by Claassens in more depth in chapter 13 of this book.

This chapter starts with a general outline of the content of the Act and the controversies over that content. It then turns to a series of case studies illustrating those controversies. The chapter focuses on the impact of the Act on issues of accountability and tenure security. It discusses the impact on 'official' customary law of influential rule-based characterisations of land rights and chiefly power, and shows how these are thrown into relief by the notion of 'living law'. Issues arising from the articulation between 'living law' and the dominant legal paradigm are discussed in relation to the practical problems of determining the content of living law for the purposes of litigation in the 'formal' court system. This is important because the courts' interpretation of the 'living law' content of indigenous land rights and chiefly authority over land will determine whether the Act, in reinforcing the powers of apartheid-era tribal authorities, undermines the land rights and tenure security of rural residents, or gives effect to the recognition of customary law as required by the Constitution.

THE COMMUNAL LAND RIGHTS ACT

The Act[3] deals with the land rights of at least 16 500 000 people[4] in the former 'homeland' areas. It also applies to land acquired through land reform after the end of apartheid in 1994. The core of the Act is the transfer of land title from the state to 'traditional communities', the use of modified tribal authority structures to administer the land and represent the 'community' as owner, and the registration of individual land rights within 'communally owned' areas.

The Act is closely linked to the Traditional Leadership and Governance Framework Act 41 which was enacted in late 2003. The latter creates a framework for provincial laws[5] that will deal with the status and powers of traditional leadership. It also deems apartheid-era tribal authorities[6] to be traditional councils, provided that they comply with new composition requirements[7] within a year. The Communal Land Rights Act authorises these traditional councils to represent rural communities as land administration committees and to allocate land in 'communal areas'.

[3] For more detailed analyses of the Act, see chapter 2 by Henk Smith in this book as well as Cousins (2005).

[4] The Department of Land Affairs estimates that 21 302 415 people live in these areas and are affected by the Act (Boonzaier, 2006: 21). The more conservative figure of 16 500 000 people is obtained from an analysis of the 2001 census and the ASSA2003 projected in terms of population growth (see the affidavit by Debbie Budlender on the DVD with this book).

[5] A number of these provincial laws had been enacted by January 2007. Some are still being debated in the provincial parliaments.

[6] Tribal authorities were created in terms of the Bantu Authorities Act 68 of 1951. They were originally called Bantu authorities but this name was changed to tribal authorities when the Act was renamed the Black Authorities Act. The imposition of Bantu authorities led to rural rebellions in many parts of South Africa. See, for example, Mbeki (1964) and Luthuli (1962).

[7] Section 3(2) of the Traditional Leadership and Governance Framework Act provides that at least a third of the members of a traditional council must be women and that 40 per cent of the members must be elected. Other members are 'selected' by the senior traditional leader. It should be noted that the 30 per cent quota for women need not be elected and can be decreased by the provincial premier when an 'insufficient number of women [is] available'.

Key features of the Communal Land Rights Act

The Act transfers title of communal land from the state to a 'community', which must register its rules before it can be recognised as a 'juristic personality' legally capable of owning land. Individual members of the community are to be issued with deeds of communal land rights, which can be upgraded to a freehold title if the community, represented by the land administration committee, agrees. The minister must determine whether 'old order rights' (rights derived from past laws and practices, including 'customary law and usage') should be confirmed and converted into 'new order rights' vesting in individuals. The minister must also determine the nature and extent of such rights. A key problem is that the minimum content of new order rights is not set out in the Act.

The consequence of the paradigm of transferring ownership is that the boundaries of the 'community' must be determined and surveyed. According to s 6 and s 18(2), the Minister of Land Affairs determines the boundaries of the land to be transferred. The definition of community in the Act is vague, and does not provide protection for smaller groups with separate identities. This was included in earlier drafts.

The senior government official responsible for the Act has told the Portfolio Committee on Agriculture and Land Affairs that the Department of Land Affairs views the population of areas under the jurisdiction of tribal authorities as the 'communities' to which land will be transferred.[8] Tribal authorities typically have populations of between 10 000 and 20 000 people. The traditional leaders who head them have jurisdiction over a number of wards and villages, under the authority of sub-chiefs, headmen, or sub-headmen; they are thus aggregates of a large number of smaller groupings.

The Act requires that community rules be drawn up before transfer, to regulate the administration and use of communal land. The Act does not specify the process whereby such rules are to be drawn up and agreed, or its timing (for example, whether the drawing up of such rules precedes the establishment of a land administration committee). Section 19(5) of the Act provides that should a community fail to adopt community rules, standard rules prescribed by regulation and 'adapted by the Minister to such community' will apply.

Land administration committees are given wide powers in relation to the land. Section 24 of the Act (on powers and duties) empowers the committees to represent communities owning communal land, allocate land rights, maintain records of rights and transactions, assist in dispute resolution, liaise with local government bodies in relation to planning and development, and to fulfil various other land administration functions. The Bill initially submitted to Parliament defined land administration committees as traditional councils established under the

[8] At a meeting of this portfolio committee on 26 January 2004, the Director of Tenure Reform in the Department of Land Affairs, Sipho Sibanda, was asked how many communities would be eligible for transfer of title in terms of the Communal Land Rights Bill. In answer, he gave the number of existing tribal authorities in South Africa, breaking them down by province (meeting observed by Claassens and recorded in minutes by the Parliamentary Monitoring Group (PMG) and Contact Trust available at http://www.pmg.org.za).

Traditional Leadership and Governance Framework Act. During the parliamentary process the Bill was amended. The Act now provides, in s 21(2), that

> '[i]f a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council.'

The word 'may' is potentially ambiguous. It can be interpreted as either introducing a choice for communities as to whether the council should exercise these powers, or as authorising traditional councils (created by another statute) to exercise land administration powers in terms of the Communal Land Rights Act. The second interpretation is more likely because the Act does not create a mechanism for exercising choice.

Moreover, s 22(2) provides that

> '[s]ubject to section 21(2), the members of a land administration committee must be persons not holding any traditional leadership position and must be elected by the community in the prescribed manner.'

In terms of the Traditional Leadership and Governance Framework Act[9] and the associated provincial laws, traditional councils must meet new composition requirements. In situations where the existing tribal authority fails to meet the composition requirements, the community would not have a recognised traditional council. Section 22(2) implies that it is only in this situation that the community would elect a land administration committee. Rather than introducing a choice for communities, s 21(2) appears to be the incentive encouraging tribal authorities to meet the composition requirements set out in the Act and become traditional councils, and s 22(2) the disincentive for a failure to do so.[10] It is otherwise incomprehensible why traditional leaders should be excluded from possible participation in elected land administration committees.

In the hearings before the parliamentary portfolio committee, the Head of Legal Services in the Department of Land Affairs, Colin Brocker, was asked to explain what would determine whether a traditional council would serve as a land administration committee. He answered that wherever traditional councils existed, they would fulfil this function.[11] In 2006, however, the *Tenure Newsletter* distributed by the department stated that communities could choose between

[9] Section 28(4) of this Act and the provincial laws all contain 'transitional arrangements' that deem existing tribal authorities to be traditional councils should they comply with the new composition requirements within a year. While this year's grace has now expired, the provincial laws were enacted later and thereby enabled an extension of the period. 'Election' processes overseen by the provincial Houses of Traditional Leaders are proceeding at different paces in the various provinces.

[10] This interpretation is consistent with the fact that the Congress of Traditional Leaders of South Africa submitted, in relation to the Traditional Leadership and Governance Framework Bill, that '[t]he transformation and democratisation of traditional authorities must be a pre-requisite for such recognition' (Mokvist Uggla, 2006: 180).

[11] See PMG minutes for the Portfolio Committee on Agriculture and Land Affairs, 27 January 2004. Available at http://www.pmg.org.za.

traditional councils and elected land administration committees.[12] A doctoral dissertation written by a Swedish student who worked with the portfolio committees that considered both the Traditional Leadership and the Communal Land Rights Bills indicates high levels of controversy and concern within the ruling African National Congress (ANC) about the combined impact of the two Bills on democracy and potential abuse of power by unscrupulous traditional leaders. She suggests that a 'clawback' was agreed to mitigate the impact of the Bills on rural people's land rights, and that it was agreed that the Communal Land Rights Bill and not the Traditional Leadership and Governance Framework Bill would have to be amended to deal with the problem (Mokvist Uggla, 2006: 283–94). It may be that the ambiguity in the wording of s 21(2) constitutes that 'clawback'.

What looked like a clear victory for the traditional leader lobby in the run-up to the 2004 elections now turns out to be more ambiguous, and perhaps intentionally so. However, the meaning of the Act is determined by the words that have been used, and not by the interpretation given to it at any time by the department. The implication of s 21(2) and s 22(2) of the Communal Land Rights Act is that it is only where tribal authorities fail to meet the composition requirements for traditional councils that land administration committees will be elected.

The Act empowers land administration committees to make most key decisions in relation to land, and to exercise ownership powers on behalf of the 'communities' they represent. It does not require the committee to consult community members on major decisions such as disposal of land or of rights in land. The only requirement in such a case is ratification of the decision by a provincial land rights board. The boards advise the minister, liaise with government and monitor compliance with the Act and the Constitution. Their members are appointed by the minister and must include nominees from the Provincial House of Traditional Leaders and the commercial or industrial sector. The minister must also appoint members from the affected communities.

Even if the Act were amended or interpreted by a court to provide for community choice in relation to the composition of the land administration committee, other problems would remain.[13] The lack of accountability mechanisms and the paradigm of centralised decision-making by land administration committees are a recipe for eliciting abuse of power. Choice would also not defuse the explosive issue of determining community boundaries in the context of existing and disputed tribal authority boundaries.

[12] DLA (2006: 4) says that '[s]ection 21(2) of the CLaRA gives the communities the democratic right to bring or not to bring on board the traditional councils in the management of communal land.'

[13] Including under whose auspices and in what circumstances the 'choice' would be made. Current 'election' processes overseen by the Provincial Houses of Traditional Leaders for the 40 per cent elected membership of traditional councils raise serious questions about the nomination process, the venue (often the chief's kraal) and notice of the meetings.

The parliamentary process

The Communal Land Rights Bill was widely opposed by civil society,[14] particularly by women's organisations. Delegations of rural people scrambled to organise delegations to Parliament within the three-week notice period for parliamentary submissions. Rural communities[15] argued that the powers given to traditional councils entrenched apartheid distortions of chiefly power, and would exacerbate the problem of traditional leaders selling land and unilaterally entering into land deals with outsiders. They said the Bill failed to provide checks and balances that would enable community members to hold leaders to account. They argued that transferring ownership at the 'tribal' level undermined the status and strength of rights at other levels, for example, at the level of the family, the village or independent groupings living within tribal authority boundaries. They said the powers vested in traditional councils would undermine control and decision-making—and thereby security of tenure—at these other levels. They also said the Bill deprived rural people of the right to elect their own representatives and made them into second-class citizens.

Another criticism was that the Bill confirmed disputed apartheid tribal authority boundaries. The objectors made the point that in some instances compliant leaders had been rewarded with larger areas of land while those who opposed government policy had been removed, relegated to smaller areas or made headmen subject to traditional leaders 'promoted' over them. The issue of boundaries was also raised in the context of land restored through the Restitution of Land Rights Act 22 of 1994, which provides for restitution to people and communities dispossessed of land through racially discriminatory laws and practices. The Communal Land Rights Bill enabled[16] the minister to endorse the title held by restitution beneficiaries to a wider 'community' than those who had actually been dispossessed. If the community is interpreted to be the residents of the larger tribal authority area, then restitution beneficiaries face the prospect of their title being vested in a larger group and their land being administered by traditional councils. This is particularly offensive in situations where there are past disputes with the tribal authority[17] and in situations where the overarching tribal authority had agreed to the initial removal of the affected people.

Another issue raised was that of people who have no historical or ethnic affiliation with tribal authorities imposed on them under apartheid. It was not uncommon in

[14] The organisations that opposed the Bill included the Human Rights Commission, the Commission for Gender Equality, the Congress of South African Trade Unions (Cosatu), the South African Council of Churches, the National Land Committee and a range of rural land non-governmental organisations, the Centre for Applied Legal Studies, the Programme for Land and Agrarian Studies at the University of the Western Cape School of Government, and the Legal Resources Centre. A range of rural community groups also made submissions opposing the Bill. For a separate discussion about objections by women's organisations, see chapter 7 by Claassens and Sizani Ngubane in this book.

[15] See submissions on the DVD with this book. Also available http://www.lrc.co.za/Publications/CLRACases.asp.

[16] This provision has been retained in the Act. See s 5(2).

[17] For example, the Makuleke case described in this chapter.

the early 1900s for people from diverse ethnic backgrounds to club together to buy land.[18] Other diverse groups of people were also put under apartheid-constructed tribal authorities—for example mission settlements, people removed from so-called 'black spots' in 'white' areas, and groups of labour tenants who had historically occupied the land before the arrival of whites.

Community submissions[19] warned that the approach taken by the Bill required community boundaries to be physically delineated. This would focus attention on separation and ethnic differences, and revive past disputes in situations where people of diverse origins currently coexisted peacefully.

Elected local government councillors also raised objections. They argued that the functions given to land administration committees would cut across and undermine local government functions such as service delivery and land use planning. They said the Bill was an expression of government 'dumping' its responsibility to poor rural people and consigning them to control by unelected traditional leaders. They referred to government's refusal to install public infrastructure on land acquired by communities through land reform, and said that faced with a choice between title deeds (ownership) and development, they would rather have development.

There were tensions within the ANC about the Bill[20] and also within the tripartite alliance. Cosatu and the South African Communist Party (Vapi, 2003) argued that the Bill should be reformulated or at least held over until after the 2004 elections.

The passage of the Communal Land Rights Act was thus politically controversial. Despite almost unanimous[21] objections and a complaint that the parliamentary procedure did not allow for sufficient consultation at provincial level,[22] the Bill was pushed through Parliament in record time just before the 2004 national elections. This was perceived as a pre-election deal to placate the traditional leader lobby and the Zulu king (Mokvist Uggla, 2006: 302). Control of KwaZulu–Natal was at the time closely contested between the Inkatha Freedom Party and the ANC. However, three years later the Act has not yet been brought into operation.[23]

[18] See chapter 9 by Peter Delius in this book.

[19] See also Claassens (2003: 27, 35).

[20] For example, the Bill was criticised in the submission of the parliamentary Joint Monitoring Committee on Quality of Life and Status of Women (chaired by Lulu Xingwana, then an ANC Member of Parliament (MP) and from May 2006 the Minister of Land Affairs) to the National Assembly Portfolio Committee on Land and Agriculture. During the land portfolio hearings, the Chairperson of the Portfolio Committee on Provincial and Local Government responsible for the Traditional Leadership and Governance Framework Bill, Yunus Carrim, who is a senior ANC MP, insisted that his committee had not known about the last-minute changes to the Communal Land Rights Act when it approved the Traditional Leadership and Governance Framework Bill. He offered to resign from Parliament if anyone could ever show that he had known that the Communal Land Rights Bill would provide for traditional councils to get land administration powers (13 November 2003, meeting witnessed by Claassens).

[21] The only organisations to support the Bill were those representing traditional leaders.

[22] See chapter 3 by Christina Murray and Richard Stacey in this book.

[23] Section 47 provides that the law will come into operation on a date to be determined by the president and published in the *Government Gazette*.

THE LEGAL CHALLENGE

Four rural communities have launched a challenge to the constitutionality of the Communal Land Rights Act on the basis that instead of securing land rights as required by the Constitution, it undermines equality[24] and the land rights of key classes of people. The applicants argue that the Act undermines the security of sub-groups and independent communities living within tribal authority boundaries. These groups could find title to their land subsumed within larger units, and control exercised by imposed traditional councils. The case challenges the version of authority over land embodied in the Act on the basis that it misconstrues the nature of underlying land rights and undermines levels of decision-making, accountability and control that operate at levels below that of the land administration committee.

The applicants do not reject the institution of traditional leadership. What is at issue are disputed versions of chiefly power relative to the nature and strength of the land rights exercised by rural people. Key issues of contestation include the level at which particular decisions about land should be taken, what constitutes proper decision-making processes, and how different levels of decision-making and accountability articulate with one another.

CASE STUDIES

This section comprises three case studies that illustrate some of the problems inherent in the approach taken by the Act. It focuses on two key themes: control and decision-making as a component of land rights; and accountability and the mediation of power. I begin with an account of relevant events in Rakgwadi (Limpopo Province) where I conducted field research in 2000 (Claassens, 2001). The other communities, Mayaeyane and Makuleke, are applicants in the Constitutional Court challenge. Field research in these communities was undertaken during 2004 and 2005 in the context of preparation for that challenge.

Case study 1: Mmotwaneng village in Rakgwadi

Rakgwadi is an area comprised of twenty-two bushveld farms which fall under the jurisdiction of the Matlala Tribal Authority. The area forms part of the Nebo magisterial district. The previous chief, Kgosi Frank Maseremule, co-operated with the apartheid government during the 1950s. The then government was intent on creating a separate 'homeland' for the Pedi or 'North Sotho' people. However, the leadership of the senior Sekhukhune 'tribe' refused to establish a government-controlled Bantu authority. Bantu authorities were the local units that formed the political building blocks of 'separate development' and the Bantustan system. Ultimately, however, minor leaders of sub-groupings within and around Sekhukhuneland, such as Kgosi Maseremule of the Bakone, agreed to co-operate (Delius, 1996: 112–18). In exchange, Maseremule, like others, was offered a block of farms in an area removed from the resistance in Sekhukhuneland. The new land was purchased from white farmers by the South African Native Trust (SANT).

The Bakone moved from their original land in Madibong to the new area of

[24] For a discussion of the equality arguments, see chapter 7 by Claassens & Ngubane.

Rakgwadi. Whereas they had had six farms in Madibong, they were given twenty-two in Rakgwadi. Six of the Rakgwadi farms were registered as 'held in trust' for the Bakone tribe. These were compensation for the farms that the group had previously purchased and left behind. The other sixteen farms at Rakgwadi were registered as the property of the SANT, but were put under the 'jurisdiction' of the newly created Matlala Bantu Authority.[25]

All twenty-two farms were laid out and planned according to the much contested policy of 'betterment' or 'rehabilitation'. There were strict limitations on the number of cattle allowed. Rotational grazing camps were imposed and ploughing fields were allocated only to specific families. On the SANT farms, people had to register as 'trust tenants' and pay yearly rents for their residential stands, their fields and cattle. People who could not afford to pay the yearly rents were arrested and served prison sentences.

In 1962 the Lebowa Territorial Authority was established with MM Matlala, the son of Maseremule, as its head. In 1972 Lebowa was given 'self-governing' status and Matlala was groomed to be chief minister. He was defeated in the polls but went on to hold various positions in the Lebowa 'Cabinet'. He was Minister of Finance when Lebowa was dissolved with the end of apartheid in 1994.

During the 1980s there were anti-apartheid uprisings in Lebowa. Chiefs were the primary target because of their role in Bantustan government as well as extortionist levies and labour demands in many areas (Delius, 1996: 162–3,188–9). During this time Matlala's royal kraal was guarded by the South African Defence Force to protect him and his family from angry residents. After the uprisings and in the early days of ANC rule, Matlala appeared to moderate his demands for obedience and tribal levies, and become more conciliatory towards the 'comrades' and development committees with which he had previously clashed (Claassens, 2001: 31–40).

During the early 1990s, in the dying days of apartheid, various Cabinet ministers in Lebowa (all of them were traditional leaders) entered into negotiations with the national Ministry of Regional and Land Affairs to transfer title of about 400 farms, constituting almost 30 per cent of the land area in Lebowa, to 'tribes'. In 1994, just before the change of government, the title deeds of many farms in Rakgwadi were transferred from the South African Development Trust (SADT)[26] to the Matlala tribe. After 1994 the new Cabinet ordered an investigation into the Lebowa land transfers. This found that there had been virtually no consultation with people living in the affected areas, and recommended that the transfers be reversed. The recommendations have not yet been implemented.

Most people in Rakgwadi knew nothing about the transfers until late 1999 when Matlala announced at various meetings that people no longer needed to pay the yearly rents to the Department of Agriculture (*molimi*) in Nebo because he himself now had title to the farms. For people in the village of Mmotwaneng this came as a bombshell and made sense of recent developments. Each of the villages in Rakgwadi has a headman (*ntona*) and a village council. The village council deals

[25] Bantu authority was the previous name for tribal authority.
[26] The SANT had been renamed the SADT.

with land disputes and internal allocations of fields and residential sites. In Mmotwaneng the council was particularly active and representative of the different clans (*kgoros*) in the village. A teacher from Mmotwaneng commented:

> 'Thus we managed to make a village council to advise *Ntona*. We consulted all the *kgoro*s of the village and each selected a representative to be on the *Ntona's* council. We have a strong council and we have managed to strengthen our *Ntona* . . . . Now lately the *Mosate* [royal kraal] is interfering in land allocation in Mmotwaneng. Instead of allocations going from our *Ntona* to the *Mosate*, the *Mosate* is now allocating our land to outsiders. There is no consultation with us. People just arrive, saying they are sent by the *Kgosi*.'[27]

There was also tension about disputes being decided at the *mosate* without the proper involvement of the Mmotwaneng headman and community members. Requests to the *kgosi* to address these issues had fallen on deaf ears. This, together with the announcement that the Mmotwaneng land (the farms Welkom and Boekenhoutlaagte) now belonged to Matlala, led to several busloads of villagers arriving at the *mosate* in January 2000 bearing a petition and demanding a meeting with the *kgosi*.

MEMORANDUM

TO: KGOSI M.M. MATLALA **FROM: MMOTWANENG COMMUNITY**
DATE: 04 JANUARY 2000

As we have made incessant pleas to the Kgosi beseeching him to address the plight of Mmotwaneng Community, and noticing that he is leaving us in the lurch, we are bound to forward our grievances in the form of a memorandum and a march. These entail the following DEMANDS that need to be responded to with immediate effect:

1. We are not prepared to allow Kgosi to claim the title deeds for us, to be his, we are here to demand them today.
   In this regard, Kgosi must remember the following:
   - 1.1 We are also responsible for the buying of Mohlalaotwane and other farms. We were denied the residence of these farms but instead we were sold to the apartheid regime by renting both Welkom and Boekenhoutlaagte farms.
   - 1.2 We have rented these two farms (Welkom and Boekenhoutlaagte) for 42 years, we therefore demand the title deeds for them.
   - 1.3 We were even jailed in 1969 because we were not affording to pay for the rent. Some of us remained in custody and eventually suffered death.
   - 1.4 As Kgosi you were silent.
   - 1.5 As community (Mmotwaneng) we are saying this is enough.
2. The problem of authority in our community is a real one and needs very careful attention. We therefore demand that Kgosi should stop undermining Ntona.
3. As Mmotwaneng Community, we are so marginalised by both Kgosi and the government. This must come to a halt.

[27] Interview with teacher (name withheld), 27 June 2000.

4. The tribal clerk, Mrs Mashoeshoe/Mogashoa is misusing her powers. Instead of helping our people, she is robbing them. This was evidenced in the Molala vs Mogashoa case. We are not going to allow her to ignore and disregard the protocol. She also subverts our Ntona. We demand that she should be removed from office and replaced by a responsible clerk. See attached letter written by her.
5. Mr Mogashoa, the husband of our tribal clerk, owes us an apology. He has rebuked our Kgoro and Ntona. He must come to apologise.
6. The pending cases involving members of our community should be resolved very soon.
   The referred cases are:
   6.1 Malata–Machipa's case
   6.2 Mogosoane–Manasoe's case
   6.3 [. . .]
7. [. . .]
8. [. . .]
9. Kgosi said that this payment for 'Molimi' has been repealed. 'As we are the ones paying, we demand that you furnish us with the documentary proof. We want to keep that document ourselves, do not keep it from us'.
10. The venue for the cases involving our members should be Mmotwaneng and the stakeholders in these cases should the Kgosi, this Council, our Ntona, the village Council (Mmotwaneng), those involved in the cases, their friends and interested members of community (Mmotwaneng).
11. [. . .]
12. Finally, we are saying our Kgosi should respond within _____ days starting from today.

PS:

Over and above these, we are still committed to obey Kgosi as our traditional leader especially in the following instances:

1. Koma
2. Dispute resolution of civil and criminal cases
3. And all matters that are his because of tradition

Point 1.1 of the memorandum refers to the fact that the parents and grandparents of the Mmotwaneng villagers had all been required to contribute to the purchase price of the original farms in Sekhukhuneland. Mohlalaotwane is an area in Madibong. Members of the tribe had been required to contribute £10 per family, or a beast. They were outraged to discover in 1958 that the *kgosi* had sited their village on one of the 'trust farms' and thereby reduced their status from landowners to tenants. Moreover, trust farms were patrolled by government rangers who implemented the betterment policy of strict restrictions on numbers of cattle and collected 'rents'. Many people could not afford to pay the annual rents. The people who were jailed were mainly very poor women. The conditions in jail were bad. Two women died shortly after being released from jail.

Points 2–6 of the memorandum refer to disputes about the authority of the clerks at the *mosate* to 'interfere' with internal land allocation processes within Mmotwaneng.

The disputed cases

Molala v Mogashoa

There are two versions of this case. According to the Mmotwaneng leaders, Mr Molala, a resident of Mmotwaneng, was allocated a field by the *ntona*. However, the same field was allocated to Mr Mogashoa by the *mosate*. Mogashoa is the husband of the tribal clerk at the *mosate*. He and his wife live at Tsimanyane village, which is far from Mmotwaneng. The Mmotwaneng leaders insist that in the context of the shortage of arable land, non-residents cannot have fields. They say the 'allocation' happened through nepotism and that the clerk was rude and abusive to the *ntona* about this and other matters.

Mogashoa has a different version of the case. He says his parents went to live in Mmotwaneng village in about 1990. They were newcomers and so had to pay a 'welcome fee' (*nthole*) of R450 and a 'greetings fee' (*maduma*) of R50 to the *mosate*. They were allocated a residential stand and a ploughing field which Mogashoa inherited after their death. However, when Mogashoa decided to move to Tsimanyane village in 1996 he 'sold' his site at Mmotwaneng to Molala. Since there are no fields at Tsimanyane he retained his field for himself. To his surprise, Molala's sister then prepared the field for ploughing. When Mogashoa took this up with Molala, the new owner referred him to the *ntona*. The *ntona* said that Mogashoa had relinquished the field by moving away from the area.

Mogashoa opened a case at the *mosate*. The claimants were called to the *mosate* and the case was decided in favour of Mogashoa. The reason given was that Mogashoa had the only documentary proof (a Lebowa Permission to Occupy certificate or PTO) relating to the site. Molala's sister, a widow, referred the case back to the village council. The village council decided that the case had been unfairly dealt with at the *mosate* because of Mogashoa's marriage to the tribal clerk at the *mosate*.

Mogosoane v Manasoe

Mr Mogosoane from Mmotwaneng was allocated a field by the *ntona* and village council in the ordinary way. However, Manasoe went to the *kgosi* and claimed the field. Manasoe is a resident of Goru village and a businessman. The *ntona* reported a dispute to the *mosate*. The claimants were advised to go to the field on an appointed day and wait for the *kgosi* to arrive and resolve the dispute *in situ*. They, together with the *ntona*, waited the whole day. However, the *kgosi* neither arrived nor sent any explanation. That night Manasoe went to Mogosoane's house and threatened him with a gun. This 'assault' was also reported to the *kgosi* but no follow-up action has taken place.

The postscript to the memorandum states that the Mmotwaneng community remains committed to obeying the *kgosi* as 'our traditional leader' and specifically refers to his role in *koma* (initiation rituals for young men and women), dispute resolution and tradition. The people interviewed said they were not opposing traditional leaderships *per se* but needed to secure their land rights.

> 'We want our own land rights. We don't mind Matlala being our chief, but each man or woman must have their own land rights. We want to feel that we are South Africans . . . .

> Like other South Africans we are entitled to have rights to our land. The current system works for the benefit of one man. Matlala says we don't have to pay rent under the new system, yet in practice if you want to open a shop, you have to pay him. If you want a residential site you have to be up to date with your tribal levies. And you have to go via him.'[28]

The march took place on 4 January 2000. On the next public holiday, the *kgosi* called a *pitso* (general meeting) at the *mosate* so that the 'tribe' could decide how to deal with the 'insults' of the Mmotwaneng community. The meeting was well attended by several hundred men from other villages within Rakgwadi.[29] Feelings ran high at the meeting. People expressed the view that the Mmotwaneng community had insulted the dignity of the *kgosi*. They also said the problems at Mmotwaneng were caused by 'migrants and intellectuals'.

In April the Mmotwaneng community was summoned to attend a *pitso* and 'rebuked' by representatives from the twenty other villages. At the meeting[30] Matlala said the community's fields belonged to him and threatened to reallocate the fields to the Mohlalaotwane and Vooruitzicht villages. He reminded the community that he had previously managed to successfully evict a royal councillor, despite the fact that the councillor had tried to challenge the eviction in court. Many people had contributed to the legal fees of the councillor (who was a relative of the chief) but to no avail. Thus people were afraid.

At another *pitso* in June, the Mmotwaneng people were told that anyone who demanded the title deeds would be expelled from 'Matlala's farms'. They were also told that people who participated in meetings at Mmotwaneng would be arrested. The leaders have lain low since the march. An experienced land activist who was the mayor of a nearby area said it was not surprising that Mmotwaneng had 'gone quiet' after their initial bravery.

> 'It is not easy to challenge a chief. In our area we are struggling to do the same. We have various advantages; we can prove that our forefathers purchased the land and have the title deeds. That concept of being the owner is a challenge to the chief's power. Also we all came from different areas; we are people with different chiefs. That means it is easier for us to oppose Chief Sekwati who claims authority over Mabitsi [the area where they purchased the land]. Yet even for us it is not easy to challenge the authority of the chief. In Mmotwaneng it is harder. Matlala has got the title. They are not sure of their legal status. Some of them are not even sure if they are doing the right thing. They feel vulnerable. Also they are used to living with the chief's power, and after all he is their chief. Plus they live right next to him. So what they are doing is very hard. Even if they know they are right, they will have doubts sometimes and sometimes they will be terrified.'[31]

Asserting centralised ownership

The Mmotwaneng dispute is only one example of a series of disputes in Rakgwadi. They have in common attempts by the *kgosi* to increase centralised control over

[28] Interview with a teacher from Mmotwaneng (name withheld), 27 June 2000.

[29] Obed Malapane, a research assistant at the time, attended the meeting as an observer. The account of the meeting is drawn from his observations.

[30] The account of this meeting is based on an interview with a Mmotwaneng leader (name withheld), 27 June 2000.

[31] Interview with the mayor (name withheld), 25 August 2000.

land. The most serious dispute concerns a group of labour tenants, the Tladi yaKgahlane, who can trace their history on the land to long before the Bakone arrived in 1957. They lived there before white farmers expanded into the area in the 1800s, and were forced to provide free labour for the farmers for three months each year in return for continuing to farm part of the land. They lodged a claim in terms of the Restitution of Land Rights Act, but subsequently discovered that their fertile river-front land had been included within the land transferred to the Matlala tribe earlier in 1994. Matlala has encouraged people from the Rakgwadi villages to plough the extensive fields left behind by the farmers and establish homesteads on the Tladi farms. He allocated a large section of the Tladi farms to a group of stock farmers from Rakgwadi as grazing land. This precipitated clashes with the Tladi farmers. Matlala arrived to warn the Tladi farmers to curtail their grazing activities on 'his' land, accompanied by a large contingent of uniformed police and army personnel. Shortly thereafter a serious fire burnt much of the Tladi grazing land.

These and other recent events indicate that Matlala is no longer concerned with balancing issues of local legitimacy and political acceptability—as he had to do after the anti-chief rebellions of the mid-1980s and in the early days of ANC rule. Instead he is relying on the tribal title to assert centralised control over land in Rakgwadi. This is being fiercely resisted by various sub-groupings within Rakgwadi—such as the Mmotwaneng villagers on the basis that village land rights have historically been locally controlled; and by groups like the Tladi who claim a separate identity and independent rights to the land.

The relative independence that was so hard won by ordinary people, relying in part on clan structure and 'proper custom', has been compromised by the transfer of title. Although legally the Matlala tribe, and not Matlala, is the registered owner of the land, he is perceived to be the 'holder' of the title deeds. In his clashes with the Mmotwaneng villagers and Tladi group, he has mobilised people from the other twenty villages to outnumber and intimidate these smaller units. This illustrates the importance of where ownership boundaries are drawn. At issue in both instances are questions of local as opposed to centralised control over land, and the relative autonomy of authority exercised at village or sub-group level *vis-à-vis* ownership type powers exercised by the chief.

Case study 2: Makuleke

The Makuleke community lives in the far north-east of South Africa near the Kruger National Park. In 1969 they were forcibly removed from the land they had historically occupied at Pafuri near the Mozambique border, when it was incorporated into the Kruger Park. In 1995, after a long battle, they won restitution of their land on the basis of an agreement that the land within the game park be transferred to their Communal Property Association (CPA) to be used for eco-tourism development, and that they would continue to reside in the resettlement area of Ntlaveni.

During the forced removal they were, without their knowledge, put within the boundaries of the Mhinga Tribal Authority. They assert that they are, and have always been, a separate community with their own traditional leader. When they were dumped in Ntlaveni in 1969 the compensatory land had been laid out in three

separate villages, each with its own residential area, block of arable fields and grazing camps. The land was administered by the SANT according to 'betterment' regulations which prescribed the issuing of PTO certificates for residential sites and fields, and strictly controlled rotational grazing camps for limited numbers of cattle. Their agricultural economy was severely undermined. Unprecedented numbers of children died from malnutrition in the years following the removal.

Among recent problems at the Ntlaveni resettlement area are that a 'headman', Joseph Nwamba, supported by Chief Cydrick Mhinga, has been 'selling' allocations of Makuleke compensatory land in one of the Makuleke villages to outsiders. He has imposed fines on women for collecting firewood—allegedly because he sells firewood. In terms of the Makuleke rules, community members may collect dry wood freely from the veld. He has given people permission to cut thatching grass before the grass-cutting season is announced by the Makuleke tribal council. Nwamba's actions have led to serious disputes, with several people having been arrested and charged with public violence.

The Makuleke traditional leader, known by his people as Chief Makuleke, was appointed headman (under Mhinga) of the three Makuleke villages in 1976. His status as headman is strenuously opposed by the Makuleke community. They have repeatedly made submissions to government and to various commissions dealing with traditional leadership, stating that they are an independent community on a par with the Mhinga community, and that Makuleke is a chief on a par with Mhinga, not a headman under him. They have included extensive historical material in their submissions. They are enraged that Mhinga, who opposed their restitution claim on the basis that the land should be restored to the Mhinga Tribal Authority and not to the Makuleke 'clan', not only asserts that they are a sub-group under his authority but is also supporting an unofficial headman to undermine their authority on their compensatory land.

The Makuleke community is concerned that the Communal Land Rights Act entrenches and expands the power of the Mhinga Tribal Authority over their land at Ntlaveni and within the Kruger Park. The Act, in s 5(2), enables the minister to endorse the title held by the Makuleke CPA to 'the community', which would enable the Mhinga Tribal Authority to exercise control over their restitution land.

Case study 3: Mayaeyane area in Makgobistad

Makgobistad is in the North West Province, bordering Botswana. The court applicants do not dispute the legitimacy of the tribal authority or its boundaries. They live within the Molopo reserve which was created by the British in 1886 in recognition of Barolong indigenous land rights in the area. However, they dispute that the tribal authority has the right to make unilateral decisions about agricultural land in an area called Mayaeyane, where their families have fields inherited over generations. Mayaeyane is an agricultural area at some distance from the main Makgobistad town. In terms of the decision of a much cited and well attended *pitso* in 1947, Mayaeyane was reserved as agricultural land and people were prohibited from establishing homesteads there. Only five original 'caretaker' families were excluded from this prohibition. Thus farmers travel back and forth between

Makgobistad and Mayaeyane, and may only stay in rudimentary 'summer houses' on the fields during periods of intense agricultural activity.

A few years ago, the young chief of Makgobistad supported his uncle (who had acted as regent during his childhood) in becoming the headman of Mayaeyane. There had previously been no headman because so few people lived there. The uncle, Peter Motsewakhumo, is establishing a new town at Mayaeyane. He allocates land to 'outsiders', some of whom are farm workers evicted from neighbouring white farms and some allegedly from Botswana. He has done this without the permission of the long-term farmers and, more seriously, has allocated both grazing land and people's fields to the new arrivals. Local government has announced a housing project and is installing a water reticulation system and new road. The Mayaeyane farmers insist that they were never consulted about these developments or Motsewakhumo's appointment as headman. They also insist that he cannot unilaterally make decisions that impact on land they have inherited over generations, and that his activities are invalid—both because he has not consulted them and because the Mayaeyane development was neither discussed nor agreed to by the Makgobistad tribal council. They say that Motsewakhumo is attempting to establish support and revenue for himself from the new arrivals, and allege that he benefits from the grants and poverty relief he has arranged for them.

They say the young chief is arrogant and does not respect the fact that the fields have belonged to their families over generations. They insist that there is no precedent allowing either the chief or headman to unilaterally reallocate family land. They refer to a series of precedents to show that decisions about residential and arable land have always been, and can only be, taken within the family. According to the Mayaeyane farmers, the young chief calls himself *mong wa mmu*, the owner of the land, and struts around as if he owns the place and people. They say his forefathers were respectful of proper decision-making processes and would never have behaved this way.

They are challenging the Act because they say the powers given to traditional councils will bolster the arrogance of the young chief and his uncle, and undermine the villagers' ability to protect their fields and insist on 'proper' decision-making processes.

ISSUES RAISED BY THE CASE STUDIES

Tenure security

The applicant communities are concerned that the Communal Land Rights Act, read together with the Traditional Leadership and Governance Framework Act, confirms disputed tribal authority boundaries and undermines more localised decision-making at layered levels of social organisation. This jeopardises the ability of groups of users—whether at the level of the family, the user group, the village or the clan—to exercise control over their land. A related concern is that the new laws undermine indigenous accountability mechanisms, thereby compromising the ability of people to hold land administration committees and traditional leadership to account.

Control over land, and where and how this is exercised, has a fundamental impact on tenure security. It determines whether people will be able to retain their homes,

fields and grazing or hunting land in the face of decisions by traditional councils to allocate the land to others or to sell it. Rights to common property land are particularly vulnerable. While it is theoretically possible to prove that rights to residential plots and fields qualify as 'old order rights' and should be registered as 'new order rights', it is not possible to register rights of access to common property areas as new order rights. In any event, the government's capacity[32] and commitment to register new order rights at scale is questionable (Cousins, 2004).

Property and authority

Authors such as Hann (1998: 4–5) and Lund (2002: 12) emphasise that property relations are not about things, but about relationships between people about things. According to Lund (2002: 11),

> '[i]t is never merely a question of land, but a question of property, and social and political relationships in a very broad sense. Struggles over property are as much about the scope and constitution of authority as about access to resources.'

Property, authority and law are closely interconnected. Property exists only insofar as institutions are able to enforce it. At the same time, the process of recognition and enforcement strengthens the institutions that play this role. In this sense, as Lund points out, these institutions 'are equally at stake'. He argues that functional property is created not by national laws and policies, but at the local level through processes of interaction between local actors. Nevertheless, national institutions and laws have a major impact at the local level in bolstering the authority of certain groups and in providing possible avenues for the legitimation of property and authority (Lund, 2002: 32).

At issue in the case studies are disputed constructs of the nature of land rights and chiefly power in relation to land. The statutory powers that the Act gives to land administration committees reinforce the top-down version of chiefly authority asserted by the traditional leaders in the case studies. This, combined with fixed boundaries and the default to controversial tribal authority boundaries, undermines the interplay of power between layered levels of authority that would otherwise mediate potential abuse of power by tribal authorities.

At the heart of the controversy about land rights and chiefly power are questions about the content of customary law.

The meaning of customary law under the Constitution

As already mentioned, the Constitution recognises customary law 'subject to the Constitution'. Recent judgments of the Constitutional Court contrast 'living' customary law with 'ossified versions in the official code'. In the *Bhe* case dealing with the inheritance rights of women, Langa CJ stated that

[32] Only R25 million was allocated for implementation of the Communal Land Rights Act in 2006–7 (Republic of South Africa National Treasury, 2005: 722) despite the Department of Land Affairs estimate (Hofstatter & Quintal, 2004) that the cost of implementing the Act would be R500 million a year. Boonzaier (2006: 21, 92) estimates that the survey costs alone would amount to R8,4 billion and could well be higher than the value of the land.

> 'official customary law as it exists in the text books and in the Act [Black Administration Act 38 of 1927] is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes continually taking place' (in para [86]).

The Richtersveld land restitution judgment (*Alexkor* in paras [51]–[52]) emphasised the distortions that arose through customary systems being viewed in terms of common law constructs:

> '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. The courts are obliged by section 211(3) of the Constitution to apply customary law where it is applicable, subject to the Constitution . . . . In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights.
> 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.'

The *Bhe* and *Alexkor* judgments, however, also refer to the problems associated with establishing the content of 'living customary law', as does Bennett (2004: 49):

> '[I]n spite of the failings of the official version of customary law, mere availability of information has had the effect of creating a de facto presumption in its favour. Litigants are entitled to object, but in practice this right seldom amounts to much, because in the heat of litigation, time and money militate against undertaking a possibly inconclusive search for the living law.'

Rule-based paradigms of customary law

The paradigm adopted by the Communal Land Rights Act is informed by pervasive perceptions of land rights and chiefly power that have their origins in influential ethnographic accounts of communal tenure in southern Africa. One of the most respected texts on customary law in southern Africa is Isaac Schapera's recently reprinted 1938 *Handbook of Tswana Law and Custom*. In it Schapera (2004: 196) states: 'Control over the land and its resources is vested in the Chief, who exercises it through the headmen of villages and wards.' He describes the administrative system of the Tswana as founded on the principle of delegated authority (Schapera, 2004: 53).

However, Schapera's much-cited chapter on property and tenure, which describes the layers of 'delegated authority', begins by stating that the boundaries between tribes were previously 'not clearly defined' and that, historically, disputes and conflicts between tribes over grazing, water and territory were endemic. This situation was changed by British intervention which adjudicated claims and established secure boundaries:

> 'The security afforded by British protection has enabled each tribe to utilise its land freely without fear of conquest or interference so that here the tribal system of land tenure may be seen functioning in as pure a form as can be found anywhere in South Africa at the present time' (Schapera, 2004: 195).

In my view this misses the point that contestation over boundaries was, and continues to be, a motive force in mediating power over land. It contributes to accountability because leaders require support to protect and extend their spheres of authority. In contrast to Schapera's description of delegated power are contemporary accounts of control over land being contested between different layers of social organisation, and of land allocation processes occurring *primarily* at family and neighbourhood level, and only afterwards being referred upwards for regularisation (Fay, 2005; Alcock & Hornby, 2004). In practice, disputes are also generally referred upwards, and not downwards, depending on whether the authority of the 'higher' structure is recognised or not.

In the preface to the *Handbook*, Schapera (2004: xi) wrote that he 'resisted the temptation' to deal with the extent to which the rules he described were 'actually enforced or obeyed in practice [and] the many subterfuges employed to circumvent the law', including the activities of 'autocratic, biased or venal Chiefs or headmen'. He referred to a possible future publication dealing 'with Tswana government and law as actually seen in practice, and not merely as represented in the statement of formal principles here given'.

An account of rules is limited if it leaves out what happens in practice, and the dynamics that animate, contradict and transform the rules. The problem is compounded when Western legal constructs that may not articulate with the dynamics at play are used to discern and codify 'the rules'. The characterisation of chiefly power by eminent South African anthropologists is often belied by their rich and detailed descriptions of quite different processes on the ground. This apparent contradiction reflects the impact of Western epistemologies and legal paradigms on ethnographic constructs of rights and authority that remain influential and are much cited in litigation about customary law.

Crais (2006: 722), for example, discusses the influence on colonial policy in the Eastern Cape of European conceptions of sovereignty that 'presumed the existence of a state exercising dominion over a given bounded territory'. Colonial officials sought to find the chiefs in charge of particular areas, and the boundaries between ethnically different groups. Yet 'chiefly power waxed and waned and political boundaries were constantly in flux and overlapping. British officials found this landscape unintelligible and untenable' (Crais, 2006: 729). Moreover, as a chief explained to a chief magistrate in 1884, people 'belonging to' different chiefs were often 'intermixed' in particular localities. The magistrate responded that 'it is quite impossible that either judicial or fiscal administration can be satisfactory so long as the several sections of tribes . . . remain intermixed as at present' (Crais, 2006: 727).

The Colonial government responded to such 'anomalies' by seeking to define not only clear boundaries between 'tribes' but also hierarchies of authority between senior and lesser chiefs, and to justify these by the use of historical genealogies. Their interventions had an enormous impact on a political context in which 'political power tended to be localized, boundaries fluid and vague, and the authority of chiefs highly variable' (Crais, 2006: 729).

The Communal Land Rights Act purports to celebrate custom and tradition. However, the case studies illustrate the point that the Act is fundamentally informed by Western legal constructs. It imposes a paradigm of exclusive ownership

and centralised control on African systems of layered and relative rights. By transferring ownership at the level of the tribal authority, it trumps rights that are exercised and controlled at levels that 'nest' below and within these large units. State-imposed fixed boundaries of jurisdiction undermine indigenous mechanisms that mediate power and see it fluctuate depending on leaders' capacity to mobilise support. This problem is compounded by disputed former Bantu authority boundaries becoming 'default' community boundaries.

Competing constructs of customary law and rights in land

The case studies illustrate competing constructs of customary rights in land, and in particular of the scope of chiefly authority over land.

Land ownership, allocation and access

In Makgobistad I interviewed people to find out when their families had acquired the fields now under threat from the new residential development. Many of the interviewees were old and had inherited the fields from their grandparents or great-grandparents. It was therefore difficult to establish the dates of acquisition. We sat in a group which included people from various families, who together tried to remember and compare reference points. We had worked out the genealogy of the various chiefs in Makgobistad. There are records of the dates when they were in office. To find out when the families had acquired their fields, I asked people which chief had allocated the land to their forefathers. People consulted one another and answered politely. Then an older man, after giving the name of the chief, added:

> 'By the way, it wasn't as if the chief actually allocated the land to us. My father told me that his father had scouted out the area as suitable for farming; he was one of the first Makgobistad people to expand into the area and start farming there. The chief knew about it, but it wasn't as if he allocated anyone the land, or even gave them permission to do that. In those days people often expanded their farming activities around the *meraka* [cattle posts].'[33]

Most of the people in the group who had given a chief's name in answer to my question about allocation then described similar processes of 'expansion' as opposed to allocation. Families who had obtained their fields more recently described the tribal council as formally confirming allocations after the neighbours had agreed to the boundaries of the field.

Part of the objection to Peter Motsewakhumo establishing himself as a headman in Mayaeyane is that people dispute that this type of authority ever existed in the area. They complain that he is building up a power and revenue base for himself by bringing in 'outsiders' who owe their existence there to him. They say he has established a village *kgotla* or council comprised exclusively of new arrivals. They assert that the nature of land rights in Mayaeyane is different—and more independent. Previously the families who farmed there would choose a 'caretaker' to liaise with the Makgobistad tribal council and to be a point of contact with

[33] Group interview by Claassens at Makgobistad, 17 February 2005.

'outsiders'. The caretaker role was limited and rotated between people from various families.

In Makuleke the researchers preparing for the legal challenge needed to understand the land administration system in order to make sense of the explosive disputes in Block H around the activities of the disputed 'headman', Joseph Nwamba. The PTO regulations[34] which applied (and continue to operate) in many rural areas in South Africa provide that certificates are issued by government officials, but tribal authorities play a key 'advisory' role in the process. In terms of the regulations, PTOs cannot be sold and are not inheritable. They can only be issued to men, or to the elderly widow of a male holder.

We interviewed the people who administered the PTO and land allocation system at the Makuleke tribal office. One of their advisers was an old man who had been the senior headman in Pafuri before the removal in 1969. He told us that in Pafuri the chief had had no role in allocating homestead plots and arable land to members of the Makuleke community. This was all done within extended family structures. After the removal, people were put into surveyed 'betterment' villages and the tribal office was required to assist in the issuing of PTO certificates for arable and residential sites. In contrast to the regulations, the current Makuleke tribal clerks referred to fields and residential sites 'belonging' to families over generations. They volunteered that when people sell their houses they assist them to re-register the PTO in the name of the purchaser at no charge. Such private sales of houses are fairly common. Many of the examples cited were of single women purchasing houses and thereby acquiring residential sites.

While the institution of chiefly authority is vitally important to people in Makuleke—not least as a symbol of independence from Mhinga—and people invest extraordinary resources of time and energy in the institutions surrounding the chieftaincy, the status of the chief is not bound up with a central role in land allocation processes. Moreover, Makuleke residents consider themselves to be the owners of their fields and residential sites, and openly transact with one another on this basis.

Sections 24(3)*(a)* and *(b)* of the Act give land administration committees the authority to allocate new order rights in land. They are made responsible for establishing and maintaining records of all new order rights and transactions in such rights. Many traditional leaders assert that the power of land allocation is intrinsic to their 'customary law' role, and therefore protected by s 211 of the Constitution.

The paradigm of chiefs allocating land is closely linked with perceptions about the genesis and nature of land rights in 'communal' areas.[35] According to Bennett (2004: 380–1),

> '[t]hose who begin an investigation of customary tenure with the assumption that ownership is a universal phenomenon . . . tend to represent the data as if one person, or body of people, holds a plenary right out of which fractions of rights are given to others. It then follows that lesser rights of use and enjoyment are conditional on grants by the "owner". On this understanding, it is often said that "ownership" of land vests in the

[34] Black Land Areas Regulations R188 of 1969.

[35] See chapter 5 by Ben Cousins in this book.

> tribe, and that traditional rulers grant individuals lesser interests from this plenary right. From such a description, it seems as if the tribe has an "absolute" title, the traditional leader is a trustee and individuals have "usufructuary" or some similar limited right.'

Bennett (2004: 381) suggests—as does Okoth–Ogendo (1989) and in this book[36]—that this model disguises the real nature of indigenous land rights, which should be viewed as a 'system of complementary interests held simultaneously'. Bennett proposes that an investigation into the nature of rights under indigenous tenure should therefore not be framed in terms of ownership, but rather enquire into the membership status of the rights-holder, the content of his or her interest in the land, and the uses to which particular tracts of land are put.

Academics writing about land tenure in Africa—such as Okoth–Ogendo (1989) following Sheddick (1954) and Allott (1961); also Bennett (2004: 380)—suggest that a key feature of indigenous land tenure regimes is that *access* to land and *control* over land do not coincide, as they do in the common law construct of ownership. Different land uses attract varying degrees of control at different levels of socio-political organisation. For example, allocations of arable land are often controlled at the level of the family and the neighbourhood, while grazing and woodland use is the concern of a wider segment of society.

The fact that control of land is vested at different levels of social organisation is centrally important to an understanding of the nature of land rights and forms of authority over land.[37] Many scholars have pointed out that colonial authorities misunderstood and downplayed the strength of individual and family rights (Chanock, 1991; Colson, 1971; Kerr, 1976: 75–80), and that the term 'communal tenure' is a misnomer (Gluckman, 1965: 76–108; Peters, 2002: 48–51; Mamdani, 1996: 139)[38] given the strength of family and individual rights to residential and arable plots.

Chanock (1991: 64) has written about the coincidence of interests between colonial administrators and chiefs in exaggerating the role of traditional leaders in land allocation. On the one hand, it suited colonial governments to downplay the strength of existing individual or family-held land rights because colonial land grabs could then be justified on the basis that they did not undermine existing property rights. On the other hand, a central role for chiefs reinforced the system of indirect rule:

> 'There is a profound connection between the use of the chieftaincy as an institution of colonial government and the development of the customary law of land tenure . . . . The authority of the chiefs was maintained by their role as allocators of land, and so was the dependence of their subjects.'

In South Africa the exaggeration of autocratic chiefly power had an additional function. It justified the draconian powers given to the governor general as 'supreme chief' by the Native Administration Act 38 of 1927[39] (Chanock, 2001:

[36] See chapter 4.
[37] See also chapter 5 by Cousins in this book.
[38] See also chapter 6 by Tom Bennett in this book.
[39] Subsequently the Black Administration Act.

282–90). Chanock details repeated warnings by white politicians that extending equality before the law to African people would lead to chaos because the only form of authority that 'natives' respected was autocracy.

A range of authors (Colson, 1971; Cheater, 1990; Chanock, 1991 and 2001; Peters, 2002 and 2004; Costa, 1998) describe the creation of customary 'rules' by colonial authorities. According to Merry, 'the customary law implemented in "native courts" was not a relic of a timeless precolonial past but instead an historical construct of the colonial period' (Costa, 1998: 530). These authors describe how the colonial assumption that land belonged to 'some community, lineage or "tribal polity"' (Colson, 1971: 197) inhibited the development of individual rights. Power was conceptualised as flowing downwards from the state, via traditional leaders who were held to be the custodians of 'communal' land. In this process the strength of user rights to land (particularly those of women) was denied and undermined, as were decentralised and participatory local processes of land allocation and dispute resolution.

Contested authority between headmen and chiefs

Disputes over spheres of authority between chiefs and headmen, such as those in Makuleke and Mmotwaneng, are common in rural South Africa. They illustrate both how important and how contested the boundaries of authority are in multilayered systems of land rights. In South Africa today there are endemic disputes about the jurisdiction and status of headmen relative to chiefs. The dispute over authority in Makuleke between Chief Makuleke and Mhinga is a case in point. Mhinga is asserting not only that Makuleke is merely a headman under his authority, but also undermining Makuleke's authority within his three villages by supporting Nwamba as a headman answerable to him (Mhinga) and not to Makuleke. Nwamba is asserting that he is equal in status to Makuleke and need not refer disputes 'up' to him.

These are not private battles between the leaders concerned. They are founded on how much support the various contenders enjoy. For example, in Mmotwaneng people took considerable risks to defend the 'dignity' of their *ntona* against incursions into his authority by clerks from the *mosate* or royal kraal. In Mmotwaneng, as in Makuleke, what is at issue is not just the role of the local leader as a symbol of separate identity, but the viability and 'proper functioning' of local councils as inclusive discussion and decision-making forums.

Tensions over the boundaries of authority are often played out in relation to the scope of the jurisdiction of tribal courts. In Makuleke some of the worst conflicts have arisen in the context of disputes over the authority of Nwamba's council to impose fines and other punishments. In Mmotwaneng the rebels insist that the chief must not undermine the status of their village council by 'interfering' in land disputes that should be decided locally. Just as leaders attempt to assert their authority through deciding disputes, so do people contest it by refusing to appear before them, ignoring their decisions or leapfrogging the tribal court by going to the High Court and challenging the right of the tribal authority to interfere with their land.

Selling land allocations

A critical issue in many disputes is the practice of some traditional leaders or would-be traditional leaders who allocate land for a fee. The revenue to be made from allocation fees is a key incentive to expanding jurisdictional authority. In addition, the new occupiers serve as a support base because the 'purchasers' are dependent on the leaders being able to retain sufficient authority to guarantee the new allocations in the face of objections from longer-term occupiers. However, selling land undermines the legitimacy and support base of traditional leaders among long-term community members and so weakens their capacity to enforce decisions.

One of the key contradictions highlighted in the community submissions to the portfolio committee was that while the role of traditional leaders should be to guarantee, protect and preserve access to land for community members, many chiefs now prefer to allocate land to outsiders because they can charge them higher fees. This exacerbates pressure on land for long-term residents, and has deeply compromised the standing and authority of chiefs and headmen who condone the sale of land allocations.

Once the scale of 'allocation sales' reaches a certain level, it changes the nature of authority and requires different mechanisms to enforce it. The extensive land made available by the apartheid government to Matlala and his father has generated high revenues in allocation fees. But it has also meant that a large proportion of the people living in Rakgwadi come from other areas and are not bound by a shared historical identity, or by old customs and forms of 'respect'.

Various people assert that the land is theirs because they bought it. Some refer to their allocation receipts as their 'titles'. A significant number of the people interviewed in Rakgwadi argue that tenure reform laws must upgrade their PTOs and receipts into title deeds. They say that the provincial Minister of Land Affairs explained over the radio that that is what the new law will do.

It is perhaps inevitable, in this context, that the land disputes in Rakgwadi are playing out as disputes over title deeds. Matlala relies on the 1994 transfers to prop up powers derived from land ownership, as opposed to powers derived from 'traditional' chiefly authority. This is resisted by groups such as the Tladi and villages like Mmotwaneng, whose only option within this framework is to claim separate titles for themselves.

The impact of fixed boundaries on the mediation of power

The history of South Africa indicates that the boundaries of authority of traditional leaders expanded and contracted all the time, depending on the outcome of wars and on any particular leader's capacity to preserve or extend his authority in the face of challenges from others. Sometimes the challenges came from rival groups, sometimes from 'royal' brothers disputing the chieftaincy, and sometimes from lesser 'chiefs' challenging the hierarchy of seniority, influence and control. Power was mediated by the existence of competing loci of power which existed in a state of

constant tension (Schapera, 1956: 207; Gluckman, 1965: 49–52; Bennett, 1995: 67[40]).

Only leaders who enjoyed support could mobilise people to go to war on their behalf, or support them in the face of challenges by others.[41] The proverb *inkosi yinkosi ngabantu*[42] (a chief is a chief through the people) expresses the role of popular support in maintaining 'royal' authority.

However, a sequence of interventions by white governments undermined the nexus of accountability between support and royal authority. In pursuance of the colonial policy of 'indirect rule', popular leaders were deposed and others put in their place. The 1927 Native Administration Act made the governor general the 'supreme chief' of all natives, with the power to impose and depose chiefs. The colonial government introduced a system of salaries for chiefs, reversing leaders' dependence on contributions and tribute from below, and redirecting the flow of power and resources downwards from government as opposed to upwards from ordinary people.

The 1951 Bantu Authorities Act made chiefs agents of government. According to Govan Mbeki (1964: 119–20),

> '[m]any Chiefs and headmen found that once they had committed themselves to supporting Bantu Authorities, an immense chasm developed between them and the people. Gone was the old give-and-take of tribal consultation, and in its place there was now the autocratic power bestowed on the more ambitious Chiefs, who became arrogant in the knowledge that government might was behind them.'

The Act, in s 2(3), provided for the government to determine the area of jurisdiction of Bantu authorities, with fixed boundaries published in the *Government Gazette*. This gave chiefs powers over people living within their 'jurisdictional' boundaries irrespective of whether those people supported them or not. It thereby undermined one of the key mechanisms of accountability: the opportunity for people to ally themselves with a challenger, who with their support would previously have been able to 'expand' his sphere of authority to include them.

Chief Albert Luthuli (1962: 200) had this to say about the Bantu Authorities Act:

> 'The modes of government proposed are a caricature. They are neither democratic nor African. The Act makes our chiefs, quite straightforwardly and simply, into minor puppets and agents of the Big Dictator. They are answerable to him and to him only, never to their people. The whites have made a mockery of the type of rule we knew. Their attempts to substitute dictatorship for what they have efficiently destroyed do not deceive us.'

[40] 'Whoever currently wielded power would invariably be challenged by rivals, who in their turn would gain power and consolidate their strength, but would eventually lose control to new competitors. These tensions explain why African ruler's [*sic*] power was never in the past absolute. Anyone who attempted tyrannical rule would soon face revolt or secession.' Bennett cites Hall, Hammond–Tooke, Schapera, Ashton and Hunter to substantiate his point.

[41] See chapter 9 by Delius in this book.

[42] This proverb exists in all the major South African languages. For example *morena ke-morena kabatho* in Sesotho.

The assumption of homogenous 'tribes'

In the context of disputed boundaries of authority and the high stakes entailed in irreversible land transfers, the Communal Land Rights Act will inevitably elicit explosive boundary disputes. During the portfolio hearings, rural residents warned that the approach of transferring title to homogenous 'communities' refocused attention on ethnic difference. During apartheid, people were classified as members of different ethnic groups and forcibly removed into separate 'homelands' (Harries, 1989: 104–7). Many have now applied for restitution to their original land in multi-ethnic areas. At the same time tribal authorities were often imposed on people of mixed origins, many of whom had no historical connection with their new 'chiefs'.[43] Moreover, during the messy reality of apartheid, many groups of people were dumped in 'communal' areas where they had no previous historical connection—and were often given stronger legal rights to the 'compensatory' land than the people originally living there.

One of the myths informing colonial constructs of customary law is the assumption of discrete homogenous tribes. Historically leaders in fact welcomed the incorporation of outsiders to expand their labour and support base (Costa, 1998: 430–2; Mamdani, 1996: 140; Colson, 1971: 202; Harries, 1989: 83–5), and in reality many areas have layered and overlapping groups of residents. The assumption of ethnic homogeneity is particularly unrealistic in the South African context. The process of delineating landowning 'communities' will exacerbate disputes not just about the hierarchical ordering and relative status of different levels of social organisation, but also about historical identity and insider/outsider status.

CONCLUSION

The disputes described in the case studies are not about the legitimacy of chieftainship as an institution. They are about the nature of chiefly power in relation to land. For example, while the Mmotwaneng memorandum challenges the *kgosi*'s right to hold the village's title deeds and interfere in village land allocation processes, it specifically states that the marchers are prepared to obey the *kgosi* in matters related to initiation, dispute resolution and 'all matters that are his because of tradition'.

The disputes challenge colonial and apartheid constructs of land rights and chiefly power. In particular, they challenge the entrenchment of apartheid Bantu

[43] Harries (1989: 94) describes how, in the early 1900s, land purchased by a combination of more than six Africans had to be purchased on a 'tribal basis' and held in trust by the Minister of Native Affairs for the 'tribe' concerned. He quotes an attorney from the Northern Transvaal who was involved in such transactions in the 1930s as stating: 'A tribe is a syndicate of ten to fifteen families which buys land and elects a chief and petty chief.' The first applicant in the legal challenge to the Act is Stephen Tongoane, on behalf of the Kalkfontein community, whose ethnically mixed forebears purchased their land in 1922. In 1979 the government imposed the Ndzundza–Pungutsha tribal authority on three such privately owned Kalkfontein farms. The traditional leader proceeded to treat the land as his private property. See chapter 12 by Claassens and Durkje Gilfillan.

authorities and Bantu authority boundaries. They indicate that the powers contained in laws such as the Bantu Authorities Act and the Native Trust and Land Act 18 of 1936[44] remain hotly contested, despite having been brutally enforced over decades. They illustrate the existence of competing versions of 'proper custom' in rural areas. They also point to the impact of perceptions about the Constitution and national laws on ongoing processes of contestation and change occurring at the local level.

At the heart of the disputes described are processes of decision-making about land: which people, at what level, and by which processes are entitled to decide who may occupy and use land for what purposes, and whether land may be transacted or not. A closely related question concerns the nature of the entitlements that must be upheld and taken into account during decision-making processes.

At issue in the litigation is whether land rights, including land rights derived primarily from custom and practice, are secured or undermined by the powers of representation, decision-making and allocation given to centralised land administration committees by the Communal Land Rights Act. Also at issue is whether traditional councils can justify the exercise of such powers by reference to the Constitution's recognition of the role of traditional leaders 'according to customary law' (s 211 of the Constitution).

The answers depend in part on how the courts interpret the 'living law' content of land rights on the one hand, and chiefly power on the other. The concluding chapter of this book discusses the issue of living law in the context of various Constitutional Court judgments. These judgments emphasise that customary law derives its validity from the Constitution and must be interpreted to give effect to the Bill of Rights. As already discussed, the judgments reject codified customary law in favour of 'living law' and stress the flexibility and responsiveness of 'living law' to 'the changes continually taking place' (*Bhe* in para [87]).

The theme of change and responsiveness is consistent with judicial statements that the Constitution must be interpreted to repudiate the discriminatory past in favour of building a 'society based on democratic values, social justice and fundamental human rights' (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* 2001 (1) SA 545 (CC) in para [21]). In that context, 'living law' interpretations of customary law are potentially a critical means of avoiding the danger of particular versions of customary law being used to subject parts of the population to a separate and authoritarian legal regime, and insulate them from the rights enjoyed by other South Africans. The other danger discussed in the concluding chapter is that of static rule-based versions of customary law being used to close down transformative processes at the local level that posit no contradiction between participatory versions of custom and constitutional values such as equality and democracy.

The 'living law' interpretation of customary law potentially opens up the determination of the content of customary law to the full range of people who apply it in practice in their daily lives. It thereby challenges the authority and veracity of

[44] Subsequently the Development Trust and Land Act.

previous state-sanctioned rule-based versions of customary law. In focusing on current practice, flexibility and change it goes further than interrogating the content of the rules applied. It potentially opens up the process of rule formation beyond chiefs and bureaucrats to include the multiple actors and voices engaged in negotiating, challenging and changing property relations and power in day-to-day local struggles.

The Communal Land Rights Act adopts a particular construct of chiefly power in relation to land, and thereby sends a signal that the version of authority asserted by the traditional leader lobby is backed by central government—thus affecting the environment in which different constructs of land rights and accountability are asserted and challenged on the ground. While national laws are often poorly implemented and Constitutional litigation is inaccessible to most rural people, laws and court decisions have an important symbolic impact in framing people's perceptions of their status and entitlements, what they dare imagine and how they justify their actions. The Act gives the top-down version of chiefly power the backing of the formal legal system, with potentially far-reaching consequences not only symbolically but also materially in relation to the validity of unilateral decisions by land administration committees concerning land sales and mining deals.

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Proclamation R188 of 1969 (Black Areas Land Regulations) (*GG* 2486 of 1969)
Restitution of Land Rights Act 22 of 1994
Traditional Leadership and Governance Framework Act 41 of 2003

Part five

Case studies

12

The Kalkfontein land purchases: eighty years on and still struggling for ownership

By Aninka Claassens and Durkje Gilfillan

INTRODUCTION

The Kalkfontein communities are the descendants of ethnically mixed groupings of people who clubbed together in the 1920s to buy rural land north of Pretoria near Settlers. Their peaceful lives were shattered in 1979 when the apartheid government, in creating the KwaNdebele homeland, constructed a tribal authority and imposed it over the three privately owned Kalkfontein farms. The reign of terror that ensued was fiercely resisted by the descendants of the initial purchasers. Ultimately, as the result of a commission of enquiry, the newly created 'chief' was deposed and replaced, and his successor's powers curtailed by a court order.

However, contrary to the recommendations of the commission, the tribal authority was not disbanded. Nor, despite a court order fifteen years ago and many lawyers' letters since then, was title to the farms transferred to the Kalkfontein co-owners from the Minister of Land Affairs, who held it in trust on their behalf. The tribal authority remains deeply controversial. Residents have repeatedly challenged its legitimacy and standing, most recently in public meetings convened by the Mpumalanga House of Traditional Leaders. Yet government development funds continue to be channelled via the tribal authority offices, and residents cannot get identity documents and social welfare grants unless they are up to date with their annual 'tribal levies'.

The Kalkfontein story underscores government's long-standing tendency to treat heterogeneous groups of rural people as 'tribes'. It shows how constructed 'tribal' identities were central to the apartheid creation and imposition of Bantustan structures. In addition, it reveals that despite enormous and consistent effort over twenty-five years by private owners with access to free legal resources, it is practically impossible to dislodge imposed tribal authority structures—even when these are widely perceived to be an embarrassment to the legitimacy of the institution of traditional leadership. The Kalkfontein example also indicates the extent to which apartheid tribal authority structures remain entrenched in

government financial arrangements and development processes in former homeland areas.

Tribal authorities were the primary building blocks of the Bantustan political system. They were established wall-to-wall in the former homelands, sometimes giving the 'wrong' traditional leader jurisdiction over clans affiliated to other 'tribes',[1] and often disregarding the independent identities of groupings of people subsumed within their boundaries.

The Kalkfontein communities are concerned that the Communal Land Rights Act 11 of 2004, together with the Traditional Leadership and Governance Framework Act 41 of 2003, entrenches the status and power of disputed tribal authorities. The communities are particularly concerned that the Communal Land Rights Act gives their tribal authority, reconstituted as a traditional council, the power to allocate land rights and represent the residents as the 'owner' of communal land. These are the very powers that were used to undermine the ownership rights of Kalkfontein residents in the past and that they struggled to curtail. The Kalkfontein co-owners have brought the current court application because they fear that the Act will reverse their hard-fought efforts to contain abuse of power by the tribal authority; and that the Act jeopardises their ongoing efforts to exercise their ownership rights independently. Stephen Tongoane, on behalf of the Kalkfontein Community Trust, is the first applicant in the litigation challenging the constitutionality of the Act.[2]

The communities' strenuous opposition to the unilateral actions of an imposed chief does not imply a rejection of indigenous values or institutions. Far from it, for over 80 years residents have chosen to exercise their ownership rights through familiar and valued indigenous practices. These practices have supported internal accountability and, as will be discussed in this chapter, have enabled flexible responses to pressure for change from women.

This chapter begins with the history of the Kalkfontein purchases in the 1920s and the discriminatory laws that governed them. It then describes how the tribal authority was created during the late 1970s—in the context of the construction of an 'Ndebele homeland' and the disruption that ensued. It discusses the various attempts made by the Kalkfontein communities to assert their land rights and to contain the excesses of the 'chief'. It also looks at the communities' involvement in the 1990 Kruger Commission and the court cases they fought.

It goes on to describe more recent attempts by the communities to enforce the court orders and their interaction with the Mpumalanga House of Traditional Leaders. The role of the tribal authority in relation to development and social welfare grants is discussed. The chapter examines the system of land rights in Kalkfontein as well as recent changes to, and debates about, women's land rights. It discusses the potential impact of the Act on the ownership institutions developed by

[1] See the Madikwe communities' 'Submission to the Portfolio Committee on Agriculture and Land Affairs on the Communal Land Rights Bill' (November 2003) on the DVD with this book.

[2] *Tongoane and others v The Minister of Agriculture and Land Affairs and others* (TPD 11678/06, pending).

the Kalkfontein communities as well as their opposition to the Bill during the parliamentary process. It concludes with events in Kalkfontein pursuant to the launching of the litigation challenging the status of the Act. A postscript updates the chapter with a discussion of statements about Kalkfontein in the State's answering affidavits[3] and in the affidavit of the present 'acting chief' of Kalkfontein, Christopher Mahlangu.

BUYING THE FARMS IN THE 1920s

In 1923, people from diverse ethnic groups clubbed together to buy the first of the Kalkfontein farms, known as Kalkfontein A. In 1924, another group, also of diverse backgrounds, bought Kalkfontein B. In 1925, this second group bought an additional Kalkfontein farm, known as Portion C.

The Natives Land Act 27 of 1913[4] prohibited black people from buying or leasing land outside the 7 per cent of South Africa that the Act reserved for black occupation. The schedule to the Act listed the areas where black occupation was permitted. The Kalkfontein farms were not included within the scheduled area.

Thus the purchasers had to apply to the governor general for permission to purchase non-scheduled land. Section 1 of the Act enabled the governor general to approve exemptions. A large number of exemptions were granted between 1913 and 1936 when the Native Trust and Land Act 18 of 1936[5] expanded the scheduled areas from 7 to 13 per cent of South Africa. Feinberg (1997: 1) documents that between June 1913 and December 1935, the governor general approved 3 300 land purchases by Africans outside the scheduled areas.

Severe pressure and overcrowding led to many African applications for exemptions from the 1913 law. At the time, officials of the Native Affairs Department were embarrassed about the severe restrictions imposed by the Natives Land Act that were meant to have been a temporary holding measure pending the identification and addition of more land by the Native Affairs Commission. Contributing to the 23-year delay in expanding the scheduled areas were the strong objections from the mining sector, which wanted more workers; and from white farmers complaining of the unfair advantages enjoyed by African purchasers 'who clubbed together' to buy land (Davenport & Hunt, 1974: 40–1).

In December 1921, at a meeting attended by Prime Minister Jan Smuts and FS Malan, who was responsible for 'native affairs' at the time, Malan pointed out that the Native Affairs Department found it 'difficult to deal with insistent claims of the natives in regard to land . . . and with anomalies arising from the provision of the existing law, which closed large areas to natives and opened none' (Feinberg, 1997: 14). At that meeting, the government decided to grant more approvals for exemption, particularly if the applications were for land in areas that had been recommended for African expansion. The 1923 Kalkfontein purchase was indeed

[3] These affidavits can be found on the DVD included with this book.

[4] This Act ultimately became known as the Land Act.

[5] Subsequently renamed and repealed. The Development Trust and Land Act was its last valid name.

for land subsequently included in the 1936 Act's list of areas 'released' for African occupation.[6]

However, title was not transferred directly to the co-purchasers in undivided shares; it was registered in the name of the Minister of Native Affairs and 'held in trust' on behalf of the co-purchasers. This is consistent with a long history of government reluctance to register title directly to African owners. Instead, in those limited instances where Africans were allowed to acquire land, government required that it be held 'in trust' on their behalf. According to Feinberg (1997: 7–8), most approvals for group purchases after 1921 were made conditional on the buyers accepting the Minister of Native Affairs as trustee. Feinberg (ibid) describes the many hurdles that would-be buyers had to go through to get approval for exemptions, and concludes that 'accepting government rules became a necessary part of the process'.

Feinberg (1997: 8) and historians Harries (1989: 94) and Marks (1989: 222) describe how officials often required groups of buyers, regardless of their ethnic origins, to constitute themselves as 'tribes' in order to get approval to buy land. The department opposed the joint purchase of land by groups of more than six people unless they were constituted as a tribe and the minister registered as trustee. This prohibition was included in the 1917 Native Affairs Administration Bill, which was, however, never enacted. Despite this, in practice officials often made 'tribal' ownership a condition of approval for purchases. In 1936, the 'six-native rule' was ultimately enacted in s 11(2) of the Native Trust and Land Act, which provided that

> 'no association, syndicate, partnership, aggregation or number of persons which includes more than six natives other than a recognized tribe, shall acquire land or hold land . . . save with the permission of the Governor-General . . . .'

Harries (1989: 94) says the word 'tribe' became a synonym for 'African purchasers of land' and quotes the explanation of a northern Transvaal attorney in 1930 that 'a tribe is a syndicate of ten to fifteen families which buys land and elects a chief and petty chief'.

The requirement that groups of purchasers should constitute themselves as 'tribes' was indicative of government assumptions about the nature of rural African society. Such a requirement ignored the reality of the ways in which groups of people constituted themselves in favour of stereotypes about timeless tribal identities. In fact, people sometimes joined land-buying groups precisely to escape the 'tribal' context.

In 1963, officials from the Department of Bantu Affairs visited Kalkfontein to investigate a dispute. Sotho and some Ndebele co-owners were objecting strenuously to the chiefly pretensions of a certain Mahlangu. The officials included the senior state ethnologist at the time, NJ van Warmelo. The administrative officer, a Mr Bothma, suggested that a census was necessary to establish how many of the descendants of the initial purchasers supported Mahlangu's claims to chieftainship. He attached Van Warmelo's comments to his report:[7]

[6] See First Schedule, Part III, Transvaal, Area 22, Districts of Pretoria and Waterberg.
[7] Report in the National Archives Repository, Pretoria, SAB N2/10/3/45.

> 'A census would certainly provide more information but I am not certain that we would know what to do with it. In my opinion the problem is caused by the Department's efforts to force the owners of private land to constitute themselves as tribes and to be governed as such when they are neither tribes, nor do they wish to be tribes. Given that tribal government is built on voluntary support, the absence of voluntary affiliation shows that the tribal system is not wanted here. The buyers of land, the members of syndicates and of artificially created 'tribes' often buy land precisely to get away from tribal government. They then organise themselves extremely well through committees etc. In fact, here we see the ingredients of a law-abiding and effective form of local government. It will presumably require new legislation to make it possible but I don't see how that can be avoided. I propose that we should support the efforts being made here and work towards the creation of a system of local government. It is part and parcel of the broader question of how best to adminster rural towns. Tribal government is not appropriate for that context and the Department cannot possibly want to have to do it all itself.'[8]

Van Warmelo's remarks show that when the façade of wall-to-wall tribal affiliation cracks, the question of alternative forms of local government inevitably arises. Intrinsic to apartheid's denial of political rights for African people was the rationale that they would have 'separate but equal' political rights within ethnically delineated Bantustans. Acknowledging that many rural African people do not live as 'tribal subjects' threatened the mythical stereotypes used to justify indirect rule and grand apartheid. The government's tribal policies and requirements inevitably elicited claims to chiefly status by would-be chiefs, especially after the Bantu Authorities Act 68 of 1951[9] gave chiefs and Bantu authorities[10] far-reaching powers within their newly delineated jurisdictional areas.

The Kalkfontein co-purchasers, as it happens, were not required to constitute themselves as a tribe when they bought the land in 1923. However, in order to get approval for an exemption from the Natives Land Act they had to agree to title being registered in the name of the Minister of Native Affairs. It was only after purchase that other racially discriminatory laws and the prevailing political context subjected their ownership to an ascribed tribal identity.

KWANDEBELE AND THE NDZUNDZA (PUNGUTSHA) BANTU AUTHORITY

In the late 1970s, attempts by the apartheid government to create an Ndebele 'homeland' north of Pretoria were constrained by a shortage of Ndebele 'Bantu authorities'.[11] This was in contrast to parts of the Eastern Cape, Natal and the far north, which had been continuously occupied by relatively homogenous groupings of rural African people with established historical roots.

Thus in 1978, the apartheid government constituted the Kalkfontein communities into a tribe. The Native Administration Act 38 of 1927[12] was used to

[8] Translated from Afrikaans.
[9] Later renamed the Black Authorities Act.
[10] Bantu authorities were subsequently renamed 'tribal authorities'.
[11] See chapter 9 by Peter Delius and chapter 11 by Claassens in this book.
[12] Later renamed the Black Administration Act.

'establish' the Ndzundza (Pungutsha) tribe and to appoint as chief Daniel Mahlangu, a descendant of a Kalkfontein A co-purchaser. Then in 1979, the Bantu Authorities Act was used to create the Ndzundza (Pungutsha) Bantu Authority, and its area of jurisdiction was defined as the three portions of the Kalkfontein farm.

The KwaNdebele Legislative Assembly was established in October 1979 with the Ndzundza (Pungutsha) Bantu Authority included as part of the 'homeland' of KwaNdebele. Six members of the Bantu authority were made members of the legislative authority. In 1981, KwaNdebele was made a self-governing state in terms of the National States Constitution Act 21 of 1971.

DANIEL MAHLANGU'S EXCESSES DURING THE 1980s

Mahlangu treated the Kalkfontein farms as his private property. He 'sold' residential sites to over 1 000 outside families. Each family paid R250 for the stand allocated to it and a further R50 as *lotsha* (allegiance fee) to Mahlangu for giving his consent to settle on the land. The newcomers, many of them poor people who had been evicted from white farms, were allocated residential sites on the ploughing fields of the original owners. Mahlangu set up a police station at Kalkfontein, opened a stone quarry and authorised the establishment of a variety of businesses. People who refused to pay the various 'tribal levies' demanded by Mahlangu found their state pensions and other welfare benefits cancelled. Several people were assaulted for objecting to his actions. A system of public floggings was instituted and one man was shot.

A dam wall which demarcated the boundary between Kalkfontein A on the one hand, and Kalkfontein B and C on the other, was partly destroyed by the tribal authority to demonstrate that the farms now formed a single unit under the authority of the 'chief' and tribal council. The partial removal of the wall resulted in flooding during rainstorms.

FINDINGS OF THE KRUGER COMMISSION

Many of Mahlangu's actions entailed riding roughshod over the ownership rights of the Kalkfontein communities and were met with fierce resistance. Detentions and floggings were meted out to objectors and those who insisted on using their land as they had done before. The Kalkfontein co-purchasers petitioned for a government commission of enquiry into the activities of the tribal authority. Instituted in 1990, the Kruger Commission uncovered widespread financial irregularities by the 'chief' and his councillors, including the extortion of a range of compulsory levies. These included levies for the 'chief's protection', 'chief's *lobola*' (brideprice), 'chief's residence', 'celebration fees' and 'chief's petrol'. According to the report of the Kruger Commission[13] (1990: 12), bank accounts were unlawfully opened in the name of the tribe instead of the statutory trust account regulated by the local magistrate. Money from the 'tribal account' was diverted to the chief's personal accounts. Where pensioners refused to make contributions to the chief, their pensions were cancelled, according to the report (Kruger, 1990: 20). The 'chief'

[13] Established by the Minister of Co-operation and Development.

also used his position to monopolise business opportunities (Kruger, 1990: 22–4).

In its report, the commission (Kruger, 1990: 49) observed that '[w]itnesses complained that the chief and councillors never gave reports-back, especially on financial matters, and that they were kept in the dark in regard to the financial administration of the tribal authority'. A number of matters were referred for investigation as potentially serious criminal offences.

The commission (Kruger, 1990: 31, 44–5, 47–9, 51–3) unearthed substantial evidence of the reign of terror which the tribal authority unleashed on the communities, including unlawful detentions, the shooting of a community member, illegal use of firearms and public floggings.

It also dealt with the violence that followed the imposition of the tribal authority. The commission (Kruger, 1990: 45–6) concluded that

> '[t]here is lengthy evidence as to what transpired before, during and after the unrest but the Commission has no doubt that the cause of the unrest and the continued dissatisfaction and discord at Kalkfontein is the installation of the chieftainship and the establishment of the tribal authority. It is the Commission's considered opinion that the vast majority of the heirs of co-purchasers are in favour of the abolishment of the chieftainship and the disestablishment of the tribal authority . . . .'

The commission ultimately recommended that Mahlangu's recognition as chief be withdrawn and that consideration be given to the disestablishment of the Ndzundza (Pungutsha) Tribal Authority. Following the commission's report, Mahlangu was indeed deposed. However, without consent or negotiation, SAP Mahlangu was appointed to replace him as 'acting chief'. Contrary to the recommendations of the commission, the tribal authority continued in office.

The commission recommended that additional land be awarded to the heirs and successors-in-title of the co-purchasers of Kalkfontein A in compensation for the land 'sold' to 'squatters'. However, it took subsequent litigation to secure the transfer of the additional compensatory land.

LITIGATION IN THE PRETORIA SUPREME COURT

In spite of the commission's report and the removal of Mahlangu, the tribal authority and the new 'acting chief' continued to allow outsiders to settle on the farms and to authorise dubious business developments. Thus in 1992, the co-purchasers of Kalkfontein A, B and C instituted legal proceedings in the Pretoria Supreme Court against the Minister of Regional and Land Affairs, the tribal authority, the 'acting chief' and the chief minister of KwaNdebele.

The focus of the application was the unlawful undermining, by the chief and tribal authority, of the ownership rights of the heirs of the original purchasers. The proceedings culminated in the granting of an order by the Court in 1992. In terms of this order, the 'acting chief' and the chief minister of KwaNdebele were interdicted from permitting people to occupy the farms, and from interfering with or dealing in the land in any way without the written consent of the elected councils or *kgotla* of the heirs. They were also interdicted and restrained from continuing with the construction of roads, from excavating sand and stone from the land, and from developing an 'industrial park' planned for Kalkfontein.

The judgment specifically recognised the rights of ownership of the heirs and

provided that since the 1913 Land Act had been repealed, the minister should no longer hold the land in trust on their behalf. It also provided that the

> 'original purchasers or heirs of the original purchasers are entitled to the transfer and/or registration of the farms . . . in their name, either individually or collectively in a manner and fashion to be determined once the identity of the various heirs has been finally established' (*Joseph Moema, Esau Sojali Mahlangu, Lucas Tongoane and Simon Swandle v Ndzundza (Pungutsha) Tribal Authority, Acting Chief of the Ndzundza Pungutsha Tribe, Chief Minister of KwaNdebele, Minister of Regional and Land Affairs, KwaNdebele National Development Corporation* (TPDe 178080/92, unreported)).

The residents of Kalkfontein A formed a legal entity known as the Katjebane Communal Property Association (CPA). Meantime, the people who had bought Kalkfontein B and C formed the Kalkfontein Community Trust. The two groupings went to separate lawyers for assistance in constituting themselves as legal entities. The formation of legal entities was a necessary prerequisite for the transfer of title. However, even after registration of these groups as legal entities, the Department of Land Affairs failed to transfer the titles.

The Kalkfontein A community was most affected by the practice of 'selling' land to outsiders and by the actions of the tribal authority, which was also based on the community's land. Thus in 1997, in frustration at delays by the Department of Land Affairs and continuing problems with the tribal authority, Kalkfontein A brought an application to compel the Minister of Land Affairs to transfer the compensatory land and their remaining land at Kalkfontein to the Katjebane CPA. The community also applied for an order compelling the Minister of Constitutional Development to disband the Ndzundza (Pungutsha) Tribal Authority.

In response, the Minister of Land Affairs agreed to acquire compensatory land and to transfer it to the CPA. However, the matter against the Minister of Constitutional Development and the Ndzundza (Pungutsha) Tribal Authority has not been resolved and is still pending before the High Court.

In December 1997, the newly acquired compensatory land was duly transferred to the CPA. However, it had been agreed that the parts of Kalkfontein A that had been 'sold' by Mahlangu would be excised from Kalkfontein A before the rest of portion A was transferred to the CPA. This process was brought to a halt when the tribal authority launched legal proceedings in 1998 challenging not only the 1992 judgment but also the decision by the Minister of Land Affairs to transfer the land. The tribal authority also contested the status of the Katjebane CPA. Initially the Mpumalanga premier supported the tribal authority in its application, but later withdrew on the advice of the then Minister of Land Affairs. Ultimately the application did not proceed and the matter is also still 'pending' in the court.

The Kalkfontein B and C communities formed the Kalkfontein Trust in 1995. Despite extended correspondence with the Department of Agriculture and Land Affairs, the trust's attempts to have the farms at Kalkfontein B and C registered in its name did not succeed. Thus the trust brought a separate application in terms of the Restitution of Land Rights Act 22 of 1994 to have the title transferred to its name.

OPPOSING THE COMMUNAL LAND RIGHTS BILL

Media reporting on the controversy surrounding the Traditional Leadership and Communal Land Rights Bills drew the attention of community leaders at Kalkfontein B and C who contacted their lawyers at the Legal Resources Centre (LRC) in 2003 to ask for copies of the Bills. Government information and consultation processes around the Bills did not reach areas such as Kalkfontein, and appear to have been limited mainly to meetings with traditional leaders.

The Kalkfontein leaders were concerned that the Traditional Leadership and Governance Framework Bill deemed existing tribal authorities to be traditional councils, and that the Communal Land Rights Bill then defined land administration committees as traditional councils. As extensive powers over land allocation and development vested in land administration committees, leaders feared that the two Bills together would authorise the Ndzundza (Pungutsha) Tribal Authority to revert to the unilateral actions that the community had struggled so long and hard to contain.

Initially the LRC lawyers advised the communities that their landowner status would protect them—as opposed to other occupiers of 'ordinary' state-owned communal land—from the unprecedented ownership-like powers provided to traditional councils. However, community leaders repeatedly raised concerns about the meaning and potential impact of s 5 of the Bill. This section provided that when making determinations about land, the Minister of Land Affairs could, 'despite any other law', vest land belonging to a trust or CPA directly in 'the community' and have the original title deed endorsed to reflect 'the community' as the registered owner of the land. (This provision was not changed when the Bill was enacted.) The community raised two problems in relation to s 5. The first was that the Bill provided that where 'communities' had traditional councils, these would act as the land administration committee, with extensive powers of representation and allocation. The Bill thereby enabled the traditional council to override the land management powers and protections of the existing trust and CPA. Furthermore, s 18, governing 'determinations', provided the minister with sweeping powers to determine boundaries and to divide and amalgamate areas of land, thereby potentially formalising the problem of the separately owned pieces of land in Kalkfontein being treated as one 'community'.

The Kalkfontein communities were concerned that these provisions provided the statutory authority for the tribal authority to once again ride roughshod over their ownership rights. Their input led LRC lawyers to revise their interpretation of the potential impact of the Bill on landowning communities.

The Bills were being rushed through Parliament during the build-up to the 2004 elections.[14] The notice period provided for submissions was less than three weeks from the publication date of the far-reaching changes that had introduced traditional councils as land administration committees. Kalkfontein, along with other rural communities, sent a delegation to make written and oral submissions to

[14] See chapter 11 by Claassens in this book.

the relevant portfolio committee.[15] With assistance from a consultation project run by non-governmental organisations,[16] the rural leaders grappled to understand the complex Bill and interpret its provisions in the light of the circumstances in their home areas. Stephen Tongoane was one of the rural leaders who, with great respect and dignity, stood up in Parliament to explain the history of the land and his community's reservations about the Bill, and to ask for the Bill to be withdrawn and reconsidered after a more adequate consultation process with the rural people affected by its provisions.

His plea was not well received. A Swedish doctoral student who observed the parliamentary hearings described portfolio committee members and department officials as 'extremely defensive' and reported that 'the atmosphere at the public hearings could hardly be described as receptive to calls for change' (Mokvist Uggla, 2006: 277). In fact, various community leaders were approached privately by senior officials from the Department of Land Affairs, and in one case by the minister, and berated for having allowed themselves to be 'used by whites'.

The Kalkfontein Trust's written submission concluded that

> '[t]he present Bill should be withdrawn and communities residing on communal land properly consulted in order to come up with a more appropriate law. We support the principle that the administration of communal land should rest with its owners and occupiers.'

In spite of strong opposition at the public hearings, the Bill, with some amendments, was unanimously approved by Parliament in 2004 in the short sitting before the elections. Four years later it has not yet been brought into operation.

ENTER THE HOUSE OF TRADITIONAL LEADERS

In September 2004, a delegation from the Mpumalanga House of Traditional Leaders visited Kalkfontein. The delegation said it had been sent by the premier to ascertain the status of the land and the views of the co-purchasers about the chieftainship. It had been some years since the community had last written to the premier complaining about problems with the tribal authority. Their previous letters had received no response. Community leaders thus surmised that the investigation had been triggered by their account of Kalkfontein's problems during the parliamentary process. They were hopeful that the new premier, Thabang Makwetla, would be more receptive than the previous premier, who had been a Mahlangu.

The delegation included an official and two traditional leaders from other parts of the province. Its members, who were courteous and respectful, said they wanted to discuss Kalkfontein as a whole and arranged to return in October in order to give

[15] See the Kalkfontein Community Trust's 'Submission to the Portfolio Committee on Agriculture and Land Affairs on the Communal Land Rights Bill' (November 2003) on the DVD included with this book.

[16] Jointly run by the National Land Committee and the Programme for Land and Agrarian Studies at the University of the Western Cape.

the communities an opportunity to prepare themselves. The October meeting was held at the Katjebane Primary School and was well attended with interested parties filling three classrooms. Those attending included representatives from the CPA in Kalkfontein A, the trust in B and C, the local African National Congress and many community members, including a good representation of women.

People from both Kalkfontein A as well as B and C explained that they opposed the chieftainship and the tribal authority having jurisdiction over their land. They recounted the history of how the land had been bought and the tribal authority created as well as all the subsequent problems and litigation. Chief Mthethwa, one of the representatives from the House of Traditional Leaders, had the report of the Kruger Commission with him and he read excerpts which detailed some of the communities' past complaints against the tribal authority. Those present felt they had received a fair hearing and were impressed by the way in which the meeting had been planned and conducted, and by the delegation's willingness to provide its members' names and contact details.

However, for the next two years they heard nothing further from the House of Traditional Leaders. During that time the court application challenging the constitutionality of the Communal Land Rights Act was launched with Tongoane as the first applicant.

In February 2007, the Ndzundza (Pungutsha) Tribal Authority summoned Tongoane and other Kalkfontein leaders to appear before the tribal council, demanding that these leaders account for their role in the litigation. When the leaders realised that this was the purpose of the meeting, they walked out. One of the royal councillors, a Ms Masango, claimed that Tongoane had brought the case only to further his ambitions to become premier of Mpumalanga.

Later in February, the tribal authority held a 'celebration' in Kalkfontein at which an ox was slaughtered and meat served to all who attended. Again the court application was the main subject of discussion and the Kalkfontein leaders were derided for their role in the case. Another tribal councillor, Robert Ndala, said that as a school principal, Tongoane was not allowed to bring an action against the government. The councillor suggested that Tongoane be removed from his post as he was a 'bad influence' on learners.

Representatives from the local House of Traditional Leaders and the mayor from the JS Moroka Municipality participated in the 'celebration'—seemingly in support of the tribal authority. Most of the heirs of the co-purchasers of Kalkfontein A as well as of B and C stayed away. However, many of the families who had purchased sites from Mahlangu during the 1980s attended, allegedly drawn by the feast laid on.

DAILY LIFE AND THE TRIBAL AUTHORITY

When the Kalkfontein co-purchasers secured the farms in the 1920s, they relied on familiar indigenous values and structures in setting up their internal relations and ownership rights. Both communities chose a *kgotla* of experienced and respected men to hear and decide internal disputes, and to mediate and balance the rights of individual heirs and their families against the interests of the wider groups.

Each family was entitled to separate and secure residential and arable land, and all

the co-purchasers and heirs had shared access to grazing land and veld products. Initially it was only the sons of the initial purchasers who became entitled to separate residential sites and fields as they grew up and established families. However, as time went by the practice changed to include daughters. The process of identifying individual allotments as well as witnessing and confirming the agreements reached was carried out jointly by the affected family, the neighbours and the *kgotla*.

The terms of shared access to grazing and veld products were also regulated by the *kgotla*, whose members were replaced at intervals. Important decisions were referred to public meetings for discussion with the wider community of co-purchasers and their heirs. This system worked well until the tribal authority began to make unilateral decisions that usurped the authority of the *kgotla* and overrode the land rights of the co-owners.

After the judgment in the Pretoria case was delivered in 1992, the tribal authority stopped interfering in relation to land in B and C, and the old systems were reinstated. However, the situation is more fraught in Kalkfontein A as the tribal authority has its offices there and the tribal councillors live among the community. In the case of B and C, the trust document attempted to incorporate the key elements of the pre-existing indigenous system, and the trust now operates on a similar basis to the previous *kgotla*.

The most serious outstanding problems concern development and social welfare. An official from the Department of Home Affairs is based at the tribal authority office. This is the only place where application forms for identity documents are processed. In addition, most applications, including those for pensions and social welfare grants, require 'proof of residence' stamps. For all these things residents have to start at the tribal office. The secretary checks whether the family's annual 'tribal levies' are up to date. If not, no assistance will be provided until all outstanding arrears have been paid. In order to obtain identity documents, pensions and social grants, residents have no option but to pay annual tribal levies.

Kalkfontein falls within the Dr J S Moroka Municipality. The municipality covers a large area and each local government councillor is responsible for zones that include more than one tribal authority. Many councillors rely on tribal authority offices and structures as their local point of contact and information. According to Kalkfontein residents, all local development projects and budgets are channelled via the tribal authority offices. The residents say the late chief warned them that because they did not support the tribal authority they would be cut off from local government support—and this is indeed what has happened to the farmers at B and C.

The Kalkfontein Trust sent the municipality letters explaining the history and ownership status of the land but has never received a reply. The trust's requests for meetings to discuss the development of the land have similarly been ignored. When the trust reports problems with roads or water, the municipality does not reply to the trust but sends officials straight to the chief's kraal in Kalkfontein A. The community has, however, managed to initiate some development projects with other parts of government such as a chicken project with assistance from the Department of Social Welfare and an irrigated tomato-growing project with the Mpumalanga Agricultural Development Corporation.

CHANGE AND WOMEN'S RIGHTS

At a meeting in Kalkfontein in 2004,[17] a question concerning land allocation practices led to a spirited debate about the rights of women. In Kalkfontein there is an allocation sub-committee. At the time its members were all men. The women at the meeting challenged why this should be the case and extracted a promise from the trustees to the effect that vacancies on the committee would be filled by women.

The background, as explained by the chairperson of the trust at the meeting, was that after 1994 women became more active in the affairs of the community. They started to attend the *kgotla* meetings and, in time, to participate in the discussions. He explained that even though there were no women on the allocation committee, women had been on the water committee for some time. After 1994, under pressure from women in the community, land was no longer allocated only to men but also to women, especially unmarried women who had children to support.

The meeting agreed that it was the job of the allocation committee to measure out new 100 m x 100 m residential sites. A R10 demarcation fee is meant to be paid into the trust account but in practice people refuse to pay and allocations are free. It was also agreed within the community that 'outside people' could not be allocated sites. Both the men and women at the meeting agreed that these days any adult 'heir' could apply for a stand—son or daughter, married or unmarried. It was agreed that stands were allocated to men and women on an equal basis.

However, a long and energetic discussion ensued about some 'outside' men gaining a foothold in Kalkfontein by marrying daughters of the community who had been allocated stands prior to their marriages. One man said that these outsiders had come in 'behind the skirts of women'. This elicited a heated response from the women, who said it implied that women had connived in bringing in outside men. They said that women, as daughters of the community, had equal rights to be allocated land. If it sometimes happened that a woman subsequently married and that her husband shared her house, this was not the same as saying that men come in 'behind the skirts of women'. The women said that this kind of approach would lead to women being treated differently from men. Everyone, including the women, seemed to agree that it was a problem that men entered the community via their wives. However, the women's concern was that the 'solution' to this problem should not undermine the right of unmarried Kalkfontein mothers to be allocated land on which to establish homesteads for themselves and their children.

The tenor of the debate was passionate and engaged, but also good humoured and pragmatic. Women engaged forcefully but respectfully. The trustees present, who were all men, articulated their concerns but conceded the merits of the women's arguments. Women have subsequently been co-opted onto the allocation committee.

[17] On 4 November 2004. Attended by Claassens and Moses Modise, both at that time LRC consultants. See also chapter 7 in this book by Claassens and Sizani Ngubane.

DEVELOPMENTS CONCERNING THE TRANSFER OF TITLE

In 2004, the LRC sent a letter to the Department of Land Affairs following up on the department's continued failure to transfer title of Kalkfontein B and C to the trust—as required by the 1992 Pretoria judgment. Two years later Kalkfontein B and C, despairing of ever receiving a reply from the department, launched proceedings in the Land Claims Court to have title transferred in terms of the Restitution of Land Rights Act. Then in September 2006, the LRC received a letter from the department stating that the transfer of Kalkfontein would be prioritised 'in terms of the Communal Land Rights Act of 2004'. Yet Tongoane, on behalf of the Kalkfontein Trust, was the first applicant in legal proceedings challenging the constitutionality of this very Act.

The timing of the letter upset Kalkfontein residents, who feared that it implied that the long-awaited transfer had been jeopardised by their role in the litigation. Residents replied that the Act had not yet been brought into operation by the president. They explained that the memorandum attached to the department's letter confused the history of the two separate communities: it treated them as one whereas they were separate and had established different legal entities to take transfer of the farms.

In May 2007, the Land Claims Court approved the application for restitution of ownership and ordered that title to Kalkfontein B and C be transferred to the trust. The answering papers of the Department of Land Affairs imply that the officials responsible for the Communal Land Rights Act were unaware of the proceedings in the Land Claims Court—despite court papers served on the Minister of Land Affairs. This long-awaited 'victory' does not, however, protect the B and C community from the traditional council's claims to power. Section 5 of the Act enables the Minister of Land Affairs to endorse the title held by 'a trust or legal entity' to reflect 'the community as the registered owner of the land'.

CONCLUSION

The Kalkfontein story illustrates the importance of understanding the context in which the Communal Land Rights Act will be applied. Tribal authorities exist wall-to-wall in former homeland areas. Their legitimacy and historical origins vary from place to place. The Kalkfontein residents are not unusual in having had no prior connection to the tribal authority that was given 'jurisdiction' over them during apartheid.

As already mentioned, 3 300 groupings of African people were granted exemptions from the Natives Land Act to purchase land between 1913 and 1936. Many of them were disparate people who came together in order to raise the purchase price of land, and ended up settling wherever they managed to buy suitable land. Besides this, before 1913 other groupings of African people had purchased or settled on land in far-flung areas by a variety of routes—through purchase, mission settlements, fleeing other areas, moving closer to work or being given land 'in reward' for services rendered during wars. As discussed elsewhere in this book,[18] victims of apartheid's forced removals were often dumped in

[18] See chapter 11 by Claassens in this book.

'communal areas' among people with whom they had no shared history. Thus the notion of ethnically pure rural 'tribes' is more a political construct entrenched during colonialism and apartheid than a reflection of reality in most rural areas.

Yet all the tribal authorities inherited from apartheid are deemed to be traditional councils in terms of the Traditional Leadership and Governance Framework Act and the provincial laws that have been enacted pursuant to this Act. The proviso is that tribal authorities must comply with the new composition requirements for traditional councils within a year. Many failed to do so within the first year of the Framework Act but have been given a 'second chance' by similar clauses in the provincial laws that were enacted later. In any event, neither the Framework Act nor the provincial laws provide a mechanism for withdrawing traditional council status from those who fail to comply.

The Communal Land Rights Act then provides traditional councils, as land administration committees, with far-reaching powers of representation and allocation. It makes them accountable upwards to the minister and appointed land rights boards, and not downwards to the rural people whose land rights they 'administer'.

Events at Kalkfontein show how difficult it is to dislodge a tribal authority—even in the era of democratic government and even when all the evidence points to its artificial construction and imposition on reluctant rural landowners. The Kalkfontein case study also reveals the embedded nature of pre-existing vested interests, elite alliances and bureaucratic arrangements in former homeland areas. For example, in 1998 the new premier of Mpumalanga supported the tribal authority in its litigation against the co-owners, and in 2006 both the mayor and representatives from the District House of Traditional Leaders attended a tribal authority feast at which the Kalkfontein leaders were derided for their 'arrogance' in litigating against the government.

Recent events indicate that despite its disastrous track record, the tribal authority remains on the offensive and that, given the opportunity, is likely to attempt to re-assert its control over the Kalkfontein farms. If the Communal Land Rights Act were implemented in its present form, the Kalkfontein co-owners would have fewer legal remedies than they did in the 1980s. This is because the Act enables the minister to endorse their titles to what he or she interprets to be a 'community', and enables traditional councils (where they exist) to act as land administration committees with the clear statutory authority to allocate new order rights and to represent 'communities' as owners of the land. Ironically, previous apartheid laws such as the Bantu Authorities Act did not provide tribal authorities with direct power over land and, as the 1992 judgment testifies, certainly not over privately owned land. A critical issue is how the open-ended definition of community in the Act would be interpreted and by whom. Earlier drafts of the Bill enabled smaller units to assert a separate identity in precedence to the claims of larger units, but this was not included in the version that was ultimately enacted.

There are striking similarities between the Act and the old laws that constrained the initial Kalkfontein purchasers' ability to exercise their ownership rights independently. Just as the Native Administration Act enabled the governor general to determine and adjust the boundaries of tribes, so the Communal Land Rights

Act enables the minister to determine the boundaries of the land to be transferred to 'communities'. Just as the Natives Land Act and the Native Trust and Land Act restricted forms of ownership, so the new law—which applies to the very same land—overrides ordinary ownership protections and vests far-reaching ownership-type powers in imposed traditional council structures.

The Department of Land Affairs' ten-year delay in effecting the court-ordered transfer of title to the trust and CPA indicates severe capacity constraints, as does its ongoing difficulty in differentiating the two communities from one another. False assumptions about the ubiquity of 'tribal' units and identities in rural areas are as prevalent now as they were in the early part of the century. They explain the alarming statement by the department's Director of Tenure Reform, Sipho Sibanda, to the parliamentary portfolio committee[19] that the number of communities requiring transfer in terms of the Communal Land Rights Act is the same as the number of existing tribal authorities.

Postscript

The State's answering papers in the case contesting the Communal Land Rights Act confirm many of the worst fears of the Kalkfontein communities about the impact of the new laws on their land rights. Statements made by 'acting chief' Christopher Mahlangu illustrate the threat to tenure security and the financial benefits at stake.

In his affidavit, Mahlangu (para 2.5) insists that the erstwhile tribal authority is now a traditional council recognised by the Mpumalanga Traditional Leadership and Governance Act 3 of 2005 and that it exercises powers derived from 'the Constitution, the Framework Act and customary law' (para 40.3). He says that no independent community exists within the jurisdictional area of the traditional council and that 'Kalkfontein B and C are part of Ndzundza (Punguthsa) traditional community' (para 23.2). Furthermore, 'in terms of the Ndzundza customary law, all land occupied by the community is controlled by a senior traditional leader as political head' (para 2.3). Mahlangu says the 'suggestion that the co-purchasers became "owners" is not only misleading, but is not borne out by the historical facts' (para 10.3) and that the 'notion of freehold title is unknown in customary law and the communal system' (para 20.2).

He does not deny Tongoane's account of the actions of Daniel Mahlangu during the KwaNdebele era, nor that Mahlangu brought over a thousand outside families onto the land in exchange for *lotsha* fees. Instead, he says the 'powers exercised by the successive traditional leaders in the area were in accordance with customary law and tradition' (para 32.2) and that allocating land to outsiders for *lotsha* fees is 'in line with other practices in other African communities' (para 33). He describes the *lotsha* 'custom' as follows:

[19] At a meeting of the Portfolio Committee on Agriculture and Land Affairs on 26 January 2004, Sibanda was asked how many communities would be eligible for transfer of title in terms of the Communal Land Rights Bill. In answer he gave the number of existing tribal authorities in South Africa, breaking them down by province. (Meeting observed by Claassens and recorded in the Parliamentary Monitoring Group and Contact Trust minutes available http://www.pmg.org.za).

> 'The would-be immigrants must first make peace with their "Chief". If they have paid all their traditional dues and a beast of farewell (Inkomo Yokuvalelisa) they may immigrate to the new "chiefdom" of choice and ordinarily, upon arrival at the new "chiefdom", they must pay homage (lotsha) whereupon they will be admitted on a delivery of a beast (Isishlango ze Kosi, the "Chief's" shoes), alternatively nowadays the equivalent of money (traditional gifts).
>
> . . . Members of the "tribe" pay allegiance to the "Chief" in various forms such as, for instance loyalty and respect. They also owe the "Chief" traditional services such as cultivating the fields of the realm and to execute traditional responsibilities and duties. Since the "Chief" holds his position by succession and rules until his death, he cannot be deposed under the customs and laws of the Ndebele tradition, unless he or she is found guilty of serious customary transgressions' (paras 2.1–2.2).[20]

Tongoane, in his founding affidavit[21] (para 41), described how land had been administered by a *kgotla* prior to the imposition of the tribal authority. But Mahlangu denies this on the grounds that ordinary community members are not allowed to convene a *kgotla* without following the prescribed traditional practice (para 23.3) and that only a senior traditional leader or headman is allowed to convene such meetings (para 23.4).

Sibanda, who deposes to the main affidavit on behalf of the Department of Land Affairs, is also at pains to deny that customary elements are interwoven into the system of land tenure practised by the B and C community at Kalkfontein. He disputes the *kgotla* described by Tongoane on the basis that '[a] Kgotla is the name given to the place where a traditional leader holds his/her council. It does not, in customary law, refer to a decision making body' (para 30.2). He adds that 'the inhabitants of the portions of Kalkfontein do not have any customary-law based system of land administration' and that it is an 'anomaly that they lament the alleged replacement of customary law . . . whereas they themselves reject one of the pillars of customary law . . . namely the role to be played by the traditional leader . . . in the administration of land . . .' (para 47.1).

The President of the Congress of Traditional Leaders in South Africa, Inkosi Phathekile Holomisa, is an expert witness on behalf of the Department of Land Affairs. In his view, '[i]t is inconceivable that a community whose affairs are administered through a "Kgotla", as described by the Applicants, could not have someone who is the equivalent of a traditional leader, be it a headman or a Kgoshi' (para 9.4).

The view that customary law cannot exist without chiefs is similar to the assumption that rural people do not constitute 'communities' unless they have a tribal identity—an assumption rejected by the Constitutional Court in the Popela restitution claim (*Department of Land Affairs and others v Goedgelegen* 2007 (10) BCLR 1027 (CC)). The court said in para [43] that it was wrong to hold that the applicants

[20] The deponent provides the following authority for his statement (in fn 1 on page 1598): Myburgh & Prinsloo *Indigenous Public Law in KwaNdebele* (University of South Africa 1958) 2–3.

[21] Included in the DVD that accompanies this book.

> 'did not qualify as a community because they did not prove an accepted tribal identity, or that they did not live under the authority of a chief designated by tribal hierarchy or that they did not occupy the land in accordance with ancient customs and traditions. None of these attributes are requirements in themselves or collectively.'

The insistence of the Department of Land Affairs that systems of customary or communal land rights cannot operate without chiefs derives from its explanation that the Communal Land Rights Act envisages two types of communal ownership. According to Holomisa (para 7), '[o]ne instance is where there is no traditional council and the other is where there is one in existence. In the former case, the community is required to elect members of a land administration committee' and in the second the traditional council may act as the land administration committee.

Since traditional councils exist virtually wall-to-wall in former homeland areas, this means, in effect, that land administration committees would ordinarily be elected only in 'new' communal areas, for example, on redistribution land outside the former homelands. Holomisa (ibid) goes on to say that 'it is inconceivable that a new committee could successfully be established in the presence of a legitimate traditional council'. The explanatory coherence of having elected land administration committees only in 'new' areas would fall away were the department to acknowledge the existence of communal or customary systems operating without chiefs on land within the former homelands.

The denial by the Department of Land Affairs of customary practices at Kalkfontein has potentially serious consequences for tenure security as this is the department responsible for communal land. Sibanda (para 7.2) says Tongoane

> 'does not realise the extent of his group's insecurity of tenure and the legal complications regarding the "title" of occupiers. The land is still registered in the names of the original owners. The current occupiers regard themselves as owners, whereas they are, in law, not the owners.'

Sibanda (ibid) says that to rectify the position, the estates of the original owners would have to be re-opened and each undivided share in the land would have to be transferred to the heirs of the original purchasers. He adds (para 13.3) that '[m]any of the persons currently assuming that they have rights as "owners" or heirs may not have any legally recognised right at all under common law.'

The 'problem' arises because of the common law lens through which Sibanda is assessing 'ownership' and tenure security in Kalkfontein. Most rural African people residing in 'titled' areas do not live according to common law categories and requirements, but adapt resilient underlying values and practices associated with intergenerational family ownership. The view of the Department of Land Affairs that customary law cannot exist without chiefs flies in the face of practice in many rural freehold areas. It whips the rug out from under vulnerable family members who may seek to use the Constitution's recognition of living customary law to challenge evictions initiated by absentee individuals who qualify as 'heirs' according to common law.

Holomisa says (para 7) traditional councils can become land administration committees only if the community agrees.[22] This is consistent with the implied

[22] Holomisa does not, however, deal with the absence in the Act of a requirement of community choice and a mechanism for exercising it.

concession of the Department of Land Affairs (Sibanda, paras 6.1–6.3) that the Communal Land Rights Act would be unconstitutional were it to impose traditional councils on reluctant rural people.

However, the interpretation of the Department of Land Affairs is very different to that of the Director General of the Department of Provincial and Local Government, Lindiwe Msengana–Ndlela, who makes no mention of community choice. She focuses (para 21.2) instead on the 'elements of democracy' introduced into the traditional councils that have now replaced tribal authorities. Msengana–Ndlela says that no fewer than 15 million people are 'under the direct rule[23] of the institution of traditional leadership' (para 17.4) and that 'traditional councils have clearly defined areas of jurisdiction. Those who find themselves in those areas must adjust to the rules and traditional practices of that area' (para 45.1).

It is striking that Msengana–Ndlela's attitude is more rigid than that of a Bantu Affairs ethnologist in 1969. Like those who rejected Van Warmelo's advice in 1969, she is driven by the imperative that to recognise that not all rural African people identify themselves primarily as tribal 'subjects' makes it impossible to justify laws that give apartheid-delineated traditional councils control over their land.

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Department of Land Affairs and others v Goedgelegen 2007 (10) BCLR 1027 (CC)

Joseph Moema, Esau Sojali Mahlangu, Lucas Tongoane and Simon Swandle v Ndzundza (Pungutsha) Tribal Authority, Acting Chief of the Ndzundza Pungutsha Tribe, Chief Minister of KwaNdebele, Minister of Regional and Land Affairs, KwaNdebele National Development Corporation (TPD 178080/92, unreported)

[23] Similarly, Mahlangu (paras 2.1–2.2) translates the word *isitjhaba* not as 'nation' or even 'tribe', but as 'chiefdom'.

Pending litigation

Tongoane and others v The Minister of Agriculture and Land Affairs and others (TPD 11678/06)

Legislation

Bantu Authorities Act 68 of 1951 (Black Authorities Act)
Communal Land Rights Act 11 of 2004
Mpumalanga Traditional Leadership and Governance Act 3 of 2005
Native Administration Act 38 of 1927 (Black Administration Act)
National States Constitution Act 21 of 1971
Native Trust and Land Act 18 of 1936 (Development Trust and Land Act)
Natives Land Act 27 of 1913 (Land Act)
Restitution of Land Rights Act 22 of 1994
Traditional Leadership and Governance Framework Act 41 of 2003

13

Stealing restitution and selling land allocations: Dixie, Mayaeyane and Makuleke

By Aninka Claassens with Moray Hathorn[1]

INTRODUCTION

This chapter[2] tells the stories of three of the four rural communities challenging the constitutionality of the Communal Land Rights Act 11 of 2004 and the Traditional Leadership and Governance Framework Act 41 of 2003. The three communities under discussion are those living in Dixie village in Limpopo Province; in the farming area of Mayaeyane which falls within the broader Makgobistad[3] area in North West Province; and in Makuleke in the far north-east of South Africa near the Kruger National Park. Kalkfontein, the first applicant in the litigation, is discussed in the previous chapter. Aspects of the Makuleke and Mayaeyane stories have been included in chapter 11 but are dealt with in more detail here.

Discussion here of Dixie, then Mayaeyane and finally Makuleke includes an examination in each case of the context that gave rise to opposition to the new laws and of events following the legal challenge. Unlike many of the earlier chapters in this book, the answering affidavits of the government and traditional leaders were available when this chapter was written. As a result, reference is made here to the comments in these affidavits.[4] Significantly, many of the comments about the status of the applicants' land rights and the nature of chiefly power over land confirm the worst fears of those challenging the constitutionality of the new laws and point to

[1] Hathorn co-authored the Makuleke case study in this chapter.

[2] This chapter draws heavily on the work of the attorneys for Dixie (Durkje Gilfillan of the Legal Resources Centre), Mayaeyane (Henk Smith of the LRC) and Makuleke (Moray Hathorn of Webber Wentzel Bowens). The assistance of Reckson Ntimane of Dixie, Morgan Mogoelelwa of Makgobistad and Gibson Maluleke of Makuleke is also gratefully acknowledged.

[3] The name Makgobistad is used to refer to both the town and the broader Makgobi 'tribal' area of which it is the centre.

[4] *Tongoane and others v The Minister of Agriculture and Land Affairs and others* (TPD 11678/06, pending). Available on the DVD included with this book.

deep contestation over the content of customary law. The stories of the three areas help one to view this contestation in the context of the resources at stake—in particular, struggles over who is able to control resources and the extent to which decision-makers can be held accountable.

Central to all three areas is the impact of decision-making power over land on people's capacity to secure and protect land rights. Another theme is the impact of imposed boundaries of 'tribal' identity on the status and definition of land rights and on the ability of ordinary people to hold leaders to account. These underlying issues of decision-making power over land, accountability and the boundaries of group identity play out in different ways in each of the three areas.

In Dixie and Mayaeyane, contestation is primarily about the strength and status of people's land rights relative to the power of traditional leaders to make unilateral decisions about communal land. In Mayaeyane the focus is on the status of individual and family rights to residential sites and fields relative to chiefly power. Farmers insist that in terms of custom, the local chief and headman have no right to undermine rights to land inherited from grandparents and great-grandparents. Farmers also dispute that the chief and headman have the right to establish a housing project in an agricultural area and allocate existing fields to outsiders without first consulting those with vested rights.

In response, state experts and the former acting chief dispute that fields can be inherited under Tswana customary law. They also dispute the farmers' version of how the fields were originally established and insist that a chief must have allocated the land. Different versions of how the first fields were acquired highlight contestation over the allocation paradigm and the underlying assumption that traditional leaders are entitled to dispense or take back land.[5]

In Dixie the focus is on decision-making power at village level relative to the power of the much larger Mnisi Traditional Council to make unilateral decisions about the land used by Dixie villagers. The implications for tenure security are graphically illustrated not only by a recent dispute over the traditional council's attempts to establish a tourism lodge on Dixie land, but also by court papers in a land restitution dispute which expose the traditional council's dealings with unscrupulous investors in anticipation of a restitution award to a large area including Dixie. These dealings put the Dixie villagers at serious risk of being evicted from their land. The Mnisi Traditional Council has used the land claim to get around the 'problem' of Dixie falling outside its tribal authority boundaries and to claim vast swathes of valuable land in the Kruger National Park on the basis of a dubious tribal sovereignty that is at odds with historical evidence of the decentralised nature of Tsonga settlements in the area.[6]

In Makuleke the dispute is not about the status of people's rights relative to chiefly power: the chief himself is challenging the new laws. The strength of land rights to residential sites and fields is not disputed; nor was it prior to the forced removal of the community in 1969. Before the removal, extended families lived in

[5] Also discussed by Claassens in chapter 11 of this book.

[6] For a discussion of the decentralised nature of Tsonga settlements in the area and the apartheid construction of 'tribal identity' see Harries (1989).

scattered settlements in the Pafuri area near the border with Mozambique and Zimbabwe, and the distribution of residential sites and fields took place primarily within families. After the removal, a 'closer settlement system'[7] with registered Permission to Occupy (PTO) certificates for residential sites was imposed, which the Makuleke tribal office has subsequently adapted and changed. People currently regard their certificates as proof of ownership of residential sites. This does not imply any lack of loyalty to their overarching Makuleke identity.

The burning issue in Makuleke is that of people's separate Makuleke identity relative to the claims of the Mhinga 'traditional community'. Chief Cydrick Mhinga claims that the Makuleke are merely a subordinate clan under his authority and as such are not entitled to independent land rights. The issue is particularly emotive because of the role of the previous Mhinga chief in the 1969 forced removal which put the Makuleke within the boundaries of the Mhinga Traditional Council. In 1998 the Makuleke managed to secure a restitution award which gave them title to the land within the Kruger National Park from which they had been removed but restricted their right to live there. Instead, it promised tenure security in the existing resettlement area which falls within the jurisdiction of the Mhinga Traditional Council. The Makuleke fear that the Communal Land Rights Act potentially undermines the status and security of the land rights they won through the restitution process and will enable Mhinga to undo their achievement and renew his claims and threats against their land rights. The tenure consequences of ongoing disputes over authority in one of the Makuleke villages are discussed.

The chapter concludes with a discussion of two issues that emerge from the case studies. One concerns the status of restitution land; the other that of tribal levies and the sale of land allocations by headmen and traditional leaders. The status of restitution land is a key issue in all three areas—in particular whether restitution land is owned and controlled by those who were actually removed or by larger 'tribes' claiming power and jurisdiction over them. This is an explosive issue for many rural communities—not only because it determines who will get control over the 'spoils' of restitution and profit from investment deals, but also because of the painful legacy of recent apartheid history. The tribal authority jurisdictional boundaries that are now entrenched by the new laws were delineated during the 1950s and 1960s as an integral step in the process of Bantustan consolidation—the very process that precipitated forced removals. Traditional leaders who co-operated with the Bantustan agenda were rewarded with large tribal authority areas and Cabinet posts in the newly created Bantustans. Few of these chiefs opposed forced removals; on the contrary, many, like Adolf Mhinga, used the Bantustan machinery to consolidate and expand their 'tribal' land base.[8] It is often these men, or their sons, who now claim that restitution awards should not be made to the Communal

[7] 'Closer settlements' were created in terms of the policy of 'betterment' or 'rehabilitation' enforced through regulations issued in terms of the South African Development Trust and Land Act 18 of 1936. The policy entailed the removal of people from scattered settlements to strictly delineated centralised villages, the consolidation of existing fields into delineated blocks of arable land and the establishment of fenced, rotational grazing camps.

[8] See also the discussion of MM Matlala in chapter 11 and Claassens (2001).

Property Associations (CPAs) and trusts established by those removed, but directly to traditional councils headed by themselves.

Alongside the manipulation of restitution runs the thread of sale of land allocations by headmen and traditional leaders. Both issues highlight the economic consequences of securing large tribal boundaries and the high stakes attached to different versions of customary law. The conclusion to this chapter argues that the versions of customary law put forward by the traditional leaders in their answering papers cannot be understood separately from their efforts to protect and expand the vested interests they secured during apartheid.

The land struggles taking place in the three areas are not 'anti-custom'. On the contrary, in all three areas rural people challenge the high-handed actions of traditional councils on the basis that they are in conflict with custom and tradition, and undermine customary entitlements to land. The case studies suggest that the scale of land sales and types of 'development' occurring in the three areas threaten to undermine the bedrock of indigenous property systems—the imperative to conserve the land base for the benefit of those entitled to a share in it.[9] Yet the respondent traditional leaders justify their actions as consistent with customary law and the Department of Provincial and Local Government supports their version of chiefly power.[10]

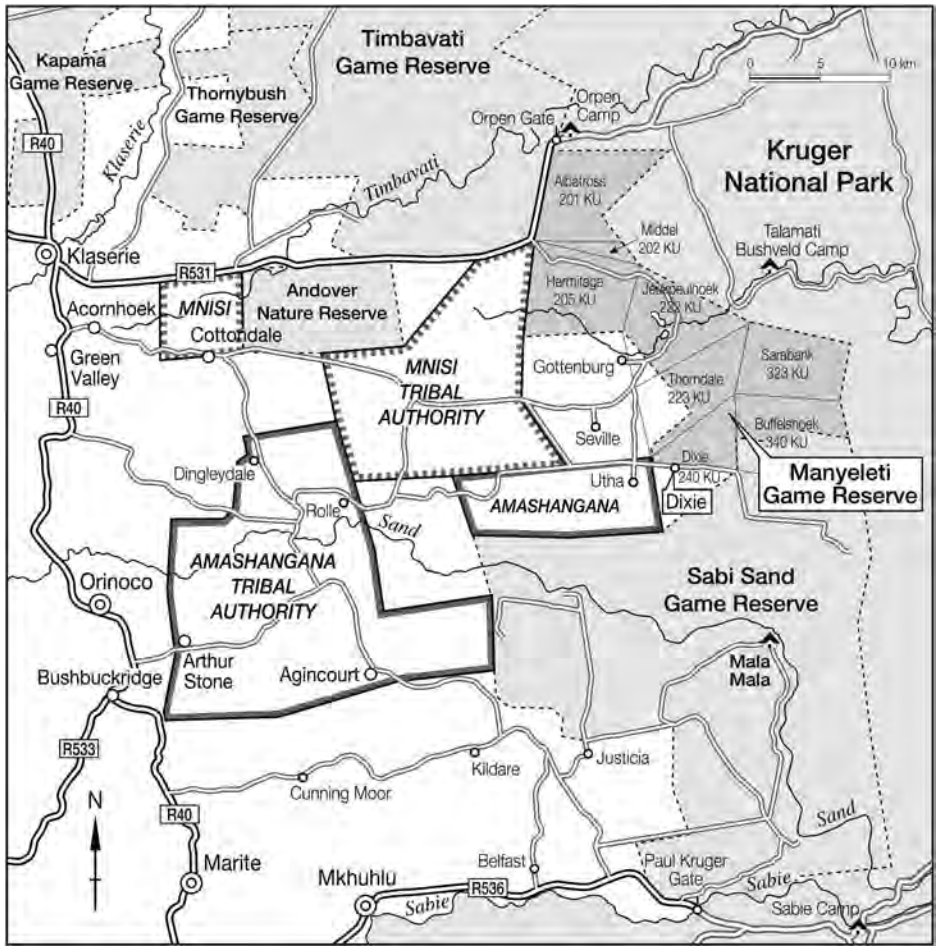
CASE STUDY 1: DIXIE

Dixie is a relatively small village in the valuable Timbavati bushveld area near the Orpen gate of the Kruger National Park. Although Dixie residents are very poor, even by Bantustan standards, the land they live on has been described as some of the most valuable real estate in South Africa. It is wedged between the Kruger National Park and upmarket private reserves such as Sabi Sand and Mala Mala. In contrast to nearby villages in the densely populated former homeland area of Bushbuckridge, Dixie and the small villages of Utha, Gottenburg and Seville are relatively isolated. Positioned closer to the Kruger National Park, history has left them surrounded by swathes of pristine bushveld. The high value of the Dixie land has sparked raging disputes about the status of land rights in Dixie.

The presence of many inhabitants of these four villages predates the first grants of land made to whites in the 1870s. Subsequent to this date, the only way in which the original occupants could retain a toehold on the land was as labour tenants to successive white owners. In the early 1960s, the South African Development Trust

[9] See chapter 4 in this book by HWO Okoth–Ogendo.

[10] The close structural linkages between this department, the National House of Traditional Leaders and the legal support made available to the respondent traditional leaders are evident throughout the court papers. Director General Lindiwe Msengana–Ndlela (affidavit on DVD, para 3) says the case of the Minister of Provincial and Local Government is supported by the affidavits of the respondent traditional leaders, the affidavit of the chairperson of the House of Traditional Leaders and expert witness Freddy Khunou. It is striking that the version of customary law put forward by the Department of Land Affairs differs in important respects from that of the Department of Provincial and Local Government and the traditional leaders. The Department of Land Affairs acknowledges the strength of entitlements to land vesting in individuals and families as well as the layered and relative nature of land rights at different levels of rural society.



Map 2: Map showing Dixie village in relation to the Manyeleti Game Reserve, the Kruger National Park and nearby tribal authority areas.
Prepared by John Hall, May 2008.

(SADT)[11] bought farms from white owners to establish a segregated game reserve for black people. That reserve, Manyeleti, has since been incorporated into the Kruger National Park. Dixie farm was divided into two sections, one inside Manyeleti and one outside. It is on this outside land that Dixie village is situated.

As more and more of the surrounding farms were converted into private game reserves, people evicted in the process made their way to the few small settlements that had not been affected. The villages are isolated from the schools, clinics and transport routes that were provided, however inadequately, in 'homeland' areas.

Representatives from Dixie were among the rural people who went to Parliament in late 2003 to make submissions opposing the Communal Land Rights Bill. They, together with people from Utha, Gottenburg and Seville, formed the Greater

[11] Previously called the South African Native Trust and the South African Bantu Trust.

Manyeleti Land Rights Group. The group said in its submission[12] that a local chief, Phendulani Mnisi, was attempting to make deals about their land with 'private investors' without consulting residents. The group feared that the Bill would 'entrench the power of the traditional council' over their land. Mnisi has no historical connection with Dixie, yet he has lodged a restitution claim to the Manyeleti game reserve—and included within the claim Dixie village and the particularly valuable land on which it is situated.

The Dixie villagers dispute his claims to sovereignty over them. They say their Tsonga-speaking ancestors moved into the area from Mozambique and lived in scattered, decentralised settlements before white people arrived in the area in the second half of the 19th century. The villagers insist that no particular Tsonga chief held sway over the area; instead, people lived in small clusters under elected or hereditary headmen who formed fluctuating alliances between family-based clans at various times. They say different chiefs have tried to assert or claim authority over them from time to time with varying degrees of success. The chief who previously 'stretched his finger' to Dixie was not a Mnisi. His name was Kheto Nxumalo. The villagers say Nxumalo held feasts and demanded tribute but did not interfere in the running of the village which has always made decisions internally through consultative processes.

Their account is consistent with observations by historian Patrick Harries (1989: 95), who quotes a government ethnologist writing in 1935 as saying that 'the Tsonga in the Transvaal are, with some exceptions, not organized into tribes at all, but represent a large formless population, the make-up of which almost defies analysis'. Harries (ibid) adds that

> 'missionaries, farmers, the Native Affairs department and anthropologists all remarked on the mobility and progressive industry of Tsonga-speakers who lived in decentralized political communities with shallow historical roots and readily adhered to new customs and values.'

The Dixie people also argue that their status as long-term occupiers and 'beneficial owners' is enhanced by the SADT history of the land. When the trust acquired the land in 1963, the villagers became both 'trust tenants' and beneficiaries in terms of the Native Trust and Land Act 18 of 1936.[13] Their claims are enhanced by the Interim Protection of Informal Land Rights Act 31 of 1996 which protects informal rights on SADT land and makes specific reference to beneficial occupation derived from indigenous practices.

The Manyeleti group, in its submission to the Portfolio Committee on Agriculture and Land Affairs in Cape Town (2003: 3), said that

> '[w]hat we want is that villages should decide who should administer their land and they must be involved in the on-going management of their land. Any major decision that needs to be taken regarding the land should be the concern of everyone in the land being targeted. Before any development can occur in the area everyone must not only be informed but must be involved in the decision making process ... one can scarcely

[12] See the DVD included with this book.

[13] Subsequently renamed and repealed. The Development Trust and Land Act was its last valid name.

> imagine what would happen if this Bill were to go through parliament. There are people out there who will not hesitate to trample on people, as the Dixie and Gottenburg communities experience illustrates.'

The Dixie lodge experience referred to does indeed illustrate the existence of people prepared to 'trample' on its residents and the matter will be discussed later in this chapter. However, that experience pales into insignificance when compared with other investment deals signed by the Mnisi Tribal Authority.[14] Chief Mnisi and others have entered into a series of investment deals in respect of the anticipated Manyeleti restitution award. These deals, had they not fallen apart, would have dispossessed the villagers of their land entirely. However, the investors fell out with one another about the division of the spoils and ended up in litigation in the Transvaal Provincial Division (TPD) of the High Court. The TPD court papers[15] lay bare not only the iniquitous claims of the white investors, but also the actions of Mnisi and his spokesperson, John Ndlovu. The papers illustrate the serious nature of the threat to security of tenure in Dixie should Mnisi and Ndlovu gain control over Dixie and the other villages—and the very real prospect that they will.

What follows is a discussion of the Dixie lodge experience, a look at events surrounding Dixie's participation in the litigation challenging the Communal Land Rights Act, a discussion of issues arising from the Pretoria litigation about the Mnisi restitution claim and, finally, reflections on the implications for free speech and tenure security in Dixie.

The Dixie lodge experience

In April 2001, Gerald Simaan of Curato Investments told people living in Dixie village of a 99-year lease agreement with the Mnisi Tribal Authority to develop a tourism lodge on part of the Dixie land. This was the first that residents had heard of the proposed lodge and they objected strongly. The proposal would have caused some people to relocate and would have restricted access to a river used for domestic purposes and watering livestock. Reckson Ntimane, the community leader who would later be the Dixie applicant in the case challenging the Communal Land Rights Act, made repeated requests for information about payment and compensation arrangements, and for an explanation of why those affected had not been consulted.

Eventually the Mnisi Tribal Authority arranged a meeting at Dixie village in October 2001 to discuss the construction of the lodge. However, members of the Dixie community were not allowed to speak. When Ntimane insisted on speaking out against the lodge he was arrested and briefly detained by members of the South African Police Service who were standing by, allegedly at the invitation of an official from the provincial Department of Land Affairs, Joas Mogashoa.

A few days later, Ntimane and others went to Mogashoa's offices in Polokwane where it became clear to them that Mogashoa supported the lodge development and had already had several meetings with Simaan even though the department had never discussed the development with the Dixie community. Desperate, the

[14] See *Noseweek* (July 2007: 8–9, 29).

[15] *Jansen van Vuuren and others v Bekker and others* (TPD 31208/06, unreported judgment delivered on 2 January 2008).

community contacted the Legal Resources Centre [LRC], a public interest law clinic providing free legal services, which wrote to the Minister of Land Affairs on its behalf. Community members knew that as long as the land remained registered as state-owned former SADT land, transactions concerning it would be invalid unless signed off by the national Minister of Land Affairs.

In reply, the national department admitted that proper consultations had not taken place with the Dixie community and undertook to oversee a meeting between Chief Mnisi, the Mnisi Tribal Authority and the Dixie community to ensure that proper procedures were followed. The letter stated that the development of the land could not take place without the consent of the Dixie community.

Instead, in March 2002, the village headman and two other Dixie people were called to the offices of the Mnisi Tribal Authority where Mogashoa informed them that Curato Investments had concluded a lease agreement with the Mnisi Tribal Authority in respect of the lodge. The information was presented as a *fait accompli* so the Dixie community applied for an interdict against Curato Investments, the Mnisi Tribal Authority and the Department of Land Affairs. Curato's lawyers replied that the lease agreement had not yet been signed and that because of their experience thus far, their clients wanted nothing further to do with Dixie.

Challenging the Communal Land Rights Act

In 2006 Dixie joined three other rural communities in challenging the constitutionality of the Communal Land Rights Act and the Traditional Leadership and Governance Framework Act. Ntimane, in his affidavit (para 37), pointed to the lodge experience and said that Dixie villagers would have been unable to stop the deal had the Mnisi Tribal Authority had the powers of a land administration committee or been able to represent the community 'as the owner of the land' as envisaged by the Communal Land Rights Act.

Ntimane (para 12) said the powers given by the Act to traditional councils acting as land administration committees would undermine existing decentralised, participatory decision-making processes in the village. He explained how decisions were taken at village meetings convened by the headman in consultation with the development forum which included the water committee, the policing forum, the school governing body and 'representatives of women and the youth'.

In response, Mnisi (para 11.2) denied 'that the Dixie farm was independent from the Mnisi traditional community' and attacked Ntimane's standing in the community. He said Ntimane's mother was a member of the Mnisi Traditional Council and that neither she nor anyone else in Dixie supported Ntimane or even knew about the Communal Land Rights Act. He said that at a meeting held in Dixie on 17 March 2007, the community had unanimously resolved to oppose the case challenging the Act and to reaffirm its 'acceptance of the Traditional rule and Authority of Hosi Phendulana Philip Mnisi in line with Shangaan customary law'.[16]

The reply by Ntimane's mother is instructive as regards patterns of conduct by the Mnisi Traditional Council and provincial government officials. She said the

[16] Annexure PPM 4 to Mnisi's affidavit.

meeting on 17 March had been called at short notice and that most people who attended were not from Dixie but from other villages. According to Mnisi's affidavit (para 9.5), the meeting was chaired by a Mr Masilela, Director of Traditional Leadership from Mpumalanga Province. Mnisi added that when Ntimane tried to speak, Masilela stopped him from doing so and told him to sit down.

Ntimane's mother, Anna Sithole, said she did not understand the meeting to have been about litigating the Act. Instead, Masilela again discussed the Curato lodge issue and blamed Ntimane for sabotaging it. When Ntimane left the meeting in disgust at not being allowed to speak, most of those present also left—despite protestations from the organisers of the meeting who followed people outside, trying to convince them to stay. Sithole (paras 14–18) said the resolution referred to by Mnisi was neither discussed nor adopted, and that Mnisi himself was the only signatory even though he did not attend the meeting.

Sithole said (para 19) that she was on the council only because the headman, Frank Nkuna, asked residents to elect three people to represent the village and she was one of those chosen. She said her son had bravely opposed attempts to misuse Dixie land and enjoyed the support of the great majority of community members for doing so.

The jurisdiction of the Mnisi Traditional Council over Dixie is legally tenuous. Dixie is not among the list of farms referred to in the 1962 *Government Gazette Notice* establishing the Mnisi Tribal Authority. This is a strange omission given that the tribal authority was established at the same time as the SADT's acquisition of the land around Manyeleti. Generally, the processes of Bantustan consolidation, tribal authority creation and SADT administration went hand in hand. The lack of a plausible historical explanation by Mnisi points to the likelihood that the Mnisi 'tribe' was simply not a presence in Dixie in the 1960s.

Mnisi's response to the jurisdictional problem is illuminating in relation to the Mnisi land claim. He says (para 20.3) that to the extent that Dixie 'may have been excluded' from the jurisdiction of the Mnisi Tribal Authority, 'that is a mistake' and 'is the reason why a land claim has been lodged'.

The Mnisi restitution claim and the Pretoria case

The Mnisi restitution claim to Manyeleti was lodged in 1998. When the Land Claims Commission first gazetted the claim for public information, it did not include Dixie because a counter-claim to the area had been made by the Seklare community.[17] The Mnisi land claims committee thus made an application to the Land Claims Court to expedite the amendment of its gazetted claim to include

[17] According to the affidavit of regional Land Claims Commissioner Mashile Mokono (para 17) in the *Jansen van Vuuren* case, Dixie was not initially included because of 'a dispute between the Mnisi community and Seklare community over the ownership of the farm'. Mnisi's affidavit (para 18.2) in the *Tongoane* case refers to 'a long-standing dispute between the Mnisi clan and the Amashangane clan about the exact boundaries of areas of jurisdiction'. Chief Kheto Nxumalo is from the Amashangane clan. The fact that three traditional leaders claim historical jurisdiction over Dixie indicates that none of them ever had unequivocal authority over the area. This supports by implication Ntimane's version of village-based social structures.

Dixie. According to an affidavit by the regional Land Claims Commissioner in July 2007 (Mokono, para 23 in *Jansen van Vuuren*), the commission is in the process of gazetting the farm Dixie as part of the Mnisi community claim.

The restitution process requires that the names of members of any claimant community be listed. The list of community members participating in the claim has come to light through the litigation in the TPD. It shows that only four of the claimant families currently live in Dixie. Of these four families one has the surname Mnisi and another is that of the current headman, Nkuna. The Manyeleti Land Claims Committee does not have a single representative from Dixie. However, as will become evident in this chapter, even the named claimants have seldom, if ever, been consulted about the deals that the Mnisi Tribal Authority and Manyeleti Land Claims Committee, represented by Ndlovu, entered into in anticipation of the restitution award. Ndlovu has a power of attorney to act on behalf of the Mnisi Tribal Authority and is the chief's spokesperson. He is also chairperson of the Manyeleti Land Claims Committee.

As set out in the affidavit of the regional land claims commissioner, the complicated deals agreed to between Ndlovu and an investor, Karl van Vuuren, would have resulted in the Mnisi claimants being entitled to only 24 per cent of the income generated by the development of the Manyeleti game reserve. Most of the benefits would have accrued to various companies of whom the sole proprietor is Edith van Vuuren (Karl's wife). Moreover, Ndlovu allegedly agreed to Van Vuuren's companies being granted 'indefinite, irrevocable and transferable' concessions to develop two luxury lodges within the Manyeleti game reserve.

The deals came to light only when a dispute between the investors involved in the claim blew up into a battle in the Pretoria High Court. The court papers and an article in the investigative magazine *Noseweek* show that the investors had for years helped and financed Mnisi and Ndlovu to pursue the land claim in exchange for certain concessions. The original investor was Karl van Vuuren. He subsequently pooled his Manyeleti enterprise into a partnership arrangement with one Abe Sher. However, when the partnership went sour they split on the basis of Sher's undertaking that he would not pursue a relationship with the Mnisi and would have nothing further to do with the land claim or the development of Manyeleti. After the split, however, the Mnisi claimants cancelled their agreements with Van Vuuren and threw in their lot with an attorney, Jurgens Bekker, who, according to Van Vuuren, is a close friend and associate of Sher's.

Van Vuuren, who estimates the land value of Manyeleti to be R650 million, then went to court to try to enforce the agreements he had made with Mnisi. He requested the court to order that his wife's companies be allowed to 'assist and resolve the Manyeleti land claim', 'to manage and develop the Manyeleti Game reserve once the claim has been finalised' and have 'irrevocable, indefinite and permanent rights thereto'.[18] He asked the court to stop the respondents—including Mnisi, Ndlovu, Sher and Bekker—from making public 'confidential' information such as the identity of the land claimants, the 'identity, decisions and the internal documentation of the Manyeleti Land Claims Committee' and the

[18] Notice of motion in *Jansen van Vuuren*.

'confidential agreements' that he had entered into with the tribal authority and the land claims committee.

Van Vuuren threatened to sue the tribal authority and the land claims committee for damages arising from breach of agreement. He also warned in his founding affidavit (para 301) that the respondents' actions would be prejudicial to all concerned 'and in particular, the ordinary Mnisi claimants, who probably have no knowledge of the facts referred to in this affidavit'.

He said (para 270) that he had already spent R4 259 898 in development and legal costs on the claim and attached documents showing regular payments to the accounts of Ndlovu and Mnisi. He also said he had provided a car for Ndlovu's use. Ndlovu, in his answer, did not deny the payments or use of the car (which he subsequently bought), but said these were needed to enable him to pursue the claim. He said (para 93.10) that '[l]ogic dictates that it would have been an administrative impossibility to make pro rata contributions to each of the individual land claimants. Hence the arrangement that contributions were made to me'.

A section of Van Vuuren's affidavit (paras 197–206) details the allegedly corrupt and unlawful activities of Ndlovu in relation to the land claim, along with an attached note of a meeting in which there is reference to three separate alleged attempts at bribery by Ndlovu. In his answering affidavit, Ndlovu (para 92.6) says that even if he did request bribes, which he denies, 'the Applicant's hands are as dirty as mine'.

In response to the threat of a damages claim for breach of contract, Ndlovu (who filed his affidavit on behalf of Chief Mnisi, the tribal authority and the land claims committee) said the contracts they entered into with Van Vuuren were in any case invalid in terms of various requirements of the Restitution of Land Rights Act 22 of 1994 and therefore unenforceable. He explained that, with Bekker's assistance, the claimants had registered a trust to take transfer of the land and that it conformed with the requirements of the Restitution Act. The name of the trust is the Manyeleti Conservation Trust. The trust deed is attached to the court papers.[19]

Regional Land Claims Commissioner Mokono,[20] a respondent in the case, said (para 11) his office had already recommended to the Minister of Land Affairs that the Mnisi restitution claim be approved and had submitted a draft settlement agreement (para 28) in terms of which the land—including Dixie—and various development grants would be transferred to the Manyeleti Conservation Trust.

Its eight trustees include founder and chairperson Hosi Phendulani Mnisi as well as John Ndlovu. The trust deed provides that the trustees will take transfer of the Manyeleti game reserve and any other assets they may acquire on behalf of the beneficiaries. The beneficiaries are defined as the 'Mnisi community, being the Mnisi land claimants for the Manyeleti land claim'. An annexure listing 212 names is attached. The trust deed vests the trustees with 'such powers to deal with the trust property which they in their exclusive discretion deem necessary' (s 11.2). It

[19] The trust deed can be found on the DVD included with this book.

[20] Mokono has since been arrested by the Scorpions crime unit (Directorate of Special Operations) and, according to the *Sowetan* newspaper (Maponya, 2007), faces charges of perjury and fraud involving a land claim by the community of Dwarsloop near Bushbuckridge.

empowers trustees to mortgage, sell or let the land, demolish fixed improvements, evict lessees and undertake township and sectional title developments (s 11.2). Section 16 provides that the trust shall never be terminated or liquidated and shall be maintained until the end of time.

The only significant limitation on the powers of the trustees is that they may not sell or encumber the Manyeleti game reserve. Dixie village falls within the land to be transferred to the trust but does not fall within the boundaries of the Manyeleti game reserve—and so does not enjoy this protection. Furthermore, as already mentioned, only four of the families on the claimant list currently live in Dixie, implying that the vast majority of Dixie villagers are not even beneficiaries of the trust.

The Mnisi restitution claim has potentially devastating consequences for the tenure security of people living in the villages on the borders of Manyeleti if it is approved by the Minister of Land Affairs. Once the Manyeleti Conservation Trust holds title to the Dixie land it will be impossible for the villagers to protect their status as a separate community with independent land rights. As in many similar situations, once transfer takes place, day-to-day power is likely to be exercised by the Mnisi Traditional Council and by strongman Ndlovu in particular. In any event, whatever the future of the trust and the traditional council, Ndlovu and Mnisi will be assured of far-reaching powers over Manyeleti and surrounding communities. The court papers include allegations that Ndlovu has long been involved in underhand secret deals which extend in scope beyond the Manyeleti claim. The *Noseweek* article (July 2007) which broke the story quotes a businessman involved with one of the existing lodges on Manyeleti:

> 'This whole Manyeleti thing has become a money-grabbing farce. It's all about the money. I've been threatened by the Mnisi: if I don't stop messing around with the claim they will come to my house in Johannesburg and burn it down with my children inside.'

It is no secret that Ndlovu and Mnisi, during their joint venture with Van Vuuren, identified the settlements of people living on the borders of Manyeleti as a constraint inhibiting the viability of their development plans.

Free speech, accountability and tenure security

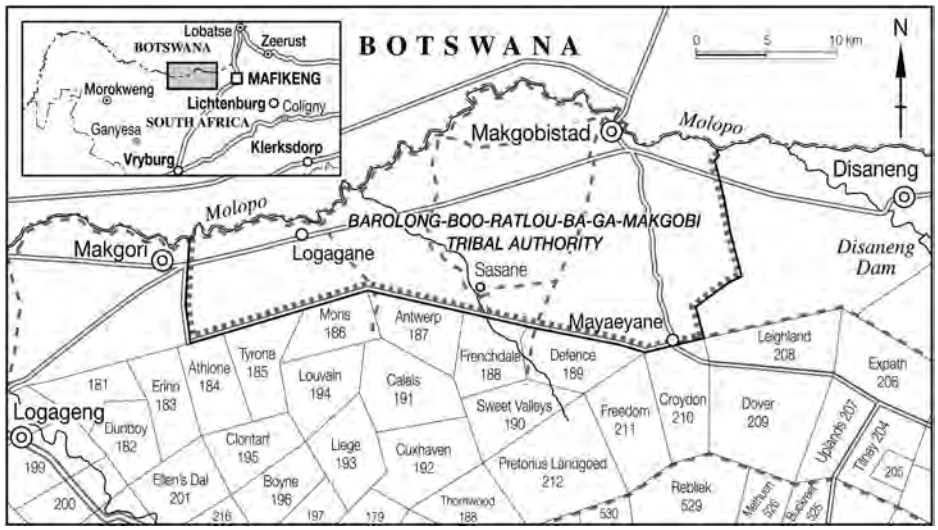
By 2004 rumours were flying in the Manyeleti villages about the tribal authority's involvement in dubious dealings around the Manyeleti land claim. Ntimane and other members of the Manyeleti land rights group spoke to as many villagers as they could to find out what was going on and to alert people to the possible implications. In response, the tribal authority applied to the court in Thulamahashe for an interdict to stop Ntimane and two others 'telling lies' about the Mnisi Tribal Authority and the Manyeleti Land Claims Committee, and for an order preventing them from meeting with communities under the jurisdiction of the Mnisi Tribal Authority.

The magistrate granted the interdict despite noting that the evidence of two key witnesses was unreliable (one witness did not know the contents of his affidavit; the other cannot write and the signature on the affidavit was not his own). The

magistrate did not, however, grant the order prohibiting meetings with people under the jurisdiction of the tribal authority.

The coercive nature of the power of the Mnisi Tribal Authority is evident not only from its decision to seek such an order but also from the decision of government officials to prevent Ntimane from speaking at public meetings at least twice. Government support and the suppression of debate and dissent have bolstered Mnisi and Ndlovu. In the absence of these, it would have been far harder for the men to get away with their dubious deals. The restitution process has provided Mnisi with the means to consolidate his legally tenuous grip on Dixie. He has constructed a version of chiefly power over land that is at odds with history and threatens the tenure security of poor people living in and around Dixie village. It is this version of chiefly power that is reinforced by the powers given to traditional councils by the Communal Land Rights Act and entrenched by the Framework Act's confirmation of apartheid tribal identities.

CASE STUDY 2: THE MAYAEYANE AREA NEAR MAKGOBISTAD



Map 3: Map showing Makgobistad, Mayaeyane and the tribal authority boundary.
Prepared by John Hall, May 2008.

Makgobistad is in the North West Province, bordering Botswana in a dry and beautiful area featuring sandy red earth and silver cluster-leaf trees. On visiting the area the origin of the current chief's name—Sandyland Motsewakhumo—is immediately apparent. In contrast to Dixie, Makgobistad has a long and fairly stable history of well-established institutions. Many of the houses are substantial and bear testimony to the investment of migrant income over generations. The large garden trees that provide shade from the intense summer heat also indicate the age of the settlement. While Makgobistad, the residential hub of the surrounding area, is too large to be called a village, it does not have a town

centre but rather the expansive, spacious quality of many Tswana settlements. Some cultivation takes place within large family yards but mostly in arable fields some distance from the residential area. Cattle are kept in cattle posts (*meraka*) outside the town.

Tswana settlements have always featured centralised residential areas and separate arable and livestock zones. For this reason they were not as badly affected by apartheid's 'betterment' programme as Nguni areas typified by small clan-based settlements interspersed with fields. In those areas, 'betterment' required the demolition of scattered homesteads and the removal of people into grid-like 'closer settlement areas'.

Makgobistad falls within the Molopo reserve created by the British in 1886 in recognition of Barolong indigenous land rights in the area. The history of the Tswana-speaking Barolong there goes back hundreds of years: historian PL Breutz (1953: 23) refers to oral history and ruins which place the first two Barolong chiefs as far back as 1300.

The applicant from this area who is challenging the new laws does not dispute the legitimacy of the tribal council or that the community falls within its boundaries. Morgan Mogoelelwa, the third applicant in the *Tongoane* case, represents a grouping of people with inherited land rights in a relatively isolated agricultural area called Mayaeyane which is some distance away from the large residential area of Makgobistad. The Mayaeyane farmers say the young chief of Makgobistad, Sandyland Motsewakhumo, has appointed his uncle, Peter Motsewakhumo, as unofficial headman of Mayaeyane. They say Peter has spearheaded the development of a housing project in their area without consulting them. Mayaeyane is abutted by previously white-owned farmland which has recently been awarded to the community in settlement of a restitution claim. The Makgobistad Traditional Council has not informed the broader community about developments in relation to the restitution claim and is allegedly objecting to the Restitution Commission's requirement that the land be transferred to a legal entity such as a trust or CPA. The traditional council reportedly wants title to be transferred to the chief or traditional council.

The applicant challenges the right of Sandyland and Peter to make unilateral decisions about land that has belonged to Mayaeyane families for generations as well as the chief's right to appoint a headman without consulting them. Faced by the threat of the housing project, the group points to a long-standing and strictly enforced rule that the area should be reserved for agricultural purposes. In terms of a decision ratified by a large *pitso* or general meeting in 1947,[21] only five 'caretaker' families were allowed to establish homes in Mayayaene. Other people had to move back and forth between their fields and the main village, living in rudimentary 'summer shelters' during periods of intense agricultural activity.

The Mayaeyane group fears that the new laws will exacerbate the tendency towards high-handed and self-serving behaviour by traditional leaders which the group says started at the time the area fell within the Bophuthatswana 'homeland'. They say the autocratic style of then President Lucas Mangope was adopted by traditional leaders who supported him and the homeland system. The Mayaeyane group points to secret land sales concluded by the Motsewakhumo family during

[21] Interview with George Mokgosi at Mayaeyane, 18 November 2004.

the Bophuthatswana era and says the tribal council was powerless to reign in abuses because of the support that compliant chiefs received from Mangope and his officials. Mayaeyane farmers fear that Sandyland and his uncles are continuing to undermine the customary entitlements and consultative decision-making traditions of the pre-Bophuthatswana period. They allege that Peter is enriching himself by selling land allocations to outsiders at Mayaeyane and that the newcomers—who now outnumber the original farmers—constitute a support and revenue base for him. Moreover, as a headman he becomes eligible for a government salary; yet a headman's position cannot be justified by having jurisdiction over an agricultural area occupied by only five families

Unfolding events seem to confirm their fears. Not only is the housing project proceeding apace with a reticulated water system and electricity grid being installed in the isolated and, as yet, sparsely populated area, but Sandyland has been charged with fraud in the magistrate's court in Mafikeng for diverting road development money to his private account. The restitution award to the land adjoining Mayaeyane is shrouded in secrecy, and rumours abound that Sandyland and Peter want to keep it for themselves.

The status of family-held land rights relative to chiefly power over land

At issue in the litigation is the status and content of the land rights vesting in families and individuals *vis-à-vis* the powers of chiefs over communal land. The issue crystallises around who has decision-making authority in respect of inherited family-held rights to 'allocated' land. As discussed in chapter 11 of this book, Mayaeyane farmers challenge the historical accuracy of the term 'allocation' as a description of how the original families acquired fields in Mayaeyane. They say their forefathers expanded their agricultural production to the areas around the *meraka* and that while Chief Makgobi, the founder of Makgobistad, was aware of this, it would be inaccurate to describe his implicit condonation as 'allocation'. The farmers do not dispute that they are part of the broader Makgobistad community; nor do they claim independent status for Mayaeyane. They emphasise, however, that rights to fields have always been strong and relatively independent, and that they have never been in the gift of traditional leaders to bestow and take away.

An old man, DL Ntswane, who acquired his fields in Mayaeyane during the time of Chief Tshipitota around 1941, describes the process subsequent to the initial expansion:

> 'I was then 22 years old. The chief sent his younger brother, Bridal Motsewakhumo to Mayaeyane to look at the land I proposed. Bridal consulted the next-door people and they agreed. They could not have objected in those days, because land was still plentiful. There was space for everyone. The boundaries of my field were marked in the presence of my neighbours. I am still farming that land. Now the actual ploughing is done by my children.'[22]

Although there are families such as the Ntswanes who continue to plough substantial areas, many have resorted to using their fields primarily as grazing for their cattle. The area is extremely dry and hot, and locals insist that the rainfall has become increasingly erratic in recent years. Moreover, substantial areas of grazing

[22] Interview at Mayaeyane, 17 February 2005.

land were allegedly sold to individuals by the tribal authority during the Bophuthatswana days and there is now a shortage of veld for grazing. People allege that Peter told the old people living at Mayaeyane to remove their cattle from the 'government grazing camp' at Mayaeyane and that he now uses it exclusively for his own cattle. They complain that Sandyland has reserved tracts of what was previously grazing land for hunting expeditions with tourists and dismisses farmers' objections on the basis that the land and animals belong to him.

In comparing the current actions of Sandyland with those of previous chiefs, farmer George Mokgosi[23] commented:

> 'Tshipitota used to respect people's land. He would never allocate your land to another person. He never said that he owned the land. He regarded the land as the property of his tribe. He used to say *kgosi-ke-kgosi ka batho*.[24] The present chief does not understand that his power comes from the people. He sees being a chief as a profession. He is always claiming that he is of royal blood and that to be a chief is his birthright.
>
> Previously, when somebody wanted to join the community, the chief used to call his people and introduce the person and discuss the matter. If the community did not agree, he would not accept that person. He also consulted the council and the other headmen before accepting a new person. The council would investigate the background of the new person before making a recommendation. That is how it worked during the time of Tshipitota.
>
> Tshipitota's son John was as good as his father. He died in November 1979. Sandyland, who was born in 1974[,] was only four years old at the time. His uncle Mmoledi acted as chief until he handed over to Sandyland in 1997. The uncle was not as bad as Sandyland has turned out to be, but not as good as his brother or his father.'

Mogoelelwa argues in his affidavit (paras 50–3) that the unilateral actions of the chief and headman conflict with local custom and precedent. He says that in terms of Tswana tradition, traditional leaders cannot deprive people of rights to arable and residential land without their agreement and without the approval of the community. He says the Act gives traditional councils the power to represent the community as the owner of the land, but does not enable rights-holders and the community to hold the traditional council to account. The result, he says, will be that the chief and headman will get the legal authority to continue with their top-down approach at Mayaeyane. Indeed, their powers will be enhanced. For example, they will be able to confer freehold title on the outsiders to whom they have allocated land.

The answering affidavit of the previous regent, Mmoledi Motsewakhumo, says that Peter, far from being an unofficial headman appointed by Sandyland, is an official headman appointed during Mmoledi's own regency in 1989. He says (para 3.2) that the royal family decided to appoint Peter and that this was later 'endorsed by the community'. He annexes an appointment letter signed by President Mangope of Bophuthatswana but provides no details or proof of when, where or how the appointment was made known to the community, let alone confirmed by them. Farmers at Mayaeyane were amazed to hear that Peter was an 'official' headman and that he had been appointed nearly two decades previously.

[23] Interview at Mayaeyane, 18 November 2004.
[24] A chief is a chief by the people.

Motsewakhumo adds (para 8.2) that a community meeting was held in Mayaeyane in November 2006 to address the court challenge, and that at this meeting the community resolved to disassociate itself from the actions of Mogoelelwa and pledged to support the Makgobistad Traditional Council. Motsewakhumo attaches a copy of the community resolution. Despite providing numbered spaces for twenty signatures by council members it is signed by only three people—Sandyland, Mmoledi and Peter Motsewakhumo. The Mayaeyane people say that councillors arrived for a meeting that was held without any prior notice, that the meeting was not well attended and that no such resolution was taken.

Allocation and inheritance

Motsewakhumo does not rebut the allegations of unilateral interference with people's land rights at Mayaeyane or explain how people came to be allocated sites on the Mogoelelwa family fields. Instead, in his affidavit (para 17.1) he questions the status of their rights:

> 'I admit that Mogoelelwa's family was allotted land in Mayaeyane. It is however a misnomer to use the word "inherit". Mogoelelwa does not disclose to this Court as to how his grandfather acquired the land. He must be aware that land was allotted to his grandfather by kgosi Makgobi.'

This remark illustrates the connection between the allocation paradigm and the assumption that traditional leaders retain an underlying ownership inherently at odds with strong inherited rights vesting in families.

Both Motsewakhumo and the expert witness for the Department of Provincial and Local Government, Freddy Khunou, a lecturer at North West University, have responded sharply and dismissively to Mogoelelwa's description of his grandfather having 'expanded' his farming enterprises to Mayaeyane as opposed to having been allotted land by Makgobi. Motsewakhumo says the concept of acquiring ownership by occupation is 'unknown in Tswana customary law' (para 17.2) and that while '[i]t may be so once land is allotted to a family, it will devolve to successive members of that family . . . [that] devolution cannot be done without the sanction of either the headman or the kgosi or the caretaker' (para 24.2). Motsewakhumo's denial of the ordinary inheritance of arable land within families is very different from the account given in Schapera's 1938 *A Handbook of Tswana Law and Custom*.[25] Schapera (2004: 204) says that '[o]nce a man has been granted, or taken up, arable land, he has a prescriptive right to it, whether it is still uncleared, under cultivation, or lying fallow; and after his death this right passes to his heirs.' His statement acknowledges that fields are not always 'granted', and may be 'taken up'.

Bennett (chapter 2 in this book and 2004) describes the distortions that arise from viewing customary law systems through the lens of common-law constructs

[25] Chapter 11 describes the perils of relying on 'official' accounts of customary rules to interpret the content of living customary law. Schapera's *Handbook* falls squarely in this category. The discrepancies between the accounts of Motsewakhumo and Schapera of the rules of inheritance are nevertheless instructive.

such as ownership. The ownership construct cannot perceive the underlying reality of 'complementary interests held simultaneously' (Bennett, 2004: 381).

> 'Those who begin an investigation of customary tenure with the assumption that common-law ownership is a universal phenomenon, however, tend to represent the data as if one person, or body of people, holds a plenary right out of which fractions are given to others. It then follows that lesser rights of use and enjoyment are conditional on grants by the "owner"' (Bennett, 2004: 380).

The notion of strong inherited rights vesting in families is inconsistent with academic IP Maithufi's conception that '[a]ll land occupied by a tribe is vested in the Chief and administered by him as head of the tribe' which Khunou quotes with approval (para 23.4). Khunou describes Mayaeyane as the 'traditional settlement of Kgosi Makgobi who founded it' (para 11.1). He says Mayaeyane did not 'evolve' itself into a sub-village; instead the 'evolutionary processes of Mayaeyane were traditionally directed, guided and spearheaded by the kgosi, the traditional authority and the headman' (para 18.1). He posits (paras 18.2–18.3) that the social world has for all time been 'divided into rulers and ruled'. He adds (para 18.5) that

> 'contrary to the applicant's allegations, many people interviewed in Mayaeyane do not regard themselves as the legitimate "owners" of land in Mayaeyane. Instead, they recognise the kgosi and the headman as the "owners" of the land who served their interests.'

He attaches a list of the people whom he interviewed at Mayaeyane: with few exceptions they are the newcomers who recently acquired land from Peter Motsewakhumo.

Selling land allocations

The construct presented by Mmoledi Motsewakhumo and Khunou of traditional leaders having underlying and residual ownership rights to communal land has important economic implications. Khunou says (para 21.13, fn 58) that it is a long-standing rule of the Barolong 'to allocate land to immigrants on certain conditions' and that in terms of the minutes of the Makgobistad Traditional Council, the affiliation fee at the time of his research (November 2006) was R4 000 per allocation. However, this fee 'may change from time to time as stipulated by the council'. Khunou says new members of the community are required to be 'loyal and owe their allegiance to the kgosi, traditional council and dikgosana, adhere to the tribal laws and traditions of the community and respect and obey the customs of the community' (ibid).

The people of Mayaeyane were surprised that it was the previous regent, Mmoledi, who deposed to the answering affidavit and not the current chief, Sandyland. However, things fell into place when they learned that Sandyland had been charged with fraud for diverting money from the tribal account to his personal account. It is widely believed that he is attempting to have the charges withdrawn on the basis that he will repay the money. He allegedly argues that the 'dignity' of the tribe would be undermined were the criminal case to proceed.

A forum concerned with 'human rights and development' has recently emerged

in Makgobistad. Members met outside the Mafikeng court during one of Sandyland's appearances. Their aim was to highlight the problems of high-handedness and corruption in Makgobistad and to ensure that the case against Sandyland was witnessed and did in fact proceed. However, the group was informed by both Sandyland and an official from the provincial House of Traditional Leaders that because the group had 'not [been] properly constituted' it was not allowed to hold meetings in Makgobistad. When members objected, saying the traditional council had no authority to stop meetings, they were told that a new law enabled the traditional council to ban meetings of groups that were 'not properly constituted'.

The chairperson of the forum, Charlotte Mokgosi, asked for a copy of this 'new law' and was told that none was available. She subsequently went to the Department of Traditional Affairs in Mafikeng to ask for a copy and was again told it was not available. She was told only that the law is known as Act 2.[26] Finally, Mokgosi contacted the LRC which suggested that this might be the North West Traditional Leadership and Governance Act 2 of 2005. However, this Act does not contain a provision which authorises the banning of meetings unless s 18(3) is construed to have that meaning. It provides that a 'kgosi/kgosigadi shall be entitled, in the lawful execution of his/her functions, to loyalty, respect, support and obedience of any member of the traditional community'. Ironically, s 18(1)*(d)* lists one of the functions of the kgosi or kgosigadi as being 'to make known to the members of the traditional community the provisions of any new law or policy'.

Mokgosi's experience of the new provincial traditional leadership law is similar to that of people from Rakgwadi in Limpopo Province who objected to having to pay a R50 car levy to buy a new kombi-taxi for their chief. When the protestors said that compulsory levies were no longer allowed by the Constitution,[27] the traditional council and officials from the provincial Department of Traditional Affairs replied that a new Limpopo law had been enacted which made tribal levies legal again. These protestors were also not provided with a copy of the law or given its name.

It is instructive that it is the provincial traditional leadership laws that seem to be having the most immediate impact on the lives of rural people and not the national Framework Act or the Communal Land Rights Act, which has not even been brought into operation yet. The existence of the new laws, whatever their content,[28] has certainly bolstered traditional leaders' confidence to claim state-sanctioned legal authority over their 'subjects'.

This is consistent with the analysis in chapter 14[29] of this book where it is argued that the new laws are unlikely to result in a slew of land transfers to traditional communities. Instead, their primary impact is likely to be the removal of the 'threat' or prospect of elected land administration committees, thereby providing traditional councils with free reign to assert versions of customary law that bolster their interests within the old apartheid jurisdictional borders that the new laws confirm.

[26] Interview with Mokgosi in Johannesburg, 31 January 2008.

[27] LRC letter of demand to Matlala Traditional Council and premier of Limpopo Province, 17 October 2007.

[28] The Limpopo Traditional Leadership and Institutions Act 6 of 2005 may well be unconstitutional in that it does indeed provide for compulsory traditional council levies.

[29] Also by Claassens.

The restitution claim

The Barolong-ba-Makgobi have lodged a restitution claim to the white-owned farmland adjoining Mayaeyane.[30] The area was historically part of the Barolong-ba-Makgobi area that, according to Krisjan Mokoto,[31] on old man from one of the original caretaker families resident at Mayaeyane, in early times stretched to the Vryburg road. He says:

> 'The first white to come here was an Englishman. He was allocated some grazing land by Chief Makgobi. He was allocated that land after the Boer war. After a time he sold all his livestock and left. The second one was Labuschagne. He ploughed for one year and then left. The Native Commissioner from Mafikeng then took the land and handed it to a Jew, Mr Gordon. Gordon also had a general dealer shop in Makgobistad. After Gordon had accumulated all that he wanted he also left and went back home. After Hitler's war the Commissioner decided to give the land to Hans Nel. Then came Ossie Patoors, who is still here. Nel sold his part to the Sam family. They are an Indian family from Mafikeng.'

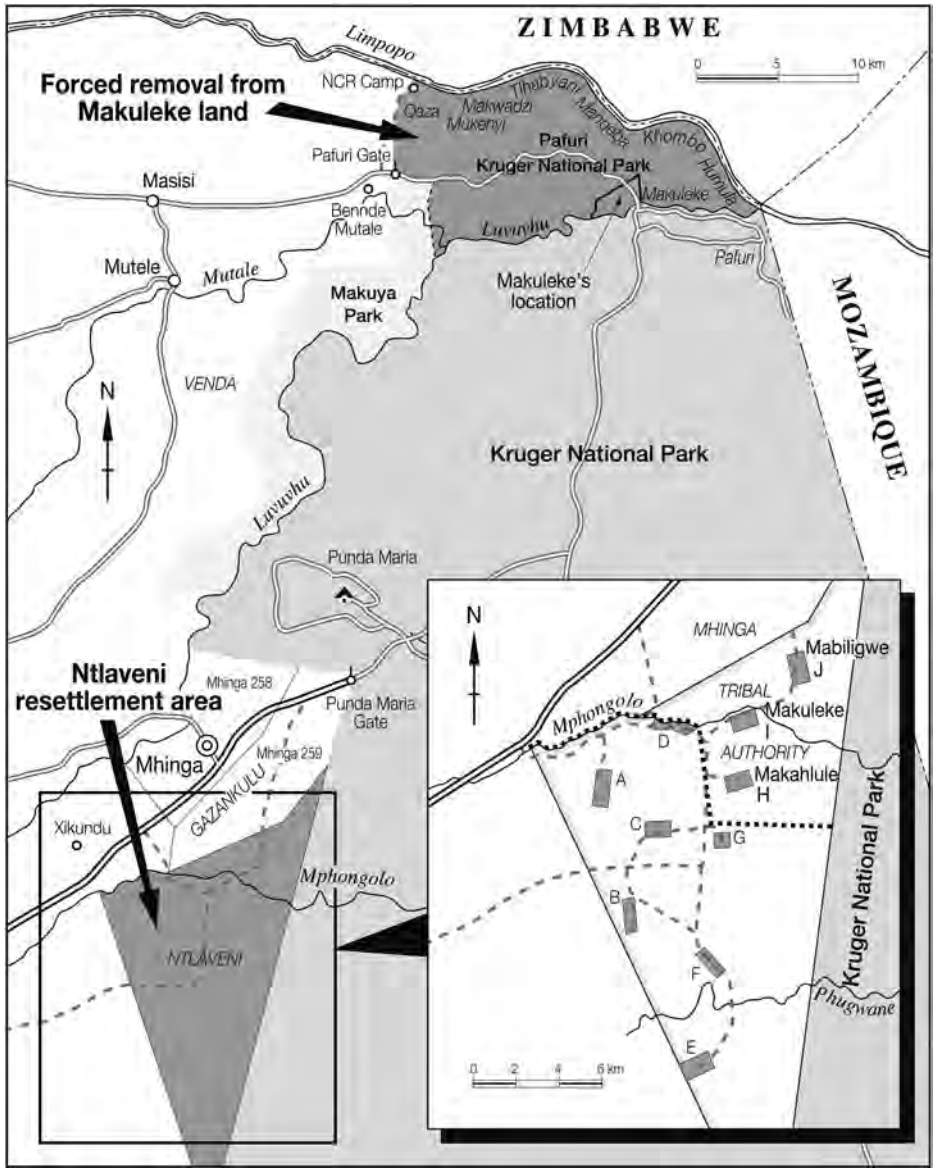
Because of Mokoto's knowledge of the history and the boundaries of the land around Mayaeyane, the tribal authority has taken him to various meetings and discussions about restitution. But Mokoto, like everyone else in Makgobistad, has not been told about the outcome of the restitution claim. Sources at the Restitution Commission say the claim has been approved and that the only outstanding step is to identify the legal entity to which the land should be transferred. The traditional council has rejected out of hand the commission's proposal that a trust or CPA be established. The council insists that the land must fall directly under its jurisdiction. The commission has apparently objected on the basis that this decision cannot be made by the traditional council alone and has suggested that a *pitso* be convened at Makgobistad to inform people of the latest development and to ascertain their views. Despite numerous efforts to arrange such a meeting, it has not yet taken place and rumours abound that Sandyland and others are keeping the restitution claim secret because they plan to keep the land for themselves.

CASE STUDY 3: MAKULEKE

Like the Dixie villagers, the fate of the Makuleke community has been closely interwoven with the shifting boundaries of the nearby Kruger National Park and with the forced removal of people from land incorporated within the park to areas on its periphery. The original Makuleke land is about 300 km north of Dixie and abuts Mozambique and Zimbabwe in the far north-eastern corner of South Africa. In 1969, the Makuleke community was forcibly removed from the land it had historically occupied at Pafuri to the resettlement area of Ntlaveni, 60 km to the south-west. The Pafuri land was incorporated into the park. In 1998, after a long battle, the Makuleke won restitution of the Pafuri land on the basis of an agreement that it would be transferred to their CPA to be used for eco-tourism development

[30] The farms involved are Freedom, Croydon and Uplands. The claim was lodged by Mmoledi William Motsewakhumo and Sandyland Motsewakhumo on behalf of the Barolong-ba-Makgobi tribe.

[31] Interview at Mayaeyane, 17 February 2005.



Map 4: Map showing the Makuleke area before the removal, and blocks H, I and J in the Ntlaveni resettlement area in relation to Mhinga Tribal Authority boundaries.
Prepared by John Hall, May 2008.

and that the community would continue to reside in the resettlement area of Ntlaveni.

Whereas Pafuri had been an isolated area of decentralised family settlements with nearby fields (Harries, 1987: 102), the Ntlaveni land was administered as an SADT 'betterment' scheme and laid out in three 'closer settlement' residential blocks with designated areas of arable land and strictly controlled rotational grazing camps. It

falls within the jurisdictional boundaries of the Mhinga Tribal Authority created in 1954 in terms of the Bantu Authorities Act 68 of 1951.[32] The Mhinga chiefdom has long asserted hegemony over the Makuleke people who claim a separate and independent identity which they managed to maintain up until the forced removal. The Makuleke are convinced that the previous chief, Adolf Mhinga, played a pivotal role in their removal and used the Bantustan political context to enhance his land and revenue base at the expense of the dislocation and suffering of tens of thousands of people. The historical facts discussed later in this chapter support their point of view.

Twenty-nine years after the removal, the Makuleke managed to use the post-democracy Restitution Act to win an award that gave them ownership of their original Pafuri land within the park but restricted their right to live there. A term of the settlement endorsed by the Land Claims Court was that the government would 'secure the tenure rights in Ntlhaveni used by the Makuleke community on an individual and communal basis' (para 19.4 of the settlement agreement).[33]

Mhinga's son, Cydrick, who had succeeded his father as chief, opposed the Makuleke restitution claim but was unsuccessful. He said the Makuleke people were merely a clan under his control and that the restitution land should instead be transferred to the Mhinga Tribal Authority.

The Makuleke brought the current legal challenge to the Communal Land Rights Act because of concerns that, together with the Framework Act, it would enable Mhinga to undo their hard-fought restitution victory. Title to the Pafuri land has been transferred to the Makuleke CPA which has entered into a series of eco-tourism ventures with investment partners managed by the separate Makuleke Development Trust and the Makuleke Empowerment Trust. Section 5 of the Communal Land Rights Act enables the Minister of Land Affairs to endorse the title deeds of CPAs and trusts to communities administered by traditional councils acting as land administration committees.

Pivotal to the Makuleke dispute is that the forced removal put the community within the boundaries of the Mhinga Tribal Authority, which has now become the Mhinga Traditional Council. The repeated efforts of the Makuleke to challenge this—including submissions to the Ralushai Commission which recommended that the separate status of the Makuleke be restored[34]—have been to no avail. Officially, the community remains part of the Mhinga traditional community.

Mhinga's answering affidavit to the court application of the Makuleke people underlines the validity of their concerns. He insists (para 57) that 'the Makulekes are part of the Mhinga traditional community' and on that basis denies that 'the

[32] Later renamed the Black Authorities Act. The Act has been replaced by the Traditional Leadership and Governance Framework Act and the provincial laws enacted pursuant to the national Framework Act. As discussed by Claassens in chapter 11 of this book, these laws confirm apartheid tribal boundaries and deem the old tribal authorities to be 'new' traditional councils provided that they meet certain composition requirements.

[33] Also referred to by Dodson J in *Makuleke Community v Pafuri Area of the Kruger National Park and Environs, Soutpansberg District, Limpopo Province* 1998 JOL 4264 (LCC) at para 7.

[34] The relevant section of the Ralushai report is annexed to Chief Phahlela Mugakula's founding affidavit as PM 10. See page 212 of the report on the DVD included with this book.

Mhinga traditional council is being entrenched or imposed' on them. He says the Makuleke traditional leader, Phahlela Mugakula, known by his people as Hosi Makuleke, is 'not allowed to establish a traditional council' because he 'is still a headman' (para 40.1).

Mhinga says (para 33.2):

> 'The Restitution of Land Rights Act is not meant to interfere in the affairs of traditional communities. In any event, the Restitution of Land Rights Act as an interim measure cannot supersede existing legislation such as the Framework Act, the Constitution and the Limpopo Traditional Leadership Act.'

His affidavit shows that he considers these laws to reinforce the powers and jurisdictional boundaries that his father managed to acquire during the heyday of grand apartheid.

The Makuleke are also concerned that the new laws will exacerbate existing disputes and problems that undermine not only their independent status but also their security of tenure at Ntlaveni. The Makuleke tribal office (the status of which is disputed by Mhinga) administers a system of registered individual land rights colloquially known as 'springboks'. The system is an adaptation of the old PTO system that applied on SADT-run 'betterment' land throughout the former homelands. In the Malumulele district, which includes both Ntlaveni and old Makuleke, springboks (otherwise known by their form number GK 56) are now issued by local government and no longer by the magistrate or commissioner. However, they follow the previous path of referral from a tribal office via the provincial Department of Agriculture. Residential sites and fields in Makuleke are recorded and numbered on a map and Springbok certificates are issued to individuals in respect of the numbered sites and fields. A register of rights is maintained both at the tribal office and in the Malumulele local government offices where the certificates are issued.

According to a clerk at the Makuleke tribal office,[35] springboks are useful in helping people to get loans from local banks because 'they show the applicant is an established person with land'. The clerk describes residential sites and fields as 'belonging' to the families who occupy them. He says sales of springboks do take place but relatively infrequently. When they do occur, the clerks help the purchasers to apply to change the name on the springbok and ensure that the register and maps are updated locally at the tribal office as well as in the local government records in Malumulele. The fee charged by Malumulele for a springbok for a new quarter-acre site is R445. Changing the name of the holder is free provided that applicants comply with the proper process.

However, the system has entirely broken down in Block H, one of the three Makuleke villages in Ntlaveni. Despite official confirmation that three areas—blocks H, J and I—were set aside as the compensatory resettlement land for the Makuleke, and despite a 1976 certificate[36] by the then chief minister of Gazankulu appointing Makuleke 'headman' of the three areas, Adolf Mhinga subsequently appointed Joseph Nwamba as the state-salaried headman of Block H.

[35] Hasani Shadrak Mngomezulu interviewed at Ntlaveni, 8–9 September 2004.
[36] See annexure SCM 3 to Mhinga's affidavit on the DVD with this book.

Cydrick Mhinga (para 27) justifies this in his affidavit on the basis that many people who did not come from Makuleke were also put into Block H and that they agitated for a separate headman. Nwamba refuses to acknowledge the jurisdiction of the Makuleke tribal office and its record-keeping systems. He sells land allocations to people for amounts ranging between R100 and R600 without issuing springboks. He has reallocated land held by Makuleke people to his followers who now substantially outnumber the original Makuleke residents. A series of disputes over control of veld resources such as wood and building sand have degenerated into violence. Several people have been charged with public violence for resisting Nwamba's actions.

The 1976 notice appointing the present chief of Makuleke, Phahlela Mugakula, 'headman' of blocks H, J and I goes on to say: 'His enhanced status shall in no way affect the rights, privileges, obligations and responsibilities of the Chief of the Mhinga Tribal Authority in respect of the said area or persons who are resident therein.' Adolf Mhinga was Minister of Justice in Gazankulu when the notice was issued.

Cydrick Mhinga, in his affidavit (para 43), says his father was fully entitled to appoint Nwamba as headman in Block H and that Nwamba and Makuleke 'are equal in status. They are both headmen and are both obliged to report to the Mhinga traditional council.' In response to the allegation that Nwamba is allotting Makuleke land to outsiders and pocketing the allocation fees, he adds (para 44) that '[h]eadman Joseph Nwamba is fully entitled to identify land for allotment in terms of custom and tradition. If indeed Makuleke is entitled to the land in question, he should have taken legal steps to protect his legal rights (if any).'

The current disputes over authority in Ntlaveni, and Makuleke opposition to the Framework Act and the Communal Land Rights Act, can only be understood in the context of the area's history. Most important is Adolf Mhinga's role in the Bantustan politics that saw the removal, not only of the Makuleke, but thousands of other Tsonga-speaking people into the empty resettlement land that he had the foresight to have included as part of the Mhinga Tribal Authority area gazetted in 1954.

History and Bantustan consolidation

The history of the Makuleke and Mhinga clans in the north-eastern corner of South Africa stretches back into the mists of time. One of the only points of agreement between the oral histories of the two clans is that they are descended from a common ancestor. In 1907 the Transvaal Native Location Commission recognised two separate 'locations' for Mhinga and Makuleke, effectively identifying them as two discrete tribes. The Makuleke 'location'[37] was further north than Mhinga's area and separated from it by other clans. Harries (1987: 98) says the isolated position of the Makuleke (it took three days to reach the area on horseback from

[37] The 'location' shown on the accompanying map is a small area (501 ha) relative to the land actually occupied and used by the Makuleke (18 842 ha). The discrepancy was recognised during the restitution process and the area restored to the Makuleke is thus much larger than the 'location'.

what was then Pietersburg) meant that for many years neither the colonial authorities nor Mhinga was effectively able to exercise control over the area. The Makuleke thus managed to maintain a relatively independent existence despite recurrent complaints by whites about poaching and various unsuccessful attempts by Mhinga to assert his authority over them.

However, the situation changed from the 1950s in the context of new dynamics created by laws such as the Bantu Authorities Act and the Bantustan consolidation programme. The National Party had come to power in 1948 and its apartheid laws and policies created a host of opportunities for those traditional leaders prepared to co-operate with the Bantustan agenda.

In 1950, the governor general used the Native Administration Act 38 of 1927[38] to appoint Adolf Sunduza Mhinga as 'chief of the Amashangane tribe resident in Mhinga's and Makuleka's locations in the Sibasa area'.[39] In 1954, the Mhinga Tribal Authority was established and gazetted under the Bantu Authorities Act of 1951.[40] Significantly, while the tribal authority jurisdictional area included Mhinga's Location no 8, it did not include the Makuleke 'location' at Pafuri. Instead, it included an unoccupied adjacent area called Mhinga Location Extension no 9, also known at Ntlaveni.

The 'omission' of the Pafuri land and the inclusion of the unoccupied but well-situated Ntlaveni land is best explained by Adolf Mhinga's evidence to the Tomlinson Commission in 1952. He said that it would be acceptable for the boundaries of the Kruger National Park to be redrawn to include Pafuri (old Makuleke) and to remove the Makuleke to an area closer to him: 'Yes, it would be all right if the government would do that. It would be all right if I were compensated by giving me other land outside [the park]' (Harries, 1987: 105).

Mhinga's proposal that the compensatory land be given to him rather than to those targeted for removal anticipates what happened next. Thousands of other Tsonga people were subsequently moved into the area. Harries (1987: 109) cites figures showing that the population of the area was 3 822 in 1970 after the Makuleke removal (which took place in 1969), but had grown to 18 428 by 1984. Harries (1987: 106) attributes this to Mhinga's success in agitating for the Vembe regional authority (which contained people who spoke Venda, Tsonga or Pedi) to be broken up into separate ethnic groups and for Pretoria to create a separate regional authority for Tsonga speakers. The Bantu Self-Government Act 46 of 1959 declared the Shangane/Tsonga to be a separate 'national unit' and paved the way for the massive waves of removals entailed in creating separate 'homelands' for previously interwoven Tsonga, Venda and Pedi communities. Adolf Mhinga was the first chairperson of the newly created Matshangana Territorial Authority and headed it until he was ousted by Hudson Ntsanwisi in 1967.

In 1973 the commissioner general in Giyani described one of the most important tasks of the newly created Gazankulu government as 'the resettlement of 11 000 persons brought home from the neighbouring Venda and Lebowa territories into

[38] Subsequently the Black Administration Act.
[39] See annexure PM 2 to Mugakula's founding affidavit on the DVD with this book.
[40] Annexure PM 3 to Mugakula's founding affidavit on the DVD with this book.

the districts of Malumulele and Giyani' (Harries, 1987: 107). Malumulele was the central area for the relocation and ethnic consolidation of Tsonga speakers, with Ntlaveni as its central node.

The ever increasing numbers of people at Ntlaveni provided Mhinga with a growing revenue base for tribal levies and taxes. Harries (1987: 121) describes as 'staggering' the number and different types of taxes and levies that rural people were required to pay. These included an annual tax for migrant workers, a dog tax, court fees, annual tribal levies, initiation levies, building levies, levies for the chief's car, *khonza* fees for 'immigrants' seeking membership and a *valelisa* fee for 'trekpasses' for those seeking to leave. There were also fees for cutting poles and collecting wood. Cydrick Mhinga says in his affidavit (para 12.1.2) that 'all headmen, including Makuleke are permitted to collect traditional levies. Such traditional levies have to be transferred to the Mhinga traditional council. This has been so, for many years.'

The removal of the Makuleke

Adolf Mhinga accompanied the white officials who told the Makuleke they were to be moved in July 1969 (Harries, 1987: 109). The removal was fiercely resisted: houses were burned down and many people fled across the border to take refuge with relatives in what was then Rhodesia. People were loaded onto GG trucks (called GG because of their 'government garage' registration plates) with their household possessions and delivered to the resettlement camps waiting for them in Ntlaveni.

The following song (recorded by Harries, 1987: 110) bears testimony to people's feelings about events:

'The GG is carrying us away
It is not me, it is my child who is crying
It is not me, it is my child who is crying . . .
Those who belong to Mhinga are taking us away
It is not me, it is my child who is crying
It is not me, it is my child who is crying
Mhinga is carrying us away
Mhinga is carrying us away'

Life was hard for the new arrivals. The area was barren and dry and did not have the same veld foods and resources as Pafuri. It was also rigidly delineated and strictly controlled as an SADT-administered 'betterment' area. The hunting and fishing which had formed an integral part of people's livelihood at Pafuri was stopped, and people were fined and arrested for the unauthorised cutting of wood.

There were repeated outbreaks of illness and diarrhoea leading to the death of many people, particularly children and old people. Men were forced to go in search of wage labour for money to buy food, leaving women to try to build houses from unfamiliar materials and to clear drought-stricken land for fields. The repeated droughts of the first years had a further devastating impact on the community. Many people considered the droughts to be the inevitable consequence of separation from the graves of their ancestors. Ultimately, women were also forced to leave their families in search of wage labour on surrounding farms. Harries

records songs expressing women's despair at the deepening poverty, and their pain at having to leave their young children behind in the care of other children.

People blamed the whites for their suffering and the destruction of their lives, but they also blamed Mhinga's claims to chieftaincy over them. According to another song (Harries, 1987: 123):

> 'Makuleke, the son of Phela, they say he is not a chief . . .
> They keep belittling us and say he is not a chief
> They take us to the wilderness because they say he is not a chief
> And they take the one who is our uncle (Mhinga) and call him a chief
> We come from the chief at Makuleke the son of Phela
> Whom they say is not a chief
> And yet he is the rightful chief'

Life at Ntlaveni

Many of the functions performed at Ntlaveni were not consistent with Mhinga's insistence that the Makuleke were merely a clan and their chief only a headman under Mhinga's authority. Not only did the Makuleke establish a separate tribal office with salaried staff and 'tribal police', but the springbok PTO system was administered directly from this office. Moreover, Makuleke performed its own separate initiation ceremonies and Mugakula received a government salary, albeit via Mhinga's office. At that time headmen—as opposed to chiefs—did not receive government salaries.

There were ongoing battles over authority in Ntlaveni. According to Makuleke's affidavit in the court proceedings (Mugakula, para 29), Mhinga repeatedly tried to thwart Makuleke development projects. He tried to obstruct the building of the N'wanati High School at various stages and opposed the building of the Makuleke tribal office and clinic. There were repeated clashes over the irrigation scheme in blocks I and J because Mhinga tried to lease plots to outsiders and insisted that the scheme be named the Mhinga Irrigation Scheme.

When Chief Makuleke (Mugakula) refused to hand over levies collected from the Makuleke communities to the Mhinga Tribal Authority, he was charged with fraud in Mhinga's court and found guilty (Mhinga, para 26.2). Ultimately, according to Mhinga (para 47.2.1), when 'Makuleke stopped attending activities of the Mhinga traditional council and failed to perform certain traditional duties, the Mhinga traditional council advised government to suspend his salary'. The council also confiscated the Makuleke stamp and stopped the salaries of the people who administered the springbok PTO system at the Makuleke tribal office.

The disputes escalated after the Makuleke won the restitution claim and had money to initiate developments in the villages and pay salaries from money generated by the land owned by the CPA. In November 1992, Cydrick was struck off the roll of attorneys and, according to people at Makuleke,[41] both his standing and his income have been negatively affected. They say the reason he is so desperate for the new laws is that 'without them, he is finished here'.[42]

[41] Interview with Mugakula at Makuleke, 8 September 2004.
[42] Meeting with extended tribal council at Makuleke, 8 September 2004.

Currently the tribal office is financed by the CPA. According to Livingston Maluleke,[43] who at the time was a local government councillor, the different structures at Makuleke interact with one another as follows:

> 'The role of the royal family is to provide the leadership of the community while the role of the traditional authority is to provide for the administration of the villages. After the land claim a CPA was set up. This CPA has an executive council which is elected every 3 years. Furthermore a trust was established to run the business affairs of the CPA. The Communal Property Association interacts with a consultative forum, which over time was renamed the development forum. The need for the forum was to ensure that information should be properly conceptualised and spread within the villages of Makuleke.
>
> The development forum is composed of different constituencies including women, the civics, the youth and the royal family. The development forum deals with broad-ranging day-to-day issues. One of its functions is to connect the development initiatives of the community with all the other structures in the community and to ensure that developments that affect the Makuleke are integrated with local municipal issues and IDP [Integrated Development Plan] project implementation. The development forum meets every 3 months and it rotates its meetings between the 3 villages. It also meets on an ad hoc basis as issues arise.
>
> There are 30 members of the development forum when they all come together. Many of these members interact regularly with one another around development issues. When they do so, they do not constitute the forum. The forum does not have a separate sub-structure in each village, but the constituent parts of the forum meet as separate interest groups within the villages. The interest groups represented in the development forum include women, civics, the youth and also traditional healers, traditional authority, and the disabled. The farmers have not yet properly constituted themselves as a structure but are likely to join as an interest group. The development forum deals with issues such as employment, spreading information, and choosing key projects for each village. The development forum also arranges key events, including catering.
>
> Traditionally the royal council is the royal family. Royal women form the mainstay of the council. While they do not attend every meeting, their input is reserved for the most serious problems. In each village the headman or *induna* forms his own council which will have some family members and some appointed members. The *induna* selects his council. The chief also selects his council. Except that the word "select" is not accurate because historically selection often amounted to self-selection. People would emerge as leaders by showing responsibility and volunteering to fulfil various functions. Those who emerge are "selected". Thus, it is a two-way process of volunteers emerging and proving their worth, and being recognised or "selected" by the chief. The royal council is composed of members of the royal family but also includes some commoners who have emerged in this way.
>
> The land in Ntlaveni is administered by the tribal authority but the land in the Kruger Park is owned and administered by the Communal Property Association. Because of the problems with Mhinga and the way in which the authority of the tribal council has been undermined in Ntlaveni, we also want the Ntlaveni land to be owned by the CPA, with the chief as the head of the CPA.'

Just as Maluleke's explanation points to painstaking processes of change and adaptation over time, so too does the description of the land administration system

[43] Interview at Makuleke, 8 September 2004.

by the people working in the tribal office. They say that whereas previously only men qualified for residential sites, older single women now also qualify. The first time a single woman was allocated her own site was in 1994.

Asked whether the date signified that the change came about because of democracy, Shadrack Mngomezulu[44] said this was a background factor but that the main reason was that

> 'single women were fighting with their brothers. Serious family disputes were caused by the partners of unmarried women visiting them at home. There are lots of problems to do with lack of respect and privacy when grown women with children have to live at home.'

Another change described by the clerks at the office is that they now recommend the allocation of residential sites to young families. Previously they would not have processed them.

> 'Because of democracy we consider the age of the applicant, and if the applicant is old enough then we will open the door for them. Before that we used to recommend sites for grown-up children only if their parents applied. But there were a lot of internal family disputes because children wanted their own houses. Now if a person comes to us for a site and he is married we accept his application. We do ask if the parents know and agreed to the application. We have opened the door to them but we also advise them to speak to their parents. Change is not difficult because the community agrees.'[45]

The clerks explained that everyone sees the need for change because of the changing kinds of family disputes coming before the tribal court.

But these nuanced processes of change and adaptation are restricted to blocks I and J. The administrative system of registered residential sites has fallen into disrepair in Block H. Nwamba reportedly pockets the allocation fees that he charges to those who come to him seeking land, and applicants are given no documentary proof except for the occasional receipt. While Nwamba reportedly enjoyed a fair amount of support at first, especially from people dumped in the area from Venda, this has waned—partly because of his autocratic approach and partly as a result of increased support for the Makuleke once they had more to offer in terms of development and services after the restitution award.[46]

Problems in Block H

At a meeting in Block H in September 2004,[47] people explained how Nwamba had confiscated land allocated to them by the Makuleke council and had reallocated it to others. According to one woman, a field that she had ploughed for thirteen years was simply taken by Nwamba. She had to pay R100 for another field but was never given a receipt and so worries that this second field is also insecure. She says she was dumped in Ntlaveni by the GGs from Venda in 1972. She is among a group who

[44] Interview at Makuleke, 8–9 September 2004.
[45] Interview with Shadrack and Gezani Mngomezulu at Makuleke, 8–9 September 2004.
[46] Interviews with women at the tribal office, 9 September 2004.
[47] Interviews by Maryanne Angumuthoo of Webber Wentzel Bowens, 9 September 2004. The names of the people interviewed in Block H have been withheld for fear of possible victimisation but are known to the Makuleke attorneys.

challenged Nwamba about his refusal to hold community meetings to discuss people's concerns. As a result, she says that Nwamba has reported her to Home Affairs as an 'illegal alien' and that the police came to arrest her on 4 August 2004 only to find that she was a South African citizen.

At the same meeting a man complained that Nwamba had confiscated a 5 ha field. The man and seven others wrote a letter of complaint to Mhinga about Nwamba's actions. The man believes that it was as a result of this letter that they were arrested by Mhinga's tribal police and some of them tied up at Nwamba's house. They were subsequently freed by the Makuleke tribal police. The man says that because of his opposition to Nwamba's actions, he has ended up with a suspended sentence in terms of the Black Administration Act 38 of 1927.[48]

At the meeting, two women admitted to unlawfully cutting live trees in order to sell firewood for a living. They described an incident in November 2003 in which instead of fining them (as the Makuleke council does in such situations), Nwamba attempted to take the wood for himself. The women confronted him as he was loading piles of their hidden wood onto his trailer. He allegedly said that it belonged to him because he was the *induna*. A physical fight ensued in which he allegedly hit one of the women with the flat side of a panga. The women managed to off-load all the wood. They say the only way for poor women to make a living is by selling firewood, but that Nwamba uses spies to find out where the piles of wood are hidden and then loads it up and sells it himself.

The women are among those who accuse Nwamba of mining and selling plaster sand for personal profit. They insist that the sand belongs to the whole community. They say his private sales of wood, sand and fencing poles have been 'destroying the area' since 1993 and that the only way to stop him would be to get an interdict and restraining order. They doubt that will ever happen because he has 'friends' at the local police station.

A particularly contentious issue is that of grazing land. People believe that many of the outsiders buying residential sites from Nwamba are doing so primarily to access Ntlaveni grazing for their cattle and that many have no intention of establishing homes at Ntlaveni. When Nwamba allocates new residential sites, he does not follow the procedure of liaising with the Department of Agriculture to demarcate a new residential area and rezone the land. Instead, he either uses people's existing fields or simply 'cuts' sites from existing grazing areas. People complain that not only are their fields and grazing rights undermined, but that their access to important common property resources such as fuel wood and thatching grass are thereby jeopardised.

Simmering fury blew up into a fight in 2003. Villagers from Block H reported Nwamba to the Department of Agriculture for undermining the land zoning and registration system. The agricultural officials organised an *in loco* inspection which Mhinga tried to attend. However, angry residents barred him from entering the area and he subsequently laid charges of public violence against them. In November 2003, villagers marched to the municipal offices to protest against Nwamba's high-handed actions. He continued to 'allocate' land 'privately' for a while. A follow-up

[48] Previously the Native Administration Act and now repealed.

visit to the area two years later showed rows of newly built houses. His authority, however, has become increasingly precarious over time as even people to whom he sold plots join in protests against his greedy and high-handed actions.'

Traditional council and community boundaries: what is at stake?

As discussed, Mhinga's answering affidavit describes Nwamba's appointment and actions as consistent with 'custom and tradition'. Mhinga's statement (para 44) that Mugakula 'should have taken legal steps to protect his rights' illustrates the underlying assumption that rights to land vest only in traditional leaders and not in the people to whom the land has been allocated. This is a very different approach from that of Shadrack Mngomezulu at the Makuleke tribal office who said 'I know that a GK56 is different from a title deed, but people here believe their residential sites belong to them.'[49]

In response to Mugakula's affidavit (para 44) stating that people's rights to their residential sites are 'akin to the rights exercised by an owner' and that land sales between residents occasionally take place, Mhinga (para 38.2) says '[s]ale of land is not allowed in terms of the communal land tenure system. If indeed sales are taking place, they are not only illegal but they are contrary to the traditional form of land ownership.'

Mhinga accuses the Makuleke of breaking with tradition in having a CPA own the 'rich soil' restored to them by the restitution award. He says (para 52.2) that '[t]he CPA structure is foreign to customary law and tradition' and repeats that Makuleke is not entitled to have a tribal council.

Mhinga is bound to attack the adaptations and accommodations taking place at Makuleke because they are inconsistent with the top-down version of customary law on which his claims and status rely. His best hope of winning back his father's advantages is contained in the statement in the answering affidavit of the director general of Provincial and Local Government that 'traditional councils have clearly defined areas of jurisdiction. Those who find themselves in those areas must adjust to the rules and traditional practices of that area' (Msengana–Ndlela, para 45.1).

Due to Adolf Mhinga's foresight, the Makuleke do indeed fall within the Mhinga Traditional Council's 'clearly defined area of jurisdiction'. All that protects their land from Mhinga's version of 'rules and traditional practices' is the existence of a CPA created pursuant to a restitution process that Cydrick Mhinga (para 33.2) has said was 'not meant to interfere in the affairs of traditional communities'. He disputes the status of the Restitution Act as an 'interim measure' which cannot supersede the Framework Act, the Constitution and the Limpopo Traditional Leadership Act.

The new traditional leadership laws that he refers to bolster his position significantly by deeming old tribal authorities to be 'new' traditional councils. The Restitution Act defines a community as 'any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes part of any such group'. The Communal Land Rights Act uses

[49] Interview, 9 September 2004.

exactly the same wording, except that it omits the ending. It makes no provision for communities to exist as part of larger groups. This omission was not an oversight: earlier drafts of the Bill had included the full definition.

Furthermore, s 5 of the Act provides a mechanism for undoing the 'problems' created by the restitution process. It enables the minister to endorse the title held by a CPA to 'the community'. Apart from what that would do to the complex contracts and agreements that the Makuleke CPA has entered into with third parties, the critical question for the Makuleke is—as it has been for 100 years—which community? Mhinga continues to vehemently assert that the Makuleke have no independent identity apart from the Mhinga traditional community. And the outcome of their repeated efforts to prove their independent status and challenge the jurisdiction of the Mhinga Tribal Authority creates no basis for optimism.

The community's efforts include making repeated representations to the Gazankulu government, to the 1996 Ralushai Commission of Inquiry and to the premier of Limpopo Province. After hearing submissions from both Makuleke and Mhinga, Ralushai finally recommended that the Makuleke chieftainship be restored. However, the recommendation was never implemented. Commenting on the commission's findings, Mhinga says (para 32.3) that 'a commission of inquiry is a tool to assist the Executive in the task of government. The Executive is not obliged to either accept the factual findings or the recommendations of a commission.'

The Makuleke have now lodged a claim in terms of the Nhlapo Commission on Traditional Leadership Disputes and Claims established in terms of the Framework Act. Whether they will be able to escape the Mhinga Traditional Council's jurisdiction in Ntlaveni depends on how they fare at this commission. Traditional leadership disputes are notoriously intractable, which is unsurprising given the vested interests and identity issues at stake. Before colonialism, the outcome would have been determined by the leader who could muster most support, either politically or in battle. However, the colonial government changed that in favour of the principle of government-as-arbiter. Once external agencies adjudicate traditional leadership disputes, the outcome depends less on who enjoys most support and more on arcane historical investigations into whether historical sources refer to a particular forebear as a headman or a chief. And yet, as a senior state ethnologist, NJ van Warmelo, said in 1936,

> '[t]he distinctions that the authorities made between chiefs and headmen appears, to one who looks at the actual facts, a very superficial one, for while there are appointed chiefs who have no hereditary right, there are actual chiefs of rank who are not recognised in any way whatever. There are, further, so-called "independent headmen" . . . who are regarded as chiefs amongst natives.'

In any event, historically the relative status of leaders at different levels of customary authority varied dramatically over time depending on their effectiveness and fluctuating levels of support. As discussed in chapter 11 in this book, competition over relative status and authority between 'headman' and 'chiefs' remains endemic. It mediates power and contributes to accountability.[50] However, that dynamic is

[50] See also chapter 9 in this book by Peter Delius.

undermined when leaders can rely on fixed jurisdictional boundaries and statutory powers to bolster their standing and undermine their opponents.

Just as competition and accommodation between different levels of traditional authority mediate power and contribute to accountability, so too do the ongoing processes of accommodation, competition and adjustment between the different types of community structures and legal entities operating in Makuleke. The harmonious picture painted by Livingston Maluleke belies the massive investment of time and energy that Makuleke people put into building and attempting to preserve a robust and mutually respectful balance of old and new values and institutions under a unifying Makuleke historical identity.

Negotiating property and authority—the role of law

The new laws put at risk not only the Makuleke's hard-fought efforts to secure their land and rebuild their lives after the removal, but also the enterprise they have embarked on of welding together old and new, democracy and tradition, land rights and traditional leadership. Mhinga's version of 'traditional' rules and fixed realms of chiefly power is threatened not only by the Makuleke's status as an independent community, but also by their CPA having title to the land at Pafuri and by their members having rights 'akin to ownership'. The kind of traditional authority Mhinga claims and that is promised by the new laws cannot afford to recognise such 'complementary rights held simultaneously'. To do so would be to acknowledge the existence of ongoing processes of social transformation and adjustment that challenge Msengana–Ndlela's notion of immutable tradition and 'clearly defined areas of jurisdiction'.

As discussed in chapter 11 in this book, property and authority are constantly renegotiated in all societies. According to Lund (2002: 11),

> 'it is never merely a question of land, but a question of property, and social and political relationships in a very broad sense. Struggles over property are as much about the scope and constitution of authority as about access to resources.'

Property exists only insofar as institutions are able to enforce it. At the same time, the process of recognition and enforcement strengthens the institutions that play this role. In this sense, as Lund points out, these institutions 'are equally at stake'. Sikor & Lund[51] write of the inter-related processes of people attempting to convert their occupation of land into secure land 'rights', and of institutions attempting to consolidate their current power into recognised 'authority'. A key marker that differentiates authority from temporary power is the extent to which an institution is able to guarantee land rights over time. Insofar as other structures successfully challenge the status of property rights, they undermine the authority of the institution that underwrites them.

Property and authority are not created directly by law and government policy but by processes of struggle and contestation at the local level. Law and policy do, however, have a major impact on the balance of power within which that local

[51] Forthcoming publication.

contestation takes place. This is well illustrated by events at Makuleke since 1950. Mhinga took advantage of apartheid laws and policy to significantly bolster his authority and expand his land base at the expense of the land rights of the Makuleke people. The songs composed at the time reflect how keenly people saw the connection between the attack on Makuleke's authority and the destruction of their land base.

People in new Makuleke, in turn, used the immediate post-democracy legal environment to claim their land back and to use their landowner status and the resources it generated to challenge Mhinga's authority within Makuleke. The post-democracy constitutional era was also a supportive environment for internal processes of contestation within the community. It saw women claiming, and being allocated, residential sites for the first time and young families getting separate residential sites whether their parents approved or not. Moreover, some people began to sell sites to one another within the community and the tribal office not only condoned the process, but supported the purchasers by helping them ensure that their names were reflected in local and district registers.[52]

Success was, however, limited in Block H where Mhinga had installed Nwamba as a headman 'equal in status to Makuleke' (Mhinga, para 43.3) and has ensured that Nwamba continues to receive a government salary. Yet current indications suggest that his mode of operation has alienated many people and that his authority is increasingly tenuous.

It is not surprising that Mhinga should welcome the newly enacted Framework Act, the Limpopo Traditional Leadership Act and the Communal Land Rights Act and see them as a vehicle for undoing the 'mistakes' of the restitution era. As discussed in chapter 14 in this book, by sending a message that the government endorses chiefly versions of rule-bound customary law, the new laws also undermine the post-1994 political environment that supported the struggles of different sectors of rural society to challenge apartheid boundaries and authoritarian versions of customary law.

What is astonishing, however, is that notwithstanding the recent and brutal history of forced removals and Bantustan consolidation, the government should have chosen to use apartheid tribal authorities as the default boundaries for 'new' traditional councils. Rural groupings made submissions to Parliament explaining how controversial these boundaries remain, and how they undermine land rights and tenure security. Moreover, it is common knowledge that virtually all of the Cabinet ministers of the various Bantustans were traditional leaders—or set themselves up as such—and Adolf Mhinga was certainly not alone in manipulating tribal authority boundaries with devastating consequences for the tenure security of ordinary rural people.[53]

The genesis of the new laws cannot be understood outside the political deals which saw them rammed through Parliament just before the 2004 elections.[54] The

[52] Interestingly, all the examples cited of inter-community bilateral sales involve women 'purchasers'.

[53] See the discussion of Rakgwadi in chapter 11 in this book.

[54] See chapter 10 by Lungisile Ntzebeza in this book for the broader context.

muted national response to the entrenchment of tribal authority boundaries reflects not only the urban bias of national political discourse, but also the skilful exploitation of the constructs of 'custom and tradition' by the traditional leader lobby, which has been extraordinarily assiduous in pushing for the retention of its apartheid privileges (Oomen, 2005: 79–86).

Once the government had decided to support traditional councils it had no option but to confirm existing boundaries. It would otherwise have had to place at centre stage the Pandora's box of boundary disputes and intractable traditional leadership claims and counter-claims. Instead, it has attempted to shift that burden onto the Nhlapo Commission, where it remains, as yet, an unexploded bomb.

CONCLUSION

Events unfolding in each of the three areas show that the boundaries of traditional authority over land are not fixed and immutable: they wax and wane, contract and expand according to the shifting outcomes of ongoing processes of negotiation, contestation and adjustment.[55] As Chief Makuleke's authority waned in the early 1980s, so Nwamba's increased. As Makuleke's increased in the 1990s, so Mhinga's sphere of authority decreased. And now Nwamba's power is waning again.

It may well be that at some time in the distant past the Mnisi royal family held some sway over Dixie—but other royal families claim that they, too, held the reigns of power at different times. What powers any of them ever had in relation to internal decision-making processes within Dixie village itself is hard to say. Given the decentralised precedents of Tsonga society compared with those of more centralised societies such as the Tswana, those powers are likely to have been limited. In any event it is impossible to ascertain the content of customary law outside the real life context of actual practices and 'living law' in a particular locality.[56] And right now what is going on in Dixie is not about customary law; it is about big men using 'custom' to cloak secret dealings which they hope will make them rich.

As discussed elsewhere in this book,[57] tensions and adjustments between the relative status of chiefs and headmen are intrinsic to indigenous land rights systems, and contribute to accountability. History is full of examples of smaller groupings splitting off to become separate entities, and different levels of 'traditional authority' regrouping in order to challenge autocratic leaders. The existence of complementary and competing centres of power means that leaders have to deliver in order to win supporters.

The dynamics of accountability are fundamentally undermined, however, once fixed jurisdictional boundaries are imposed and traditional leaders get their power directly from central government. That is what the new laws do. They entrench apartheid boundaries in the name of tradition and at the same time free traditional leaders from indigenous accountability constraints. The case studies suggest that the implications are serious and go beyond entrenching apartheid distortions and

[55] See chapter 9 in this book by Delius.
[56] See chapter 4 by Okoth–Ogendo and chapter 6 by Tom Bennett in this book.
[57] See chapter 9 by Delius and chapter 11 by Claassens.

vested interests. The promise of title creates incentives for traditional leaders to challenge past restitution settlements and pursue inflated 'tribal' claims to valuable mining and tourism land.

Contestation around claims and counter-claims to land and authority is inevitable and will occur regardless of new laws and changes in government policy. Law and policy do, however, deeply affect the parameters within which that contestation occurs. Not only do they favour certain actors over others, but they elicit and support certain types of initiative. The dramatic changes won by rural women in the post-1994 context are but one example. There have always been large numbers of single mothers struggling to be allocated residential sites, but it was only after 1994 that incremental struggles snowballed into precedent-setting (although uneven) processes of change in land allocation. The changes were not introduced by the government. They were hard fought and won by women in the supportive context of the democratic transition and the new Constitution, which changed what people dared imagine and how they saw themselves.

At that time, the government was perceived to favour democracy and equality unequivocally, and traditional leaders with Bantustan connections were lying low and trying to reinvent themselves as allies of the African National Congress. However, the Framework Act and the Communal Land Rights Act send a message that government has now changed sides. The message is that if tribal authorities include a few women and some 'elected' members, the government will back them and support their version of custom and tradition.

State-sanctioned versions of ethnic identity and chiefly power are likely to have consequences far beyond high-profile deals over valuable land. They will also impact on whether traditional councils can get away with unilaterally selling land allocations to outsiders. There are serious implications for the land base and composition of rural communities if traditional councils are able (as the respondent chiefs allege) to exercise unfettered powers of land allocation. The relative profitability of allocating land to outsiders would no longer be mediated by neighbourhood processes balancing the entitlements of existing community members against the suitability of outside applicants. The case studies also illustrate the potential impact of chiefly versions of customary law on whether rural people will be 'allowed' to inherit and protect the houses and fields they have built up over generations.

The case studies ring alarm bells about officials backing versions of customary law that restrict rural people's right to hold meetings, their ability to hold traditional leaders to account, and their ability to involve development committees and other structures in day-to-day decision-making processes. Chapter 7 in this book by Claassens & Ngubane discusses women's concerns about the impact of the new laws on patriarchal power relations and traditional leaders' receptivity to pressure for change.

The answer may be offered that insofar as a particular interpretation of customary law is in conflict with the Bill of Rights it is invalid. In practice, however, it is difficult to challenge the constitutionality of customary law on a case-by-case basis in isolated rural areas, especially within the parameters of the power relations that are reinforced by the new laws.

The Departments of Land Affairs and Provincial and Local Government have tried to characterise the litigation challenging the new laws as 'anti-chief' (Sibanda, paras 3.4 and 70.3; Msengana–Ndlela, para 17.4). It is not anti-chief: it opposes the distortions and unequal power relations that the new laws superimpose on the underlying dynamics of customary systems. The problems that exist in the case study areas do not imply that all traditional leaders are corrupt. Neither were all traditional leaders closely engaged in the hierarchies and practices of Bantustan government. There are tried and tested mechanisms to counter and contain abuse of power within indigenous authority systems. In some instances, these managed to limit the reach and withstand the temptations of apartheid laws and Bantustan administration. At village level in particular, many councils have managed to retain their consultative character. It is not at village level, however, that the new laws provide for land transfers and bestow power.

The four communities that brought the legal application were not 'chosen' as examples of chiefly corruption as the state's answering papers allege (Msengana–Ndlela, para 20.1). At the time that farmers at Mayaeyane decided to challenge the Communal Land Rights Act, they did not know that Sandyland would be charged with fraud. They were not then aware of the secret negotiations about the restitution claim to the land adjacent to Mayaeyane. Neither the Dixie villagers nor their lawyers knew of the dramatic events unfolding around the Mnisi land claim. The *Noseweek* article exposing the nature of the deals that Ndlovu and Mnisi had entered into with Van Vuuren came like a bolt from the blue. It was only from the court papers in that matter that the seriousness of the problems facing the Dixie villagers became clear. These are things that simply happened in the ordinary course of events. And in the ordinary course of events, the people whose land is at stake are trying to contain them. However, their capacity to do so has been severely undermined by the enactment of the Communal Land Rights Act and the Traditional Leadership and Governance Framework Act.

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Part six

Conclusion

14

Customary law and zones of chiefly sovereignty: the impact of government policy on whose voices prevail in the making and changing of customary law

By Aninka Claassens

LAW REFORM AND THE REALM OF THE 'CUSTOMARY'

A key controversy in the contemporary literature on tenure reform in Africa is the question of how statute law should articulate with customary law. The World Bank and other influential institutions have moved away from failed land titling approaches and are now advocating that tenure reform must recognise and support existing customary values and institutions (Deininger, 2003).[1] However, various academic commentators warn that the 're-turn to the customary' is likely to backfire on the poor by reinforcing unequal power relations (Peters, 2002; 2004; Chimhowu & Woodhouse, 2006; Daley & Hobley, 2005), disadvantaging women (Whitehead & Tsikata, 2003) and cloaking self-interest and constructed notions of the customary in a veil of 'timeless tradition'.[2]

The case[3] against the Communal Land Rights Act 11 of 2004 and the Traditional Leadership and Governance Framework Act 41 of 2003 has its origins in such concerns about law entrenching distorted versions of 'custom' and reinforcing unequal power relations. The case was brought primarily because of fears that the new laws would further undermine the vulnerable tenure status of women and ordinary people, and would elicit or exacerbate abuse of power by unaccountable apartheid-era tribal authorities transformed into traditional councils.

Yet there is also a widely-held view (shared by many of the authors in this book) that current patterns of use and occupation in communal areas derive from indigenous systems of shared and relative rights, and that law reform ignores the

[1] Whitehead & Tsikata (2003) review and analyse these shifts in tenure policy.

[2] See the introduction to this book by Ben Cousins.

[3] *Tongoane and others v The Minister of Agriculture and Land Affairs and others* (TPD 11678/06, pending).

dynamics of these systems at its peril. Alongside the voluminous literature on manipulation of 'customary law' by colonial and apartheid governments is another documenting that despite past (and current) distortions, the underlying dynamics of indigenous land rights systems remain remarkably resilient and that key indigenous concepts continue to organise land relations in practice (Okoth–Ogendo, 1989; 2002; Cousins, 2007; Fay, 2005; Cross, 1992). The literature about the resilience of underlying land rights systems makes plain that the principles and values that continue to manifest in communal areas are at odds with colonial and apartheid constructs of authoritarian chiefly power.

Many analysts of tenure reform in Africa describe how transfer and registration processes that delineate exclusive rights—whether for individuals or groups—tend to exclude vulnerable categories of people who have overlapping 'secondary'[4] entitlements in the land (Platteau, 2000). The consequences for women are often particularly serious (Mackenzie, 1993). Time and again, titling programmes have increased the vulnerability of those excluded from 'primary' rights of ownership. In any event, the new registers tend to fall into disrepair over time and 'revert' to socially embedded tenure systems—but on more unequal terms. The Kenyan case is the most well known (Berry, 1993; Shipton, 1988; Okoth–Ogendo, 1986).[5]

An emerging view is thus that in order to avoid further undermining the security of the most vulnerable, law reform must acknowledge and engage with the dynamics of systems of layered and overlapping indigenous entitlements to land. Nyamu–Musembi (2002: 144) says that 'the further removed the formal law and policy is from nuanced practice at the local level, the less relevance and legitimacy it will have in people's lives'. In practice, many transactions and arrangements currently take place either 'outside' or against the law, often resulting in legal vulnerability. One example is the misfit between the embedded reality of family ownership and the dominant legal paradigm of individual ownership.[6] The disjuncture between law and practice has a range of consequences not only in relation to tenure security, but also in terms of complicating service delivery and slowing down development (Kingwill, 2005).

However, in attempting to describe the nature of resilient indigenous entitlements to land, it is all too easy to fall into the trap of normative and romanticised generalisations about the 'customary'. 'Tradition' and 'custom' do not denote timeless and neutral states of existence; they embody contested and constructed versions of reality in which competing interests and forms of power are at stake (Merry, 2004; An–N'aim & Hammond, 2002: 13; Chanock, 2002: 41). Moreover, 'customary' systems are not static: they change all the time and vary from place to place (Nyamu–Musembi, 2002: 133). People do not live in worlds that are either 'customary' or 'modern': their lives incorporate a range of different

[4] As Yngstrom (2002: 25–6) explains, field research challenges the idea of women's rights as 'secondary'. This characterisation reflects Western preconceptions about a ladder of hierarchically arranged rights rather than the underlying nature of coexisting entitlements held by women.

[5] For South African examples see chapter 8 in this book by Rosalie Kingwill.

[6] For South African examples see chapter 8 by Kingwill in this book and the supporting affidavits by Thandabantu Nhlapo on the accompanying DVD.

experiences and influences that move between crude dichotomies such as rural/urban, traditional/modern, tribal authorities/trade unions and rights/culture in myriad ways on an ongoing basis (Nyamu–Musembi, 2005: 42; Woodhouse, 2003: 1716). 'Cultures' that were never closed or static in the first place adapt continually as peoples' lives intersect with other systems, such as the dominant capitalist economy. There is ample evidence from the 19th and 20th centuries of individual commodity production and land transactions occurring routinely within so-called 'communal' areas (Berry, 1993; Chimhowu & Woodhouse, 2006; Bundy, 1979).

Across Africa, rural areas that are characterised as 'communal' are under great pressure from land shortages and forces such as unemployment, poverty and increasing integration into the global economy (Bryceson, 2002; Chimhowu & Woodhouse, 2006; Bernstein, 2005). People living in these areas are vulnerable to elites who straddle the point of intersection between 'communal' or 'customary' systems and the market economy (Lavigne Delville, 1999; Peters, 2004). Law reform can have far-reaching consequences for the balance of power at that point of intersection, often strengthening the position of elites who have information about the law, and the experience and means to make it work in their favour. Alternatively, it can prioritise the protection of the most vulnerable. This chapter considers the impact of the Communal Land Rights Act and the Traditional Leadership and Governance Framework Act at that point of intersection, and in particular, their impact on resilient features of indigenous land rights systems and constructs of customary law that bolster unaccountable versions of chiefly power over land.

Static constructs of customary law support the interests of traditional elites who may seek to preserve the powers and advantages they secured under colonialism. As Whitehead & Tsikata (2003) show, the customary law arena is one that tends to favour authoritarian and patriarchal interests. Nevertheless, people living in many rural areas have no option but to engage with customary law because of its impact on power relations at the local level. In many parts of Africa, disputes over land and resources entail contestation about the content of custom and tradition, and, in particular, about the nature and strength of 'customary' entitlements to land relative to the scope of chiefly power to control and deal in communal land (Ubink, 2006; Oomen, 2005).

In South Africa, these ongoing contestations are thrown into relief by the new laws dealing with communal land and traditional leadership. There was an outcry when the amended Communal Land Rights Bill was tabled in October 2003. Submissions by rural organisations said the Bill was likely to harden the fluid political environment of the previous two decades, and enable traditional leaders to revert to the arrogance and abuses of the apartheid era, thereby deepening tenure insecurity for rural South Africans living in communal areas.

The South African Constitution both creates a right to tenure security and recognises customary law. Furthermore, it recognises the institution of traditional leadership 'according to customary law'. Central to the litigation challenging the constitutionality of the new laws are thus questions concerning the content of customary law. These arise both in relation to whether the new laws adequately secure the content of existing 'customary' entitlements to land; and whether the

far-reaching powers given to traditional councils can be justified on the basis that they accord with customary law.

This concluding chapter focuses on debates about the nature of land rights and customary law in South Africa, with a particular focus on Constitutional Court judgments that reject the 'official' rule-based version of customary law in favour of a 'living law' interpretation based on the consideration of actual practice in changing contexts. The first section of the chapter examines the constitutional provisions dealing with customary law and discusses recent judgments about customary law and living law. It considers the difficulties entailed in establishing the content of 'living customary law', and of integrating customary law and 'living law' in particular with the formalist requirements and assumptions of the dominant South African legal culture. It goes on to discuss a recent case about male primogeniture and succession that highlights the difficulties facing the ambitious transformative agenda of the South African constitutional undertaking. It suggests that without the 'living law' interpretation, there is a very real danger of distorted rule-bound versions of customary law being used to close down processes of transformative social change in rural areas that articulate and integrate both 'traditional' and constitutional values.

The next section argues that this danger is exacerbated by laws such as the Communal Land Rights Act and the Traditional Leadership and Governance Framework Act which entrench and privilege apartheid versions of customary law and chiefly power. The argument is illustrated by the affidavits of chiefs and government experts in the State's answering papers to the legal challenge to the constitutionality of the new laws. These statements illustrate the tenure implications of chiefly versions of customary law.

On the basis of an analysis of the State's answering papers, the chapter then suggests that a key purpose of the new laws is to protect areas of chiefly hegemony from the 'threat' of countervailing authority over land. It argues that current contestation between and within different levels and forums of authority in rural areas mediates power and supports the development of a 'living law' reflecting multiple voices. It argues that even if land transfers do not take place, the new laws will have a major impact on the status quo in rural areas by entrenching traditional council jurisdictional boundaries and bolstering the legal powers of such councils to unilaterally determine the content of customary law. This is important because of the limited capacity of the Department of Land Affairs to implement new legislation effectively.

The next section interrogates statements in the court papers about tribal levies. It discusses recent provincial legislation dealing with tribal levies and seemingly contradictory statements in the White Paper on Traditional Leadership (DPLG, 2003). It suggests that the 'contradictions' are in fact consistent with a wider compromise arrangement between the state and traditional leaders, and that the new laws form an integral part of that compromise. The basis appears to be that instead of giving traditional leaders direct legal powers of taxation and local government as they demand, the government will bolster their ability to push the limits of the open-ended customary law arena in relation to governance and taxation powers. This has serious implications for the rights of the millions of South

Africans who live within the traditional council boundaries entrenched by the new laws. It raises questions about a 'patchwork democracy' and the articulation between rights and culture in South Africa.

The chapter ends with a return to questions of how tenure reform laws should best articulate with underlying systems of land rights. It outlines a possible alternative approach to tenure reform in South Africa that seeks to recognise and support the dynamics of underlying indigenous organising principles and internal accountability mechanisms, and to avoid entrenching distorted power relations.

CUSTOMARY LAW AND THE CONSTITUTION

At the heart of the current litigation is the nexus between the nature and strength of indigenous land rights on the one hand, and the scope and extent of chiefly authority over land on the other. As discussed in chapter 11,[7] the Communal Land Rights Act gives far-reaching powers to traditional councils acting as land administration committees. It centralises decision-making authority to the level of traditional councils and undermines the status and content of land rights derived from customary entitlements held by individuals, families and sub-groups occupying land within traditional council boundaries.

A key issue is whether or not the Act adequately secures 'indigenous' entitlements to land that are legally vulnerable because of past discrimination, or exacerbates the distortions that undermined them in the first place. Central to the litigation is s 25(6) of the Constitution which provides that

> '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided in an Act of Parliament, either to tenure which is legally secure or to comparable redress.'

Many of the people who currently use and occupy 'communal' land are 'legally insecure' precisely because past laws and practices (which applied only to black people) failed to recognise the strength and nature of their socially embedded indigenous entitlements to land. These laws and practices downplayed the strength and status of women's entitlements relative to those of men, and the strength of rights exercised by individuals within families and by families relative to top-down power vested in chiefs and tribal authorities.[8] The conceptual tools of past—and current—understandings of hierarchical property relations constrained the ability to 'see' and understand the coexistence of overlapping entitlements to land (Van der Walt, 1991; Dlamini, 1991).[9]

Customary law is recognised and protected by the South African Constitution, which provides in s 211(3) that 'the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. Furthermore, the Constitution's recognition of traditional leadership is 'according to customary law' (s 211(1)) and provides that '[a]

[7] Also by Claassens.

[8] See in this book chapters 5 by Ben Cousins, 6 by Tom Bennett, 7 by Claassens and Sizani Ngubane, 9 by Peter Delius and 11 by Claassens.

[9] See also chapter 4 by HWO Okoth–Ogendo and chapter 6 by Bennett in this book.

traditional authority that observes a system of customary law may function subject to any applicable legislation and customs . . .' (s 211(2)).

As will be described in this chapter, traditional leaders justify claims to unilateral power over land and to governance-type powers by reference to these constitutional provisions—contributing to the controversy about the customary law content of land rights on the one hand, and the scope of chiefly power on the other, and how and by whom the content of customary law is determined.

The Constitutional Court has described the importance and benefits of customary law:

> 'The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as *ubuntu*.[10] These valuable aspects of customary law more than justify its protection by the Constitution' (*Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 in para [45]).

However, Constitutional Court judgments go on to differentiate between 'codified' customary law and the 'living' customary law practised on the ground. In the *Bhe* case dealing with the inheritance rights of women, Langa CJ says (in para [86]) that

> 'official customary law as it exists in the text books and in the Act [Black Administration Act 38 of 1927] is generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes which continually take place.'

In the Richtersveld land restitution judgment (*Alexkor Ltd & another v Richtersveld Community & others* 2003 (12) BCLR 1301 (CC) in para [52]), the court says that

> '[i]t 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.'

In search of 'living law'

The challenge, as the Court itself has indicated, is how to establish the content of a 'living' law that 'recognises and acknowledges the changes continually taking place', especially in the context of widespread regional variety and competing versions within particular localities (Mnisi, 2007). And in determining the content of living law, how does one avoid 'fixing' or codifying a particular version or rule, thereby closing down the competing constructs that animate change over time?

The living law paradigm raises a series of questions about what constitutes law,

[10] See Mogkoro J in *S v Makwanyane and another* 1995 (3) SA 391 (CC), 1995 (2) SACR 1, 1995 (6) BCLR 665 at paras 307–8.

for example, whether and at what point particular 'customs' or patterns of practice qualify as 'law'. Questions of both scale and timing arise: how widespread is the custom or practice, and at what point during processes of change and transition can an emerging practice be considered a 'law'?[11]

Enforceability and sanction are key factors differentiating law from practice. They put issues of authority and power at centre-stage, and raise the question of the sources of authority and power. Legitimacy and its relationship with compliance are one set of issues: they point to questions of 'sufficient' accountability and fit with underlying values to enable 'sufficient' compliance for the law to be functional.

Another set of issues entails the statutory powers given to traditional leaders by national legislation and the state. The chapters in this book by Bennett, Delius, Cousins and Claassens argue that many of these powers derive not from custom, but from colonial and apartheid constructs embodied in previous laws. The impact of this statutory authority on current practice is not neutral. The assertion of unilateral power by some traditional leaders is now part of the lived reality in many rural communities. However, there is enormous variation in practice between different parts of South Africa. Traditional leaders in some areas are respectful of participatory decision-making processes and are willing to adapt their practice in response to changes in the broader society (Alcock & Hornby, 2004). Others cling to the retention of their apartheid powers (Oomen, 2005; Claassens, 2001; Bentley *et al*, 2006). The enormous variation between different situations demonstrates another difficulty with establishing the content of customary law: no particular version of 'living law' can be generalised across the country.

There is also the issue of how 'living law' articulates with the formal court system. Nhlapo (2005) has contrasted the problem-solving 'restorative' approach of customary law with Western notions of retributive justice. He writes that customary law courts 'are embedded in a value system based on reconciliation rather than retribution; one that emphasises processes above rules and in that way promotes social healing above punishment' (Nhlapo, 2005: 17). Oomen (2005: 216) also stresses the processual and participatory nature of local courts in rural Sekhukhuneland and their focus on finding viable solutions rather than applying inflexible rules.

> 'The local culture of dispute resolution is about mixing and matching rules that refer to culture, common sense, state regulations, the Constitution, precedent and a variety of other sources hardly considered contradictory. As one Mamone councillor said: ''Actually we are just using our heads and doing something'' . . . . Rules might be the language in which disputes are argued, but they do not determine their outcome' (Oomen, 2005: 210).

The Constitutional Court judgments reflect a perception of 'living law' as flexible, adaptive and solution-orientated. They imply an appreciation of the utility of customary law outside the court setting as it is applied and changed in practice by ordinary people in different settings, including at the level of family meetings.

[11] Oomen (2005: 80) quotes the TPD 1998 case of *Hlope v Mahlalela* in which the court rejected the evidence of an expert witness because she 'does not or cannot differentiate between cultural practices and Swazi law'. Oomen concludes that courts other than the Constitutional Court tend to interpret customary law as 'not so much that of an open and evolving set of rules, but of a closed system, ascertainable in law' (ibid).

The difficulty is how to reconcile this processual, flexible, 'persistently renegotiated legal culture' with the 'absolutist, binary system of state law with its emphasis on legal certainty' (Oomen, 2005: 218). Just as the Constitutional Court refers to the distorting impact of viewing indigenous law through the 'common-law prism' (*Alexkor* in para [56]), so problems and distortions arise in the application and interpretation of 'processual' customary law in formalist courts. The differences in form (participation and discussion by a range of people as opposed to judges and magistrates presiding over a rigid process) and intent (finding a workable solution as opposed to applying fixed rules) mean that to determine the content of customary law by the standards of 'formal' law is to apply a distorting paradigm.

Western constructs of law are thereby, once again, privileged over African law. Martin Chanock's history of the construction of South Africa's legal culture raises pertinent questions about the nature and supposed neutrality of the formal legal system in South Africa. He shows that neither customary law for black people nor common law for white people evolved 'naturally'. Each was constructed politically and in tandem with the other. Customary law was built on colonial constructions of a mythical African past. Its existence enabled the setting apart of a separate sphere of common law for whites that placed the history of South African law in Europe as opposed to Africa (Chanock, 2001: 25). The separate customary law regime made black people subject to authoritarian rule by white officials and chiefs, bypassing the formalities that protected white people from the disenfranchisement and dispossession enabled by laws applied exclusively to black people (Chanock, 2001: 521). Chanock (2001: 508) argues that 'the judges in their formalist cloaks lent a non-political prestige to the enforcement of the now routinely discriminatory statute law, while continuing to use the language of justice and equity in the private law'.

The Constitutional Court has provided important parameters regarding the integration of customary law into the rest of South African law. The first is that customary law forms an integral part of South African law, deriving its validity from the Constitution, and must be applied in accordance with the 'spirit, purport and objects of the bill of rights' (*Alexkor* in para [51]). Secondly, customary law must be interpreted to be 'living customary law which is an acknowledgement of the rules that are adapted to fit in with changed circumstances' (*Bhe* in para [87]) and not the codified version built on colonial and apartheid precedents.

The living law interpretation potentially addresses the danger of reactionary versions of customary law being used to subject parts of the population to a separate and authoritarian legal regime and insulate them from the rights enjoyed by other South Africans. In focusing on current practice, flexibility and change, the 'living law' approach goes further than interrogating the interpretation of current 'rules'. It potentially widens the making of customary law beyond chiefs and bureaucrats to include the multiple actors who are engaged in confronting, negotiating and changing property relations and power in day-to-day local struggles. It thereby challenges the authority and veracity of previous state-sanctioned rule-based versions. Mamdani (2000: 5) has argued that prior to colonialism, there were multiple sources of custom including clans, women's groups and age groups. He adds that colonialism privileged chiefly versions of custom and silenced all contrary

versions, thereby sanctioning an authoritarian version of custom as law. Once chiefly versions of customary law were reduced to writing by anthropologists and state ethnologists and embodied in precedent-setting judgments, they became even more impervious to competing versions put forward by ordinary people.

The potential benefits of the 'living law' interpretation remain vulnerable to deeply ingrained formalist assumptions about the operation of law. Formalist approaches that fail to perceive customary law as anything other than the rule-based application of law in court settings obscure the multiple voices that, in practice, contest and renegotiate the 'rules' concerning property and authority on an ongoing basis. In seeking the living customary law, it is necessary to interrogate not only the articulation between official customary law and living law, but also the formalist assumptions underlying South African law generally.

CUSTOMARY LAW AND THE TRANSFORMATIVE AGENDA OF THE CONSTITUTION

Past and current land struggles in South Africa—some of which are described in this book[12]—bear testimony to ongoing challenges to authoritarian versions of customary law, and to claims to land rights based not only on the principle of equality but also those derived from indigenous entitlements as well as underlying customary principles and values. However, processes of locally negotiated change that integrate values such as equality, dignity and equal citizenship with 'proper' custom are in danger of being declared invalid by the 'formal' courts through the application of rule-based versions of distorted customary law.[13]

The Shilubana case

One example is the recent Shilubana case challenging a woman's appointment as traditional leader of the Nwamitwa clan in Limpopo. Phillia Shilubana is the daughter of a Tsonga traditional leader. When her father died in 1968, her uncle was appointed to act in his place because she had no brothers. At that time, both Phillia and the Nwamitwa clan accepted the appointment of a male chief as inevitable.

However, by 2001 the political and constitutional environment had changed and a consensus emerged that Phillia was the most appropriate person to succeed her uncle when he died. This decision was extensively discussed in various forums and ultimately recommended by the royal family, the tribal council and a large consultative community meeting convened to debate the issue. In May 2002, to much rejoicing, she was officially installed as *khosi*, her appointment having been ratified by the premier of Limpopo Province.

However, her uncle's son challenged the validity of her appointment on the basis

[12] See chapters 8 by Kingwill, 11 by Claassens, 12 by Claassens and Durkje Gilfillan, and 13 by Claassens with Moray Hathorn.

[13] See Steward (1998: 224) for a discussion of similar problems in Zimbabwe where judgments about customary law in the formal courts undermined flexible processes of change. These flexible processes embodied underlying indigenous principles which differed from the rigid, distorted customary 'rules' applied by the courts.

that it was in conflict with customary law. He took the matter to the Pretoria High Court which ruled in his favour. The case was appealed to the Supreme Court of Appeal in Bloemfontein which upheld the Pretoria judgment. A further appeal was argued in the Constitutional Court, where the judgment is awaited.

The Supreme Court of Appeal held that according to customary law, succession follows particular customary rules and allows no leeway for choice whether by the royal family, tribal council or community. The Court said its ruling had no bearing on issues of equality and living law, but confined itself to upholding customary law as required by the Constitution (*Shilubana and others v Nwamitwa* 2007 (2) SA 432 (SCA); *Nwamitwa Shilubana v Nwamitwa* (2006) SCA 174 (RSA)). What was not put before the court was evidence that the 'rules' of customary law are more often than not belied by actual practice, and disguise the reality of competition between royal contenders adjudicated by the royal family and then justified by reference to flexible versions of custom and primogeniture (Comaroff, 1978: 16; Oomen, 2005: 218–9; Costa, 1997).

The National Movement of Rural Women intervened as an *amicus curiae* in the Constitutional Court. It produced records to show that historically there had been some women Tsonga chiefs before official versions of distorted customary law closed down the flexibility of past practice. It put forward evidence that in practice succession is not, and never has been, determined by the rigid rules of official customary law. In addition, the application of these 'rules' is not only inconsistent with living practice, but pre-empts the very transformative processes envisaged by the Constitution.

The transformative agenda of the Constitution

The South African Constitution is unusual in that it focuses explicitly on the need for change. It sets out to deal with the legacy of the past and to address inequality. It is different from constitutions that 'reflect the outcome of a change which has already taken place' in that its focus is on 'the change which is yet to come' (Budlender, 2005: 715). In making this point, Budlender (ibid) quotes a judgment by Langa CJ (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others* 2001 (1) SA 545 (CC) in para [21]):

> 'The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.'

Budlender (ibid) also quotes former Chief Justice Ismail Mahomed (*S v Makwanyane* at para 262):

> 'In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different . . . .

> The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.'

The South African Constitution requires law to play a transformative role. The Shilubana case illustrates that without the 'living law' interpretation (which can only be applied if it is argued by the litigants, entailing research that is often time-consuming and expensive), there is a danger of rule-based versions of customary law closing down the very processes of transformative social change envisaged by the Constitution. The danger is exacerbated by laws such as the Communal Land Rights Act and the Framework Act which bolster chiefly versions of official customary law.

CUSTOMARY LAW IN THE CONTEXT OF THE LEGAL CHALLENGE

Many of the chapters in this book relate to research conducted for a court case challenging the constitutionality of the new laws. The case was brought by four rural communities against the government. The traditional leaders from the affected areas applied to court to be admitted as respondents as did the National House of Traditional Leaders. Once the traditional leaders had been admitted, their legal representation was organised and financed by the government. Their affidavits graphically illustrate that different interpretations of customary law have important consequences for security of tenure and for the distribution of benefits deriving from communal land.

The court papers and chiefly versions of customary law

Most of the traditional leaders involved in defending the legal challenge deny in their answering affidavits the existence of land rights at layered levels of social organisation,[14] and of authority and decision-making at levels such as the family, user group and clan.[15] Chief Mhinga, for example, disputes the relevance of a Land Claims Court judgment asserting the tenure rights of the Makuleke community at Ntlaveni. His grounds are that the Restitution of Land Rights Act 22 of 1994 is an 'interim measure' that cannot supersede the Framework Act, the Constitution and the Limpopo Traditional Leadership and Institutions Act 6 of 2005 (para 33.2). He insists that the Makuleke are part of the Mhinga traditional community (para 57) and must accede to the authority of its traditional council. He says the executive is not obliged to accept the factual findings of the Ralushai Commission that Makuleke is a separate community (para 32.3).

In Kalkfontein, Acting Chief Mahlangu says the tribal authority that he heads—a controversial, apartheid-created body—is recognised by the recent Mpumalanga Traditional Leadership and Governance Act 3 of 2005 (para 2.5) and exercises the

[14] Kutama, paras 41 and 45.1; Mahlangu, para 23.6; Motsewakhumo, para 34. The respondents' affidavits are available on the DVD with this book.

[15] Kutama, paras 42.2 and 46.2; Khunou, para 18.5; Mahlangu, paras 23.3–23.4; Mhinga, para 49; Motsewakhumo, paras 17.2 and 24.2; Mnisi, para 12.3.

powers conferred on it by the Constitution, the Framework Act and customary law (para 40.3).

He denies that the descendants of the people who bought the Kalkfontein farms are owners (para 10.3). He says they form part of his traditional community (para 23.2) and that the notion of freehold ownership is unknown in customary law (para 20.2). He does not deny allegations of past abuses by traditional leaders, including the sale of land allocations to over a thousand outside families; instead he justifies these actions, saying they were consistent with customary law and tradition (paras 32.2 and 33). Mahlangu says it is 'customary' for community members to pay allegiance to the chief in various forms and that community members must execute traditional duties, such as cultivating the fields of the realm (para 2.2). In particular, he asserts that in terms of Ndzundza customary law, all land occupied by the community is controlled by the senior traditional leader as political head (para 2.3).

The versions of chiefly power espoused by the traditional leaders in the litigation are supported by the expert witnesses used by the Department of Land Affairs and the Department of Provincial and Local Government. The Department of Land Affairs relies on Professor Jan Bekker as its main expert on customary law. Bekker worked for the Department of Native Affairs from 1946 to 1970—the very period when the Bantu Authorities Act 68 of 1951[16] was enacted, and controversial tribal authority jurisdictional boundaries delineated and enforced in the face of rural uprisings in Pondoland (Mbeki, 1964), Sekhukhuneland (Delius, 1996) and Zeerust (Hooper, 1960). In his affidavit, Bekker claims expertise in 'the practical administration of customary law'.

In response to Delius's historical evidence, Bekker says the present government cannot base land tenure reform on Utopian versions of pre-colonial land tenure (para 8.4) because 'even the reserves proper had no significant history of pre-colonial traditional land tenure' (para 8.3). '[I]n pre-colonial times many Africans were nomadic, in a process of migration from the so-called Great Lakes into Southern and Eastern Africa' (para 8.13.2). In Bekker's view the

> 'colonial and apartheid governments created much of the communal (tribal) land. They did not merely impose a distorted version of customary law on pre-existing tribal land. The colonists and apartheid agents would actually love to hear that they did no more than merely 'recognise' tribal lands. In fact they created substantial ''Bantu areas'' them [in order to] to achieve their policies of segregation and to serve as sources of cheap labour' (para 8.4).

Notwithstanding his view that 'Bantu areas' were created by the apartheid government, Bekker says that because traditional leadership is recognised by the Constitution 'it stands to reason that the geographic integrity of the communities concerned should as far as possible be preserved, and that the policy of transferring land to existing communities is 'therefore a step in the right direction' (para 8.7).

He disputes that there are widespread misconceptions about the content and dynamics of indigenous social and legal systems in South Africa (para 9.1). He says that

[16] Subsequently the Black Authorities Act.

> 'South African customary law has over many years developed a content and character of its own. It is the subject of scholarly debate, high court judgments, constitutional recognition and South African Law Reform Commission projects. Its nature and substance depend on these sources—not on the Communal Land Rights Act' (para 9.2).

It is significant that local practice and living law do not feature in Bekker's list of the sources of customary law. Instead, in his view, '[s]ecurity of tenure and legal certainty go hand in hand. The alleged social practices referred to by the deponent[17] are to some extent responsible for the continued insecurity of tenure' (para 10.9).

The Department of Land Affairs' expert on women's rights is Chuma Cossie, who for 15 years was legal adviser to the AmaGwali Tribal Authority of which her father was the traditional leader. She says the allegations of discrimination against women are 'far fetched and not practised' (para 5.6) and that in customary law, family property is referred to as belonging to the head of the family merely because 'this is a brief and convenient way of describing such property' (para 5.7.3).

Excluding countervailing authority and restoring old powers

The new laws bolster traditional leaders' powers to define and enforce versions of customary law that support their interests at the expense of countervailing views about land rights and customary law. Not only does the Communal Land Rights Act give traditional councils far-reaching powers over land,[18] but the new laws exclude the possibility of countervailing authority by state officials, elected structures or other landholding institutions[19] within the jurisdictional boundaries entrenched by s 28(4) of the Framework Act. This is important because of the state's limited capacity to implement land reform laws. It means that even where land transfers do not take place, traditional councils are given a protected space within which to exercise 'customary' powers over land.

[17] Bekker is responding to paras 27–29 of the Nhlapo affidavit in which the latter describes the prevalence of the social practice of family ownership and the negative consequences of transferring family-held homes to individual owners.

[18] Section 21(2) provides that traditional councils 'may' act as land administration committees. The wording of the section appears ambiguous and may seem to provide communities with a choice between traditional councils and elected land administration committees. However, when read in the context of the Act as a whole, it becomes clear that the section provides that where traditional councils exist they are authorised by the Act to act as land administration committees. This interpretation is germane to the litigation and is discussed in chapter 2 by Henk Smith and chapter 11 by Claassens. The Department of Land Affairs now disputes that the 'may' in s 21(2) means 'must' (for example, Sibanda affidavit, para 6.1). However, the Department of Provincial and Local Government interpretation that the 'may' means 'must' has remained consistent. According to this department's Director General, Lindiwe Msengana–Ndlela (paras 23 and 19.2), tribal authorities that meet the composition requirements of the Framework Act are deemed to be traditional councils and become land administration committees. Only where tribal authorities fail to comply with the new composition requirements will land administration committees be elected.

[19] See chapter 2 by Smith. Section 5 of the Act gives the minister the power to endorse the titles of trusts and Communal Property Associations (CPAs).

The schema of the Communal Land Rights Act requires case-by-case implementation through time-consuming rights enquiry investigations which will be delayed by boundary disputes in many areas. Given the number of people falling within the ambit of the two laws,[20] the prevalence of current disputes and the capacity constraints already facing the Department of Land Affairs, many millions of people would have to wait decades for rights enquiry processes to reach them, implying that the status quo will continue indefinitely in many areas.

The impact of the new laws on the status quo is that people's land rights will be administered by 'ordinary' traditional councils applying their version of customary law. The answering papers of both the respondent traditional leaders and the Department of Provincial and Local Government assert that customary law already provides traditional leaders with intrinsic powers of land administration within their areas of jurisdiction. Moreover, by entrenching traditional council boundaries and removing the prospect or legal capacity of countervailing forms and levels of authority within these areas, the new laws undermine alternative versions of customary law and the forums within which these are developed and articulated.

Countervailing forums of authority take a variety of forms in rural society including civic societies, development forums, ward committees, trusts, CPA committees and 'customary' forums such as clan and village council meetings. They provide people with the opportunity to choose between different options and levels in deciding which is most likely to advance their claims to land. In practice, people often approach more than one forum with their problems and play different structures off against one another (Lund, 2002; Von Benda Beckmann, 1981). This contributes to accountability because each structure or forum has to deliver in order to be able to draw supporters. As Lund (2002: 11) has cogently argued, '[s]truggles over property are as much about the scope and constitution of authority as about access to resources.' He describes the process of sanctioning property rights as a key means of entrenching power and authority, and says the legitimate authority of institutions 'may whither if other institutions are successful in positioning themselves as legitimate authorities' (2002: 12).

The new laws change the fluid and dynamic interaction between different forums and structures that has flourished in the post-apartheid era. The laws do this by vesting the legal authority for land administration and allocation exclusively in traditional councils and by enabling the minister to undermine the title and powers of other landholding institutions such as trusts and CPAs.[21]

The origins of this approach are foreshadowed in the Department of Constitutional Development's[22] 1999 'Status quo report on traditional leadership and institutions'. The report (DCD, 1999: 19) refers to the 'problem' of the increasing loss of power by traditional leaders

[20] In his affidavit, Sibanda (para 26) estimates that the new laws will affect 21,5 million people.

[21] Section 5(2) provides that when the minister makes a determination, titles held by CPAs and trusts should be endorsed to reflect the community as the registered owner of the land.

[22] The Department of Constitutional Development was subsequently renamed the Department of Provincial and Local Government.

> 'following the introduction of new local government structures. In some cases, community organisations and local government structures have taken over land administration functions while new land ownership forms, such as those arising from the Communal Property Associations Act of 1996, have diminished the role of traditional leaders in land administration.'

The report recommends (DCD, 1999: 20) that these problems could be resolved

> 'by developing legislation that clearly distinguishes which structures in the rural areas have responsibility for land administration, developing legislation to exclude land belonging to traditional leaders from the application of the Communal Property Associations Act and developing legislation to enable traditional authorities to obtain the title deeds of tribal land.'[23]

The report makes it plain that the authors consider communal land to belong to traditional leaders. It anticipates the last minute changes to the Communal Land Rights Bill which enabled 'traditional communities' to acquire title to land. Although these changes do not provide for transfer directly to traditional authorities, they achieve the same purpose because traditional councils, as land administration committees, are given the power to represent the communities to whom the land will be transferred (s 24(1)). Moreover, s 5 of the Act enables the minister to undo post-1994 transfers of restitution and redistribution land to CPAs and trusts by endorsing the title deeds to 'the communities' now represented by traditional councils.

Oomen (2005: 85) describes the post-apartheid lobbying by traditional leaders that went into ensuring that 'tribal subjects' could not 'opt out' of areas of chiefly jurisdiction. She concludes that traditional leaders

> 'did not want the acceptance of their authority to be democratised, to become a matter of free choice, but instead preferred to rely on the continued imposition of apartheid legislation imposing their position so that they, and not their subjects, could determine the pace of change in their areas' (Oomen, 2005: 86).

This point is illustrated by a research report published by the Human Sciences Research Council (Bentley *et al*, 2006: 59) which quotes an Eastern Cape traditional leader, Inkosi Mtikrakra from the village of Sithebe:

> 'In the new democratic government people no longer do that [obey the tribal authority] because there are no laws to compel people to heed what the tribal authority says. An example is the Transkei Authorities Act 4 of 1965, which was against illegal gatherings, but now people do as they wish or please. People hold meetings in schools, churches, even in open spaces. Even tribal authorities courts are no longer respected by the defendants being charged.'

According to the secretary of the Sithebe Tribal Authority, the status of traditional leaders has declined because 'during the apartheid regime traditional authorities were rejected and the dignity of tribal authorities has dropped in this new

[23] It is instructive that the status quo report (DCD, 1999: 19) nevertheless describes opposition to the 'continued allocation of the land administration function to traditional authorities' as the 'most significant common issue'.

democratic dispensation' (Bentley *et al*, 2006: 60). The secretary and others say the only 'solution' is for traditional structures to get back the legal powers they 'lost' with the end of apartheid.

Customary law and governance

The consequences of privileging traditional leaders' interpretation of customary law extend beyond the issue of land rights and tenure security. They have ramifications in terms of traditional leaders' recurrent claims to open-ended government-like powers. For example, the Chairperson of the National House of Traditional Leaders, Khosi Kutama, explains in his answering affidavit (para 17.3) that in the past, 'even though the functions of government were not differentiated into judicial, administrative and legislative category [*sic*], it was accepted that the institution of traditional rule provided a form of government'. He says African people 'knew no other form of government except through the institution of traditional leadership' (para 11.2). He cites the Constitution's recognition of the 'institution, status and role of traditional leadership according to customary law' (para 23.2) and refers to the director general's affidavit as outlining 'the role of traditional leaders at local level to ensure delivery of services to all people. This they do by linking up with all the departments of government to ensure that services are brought closer to the people' (para 26.1).

Director General Msengana–Ndlela says in her affidavit (para 17.4) that no fewer than 15 million people[24] 'are under the direct rule of the institution of traditional leadership'. She annexes the 2003 White Paper on Traditional Leadership and Governance, which recommends that '[t]ribal councils as they existed before colonialism, and which were based on custom, should be established and renamed "traditional councils".' These councils 'will exercise the powers and perform the functions conferred upon them in terms of customary law, customs and statutory law' and will 'continue to generally administer the affairs of the community in accordance with custom and tradition' (DPLG, 2003: 46).

The White Paper goes on to say that traditional councils 'should play a role similar to that previously played by tribal authorities prior to 1994' (DPLG, 2003: 47). Yet prior to 1994, tribal authorities played an equivalent role to local government in the former homelands and their legitimacy was highly contested. The White Paper adds that traditional councils 'will, however, not discharge the functions currently assigned to municipalities' (ibid).

The contradictory statements in the White Paper illustrate both the department's dilemma and its potential solution. The dilemma is how to accommodate traditional leaders' demand that their pre-1994 governance role be restored, and yet retain the system of elected local government required by the Constitution. The 'solution' is to stop short of giving traditional leaders direct statutory powers of local government but to significantly bolster their status and authority, thereby enabling them to push the limits of the open-ended customary law arena.

[24] The Department of Land Affairs says the Act will apply to over 21 million people (Sibanda, para 26).

Tribal levies

Recent developments concerning the legal status of tribal levies illustrate the government's approach. The imposition of tribal levies and taxes was a flashpoint for anti-Bantustan and anti-chief mobilisation during the 1980s (Delius, 1996: 162–3; Maloka, 1996: 177). There was controversy about recurrent demands that poor rural people 'pop out' innumerable levies—whether to buy cars for their chiefs, pay their *lobola* (brideprice) or build royal palaces. There were also complaints that the funds collected were not properly accounted for.

Seemingly recognising that experience, the 2003 White Paper on Traditional Leadership (DPLG, 2003: 43) provides that

> '[t]he authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and the double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities.'

However, in his affidavit, Kutama says that, historically, traditional leaders could levy traditional taxes (paras 17.3 and 40.2) and that the Framework Act recognises 'this established practice of collecting traditional levies ... . Most provincial [traditional leadership] laws have retained this long established practice' (para 40.3).

On first reading, his statement seems to contradict the White Paper, as do the laws to which he refers. However, on a closer reading the provincial laws differentiate between statutory taxes and 'monies which in accordance with the customary laws of the traditional community concerned are payable to the traditional council' (s 24*(a)* of the Limpopo Act). Section 25 of the Limpopo Act provides that a 'traditional council may, with the approval of the Premier, levy traditional council rates' and that 'any tax payer who fails to pay the levy may be dealt with in accordance with the customary laws of the traditional community concerned'.

LAW, THE BALANCE OF POWER AND THE POWER OF DEFINITION

The pivotal questions are these: what is the content of unwritten customary law? How, and by whom, are disputes about its content resolved? It is difficult for ordinary people to challenge chiefly versions of customary law in tribal courts overseen by traditional leaders, or in formal courts which are precedent-driven and rely on past judgments that upheld colonial and apartheid versions of customary law. In addition, as Bennett (2004: 49) has remarked,

> 'in spite of the failings of the official version of customary law, mere availability of information has had the effect of creating a de facto presumption in its favour. Litigants are entitled to object, but in practice this right seldom amounts to much, because in the heat of litigation, time and money militate against undertaking a possibly inconclusive search for the living law.'

The danger of ossified rule-based versions of customary law closing down the transformative processes envisaged by the Constitution is exacerbated when statute

laws such as the Limpopo Act explicitly authorise traditional councils to impose 'customary' levies and duties, and to punish offenders in tribal courts.

Moreover, s 21 of the Framework Act provides that disputes concerning 'customary law or customs' must, in the first instance, be resolved 'internally and in accordance with customs' by community members and traditional leaders. If a dispute cannot be resolved internally, it must be referred to the relevant House of Traditional Leaders. If that institution is unable to resolve the dispute, then it must be referred to the premier of the province. He or she must resolve the dispute after consultation with the parties and the provincial House of Traditional Leaders.

The nub of the issues is as explained by Msengana–Ndlela in her answering affidavit (para 45.1):

> 'The traditional councils have clearly defined areas of jurisdiction. Those who find themselves in those areas must adjust to the rules and traditional practices of that area.'

A 'patchwork democracy'

Oomen (2005: 86) refers to a 'patchwork democracy' which enables chiefs to decide the extent to which the new Constitution is implemented within their jurisdictions, and means that an individual's rights continue to be determined primarily by place of residence. The implications of Msengana—Ndlela's statement is that people living in the former homelands must, yet again, simply accept and 'adjust' to a separate legal regime from other South Africans.

This cannot be explained or justified on the basis that customary systems operate only in the former homelands, and that 'formal' or state law reigns supreme in the remainder of South Africa. In practice, customary values, decision-making forums and dispute resolution mechanisms pervade the lives of most South Africans, including people living in urban areas—whether in informal settlements or on 'privately owned' land. Customary values and institutions such as the extended family remain vibrant, and instead of falling into abeyance, constantly adapt to changing circumstances.

Yet the new laws apply only in the former homelands, and on land reform land, which by definition belongs only to black people. By imposing traditional councils in former homeland areas, and setting apart protected realms for them, the laws change the balance of power within which rural people interact with authority and make and challenge land and property relations. The laws strengthen traditional leaders' ability to impose distorted versions of unilateral chiefly power. This will have major consequences for current disputes concerning unilateral actions by traditional leaders including land sales[25] and abuse of power in relation to mining

[25] Public concern about the sale of land 'allocations' by traditional leaders is evidenced by a resolution adopted in 2007 at the 52nd National Conference of the African National Congress (ANC). Resolution 10 under 'Rural development, land reform and agrarian change' resolves to '[e]nsure that the allocation of customary land be democratised in a manner which empowers rural women and supports the building of democratic community structures at village level, capable of driving and coordinating local development processes. The ANC will further engage with traditional leaders, including Contralesa, to ensure that disposal of land without proper consultation with communities and local governments is discontinued.'

deals, development projects, restitution claims and tourism ventures (Hofstatter, 2003; 2006), Govender & Mthethwa (2006), Makhanya (2007), Ndaba (2006).[26]

Real change in property relations does not generally come about through the enactment of national laws. It takes place through processes of interaction, negotiation and contestation at the local level—although laws can and do affect the balance of powers within which that process of local change occurs (Lund, 2002: 32). According to Oomen (2005: 251), change 'has to be forged locally, laboriously negotiated within local power relations'. She says that for the state to return the power of defining local 'customary' law to ordinary rural people, it would have to provide additional resources to support the marginal voices involved in the negotiation of local rule.

The South African state, however, has done the opposite. It has used laws enacted at the national and provincial level to entrench apartheid tribal authority jurisdictional boundaries, to exclude countervailing structures and voices, and to bolster traditional leaders' power to define and enforce versions of customary law that serve their own narrow interests. While the White Paper on Traditional Leadership and Governance provides that new traditional councils should be 'based on custom and operate as they did before colonialism' (DLA, 2003: 46), it also says they should play the same role as tribal authorities prior to 1994 (DLA, 2003: 47). These are mutually exclusive objectives.

Rights versus culture?

Notwithstanding that various Constitutional Court judgments refer to the transformative agenda of the South African Constitution, the reality remains that law is often used by those in power to consolidate and formalise the advantages they enjoy. During the constitutional negotiations, there was strong lobbying by traditional leaders for customary law to be exempt from the right to equality. The Congress of Traditional Leaders in South Africa (Contralesa) submitted a memorandum stating that the Constitution would not be successful if it relied on 'foreign concepts and institutions'.[27] This was fiercely resisted by organisations representing rural women. Ultimately customary law was recognised, but subject to the Bill of Rights (Albertyn, 1994).

Ntsebeza,[28] Oomen (2005) and Mokvist Uggla (2006) have described traditional leaders' skilful exploitation of prevailing political contradictions to

[26] In a national opinion poll conducted by Markinor for the Institute of Justice and Reconciliation (Lombard, 2004: 2), 23 per cent of black South Africans asserted that they were having a land dispute with a traditional leader. Given that fewer than 40 per cent of the African population (sampled as a whole) live on communal land in former homeland areas, this indicates that the majority of people living in former homeland areas have land disputes with traditional leaders.

[27] From a Contralesa resolution forwarded to the Constitutional Assembly (Constitutional Assembly *Traditional Authorities Special Edition* (1 March 1995: 36) quoted in Maloka & Gordon (1996: 47)).

[28] Chapter 10 by Lungisile Ntsebeza in this book.

justify the continuation of their apartheid powers[29] by reference to African identity and 'culture and tradition'. For example, a Contralesa submission[30] about the Framework Bill appealed to the government 'to put aside borrowed Eurocentric thinking and approach the issue as Africans' (Mokvist Uggla, 2006: 178).

A false dichotomy between 'rights' and 'culture' is functional to those who are determined to attack one or the other. In practice, rural people often find ways to integrate the two. They have no option but to operate within the parameters of existing social relations, value systems and institutions. Often their actions are informed by claims that combine 'tradition', 'birthright', reciprocal obligations and need with values such as equality and democracy that informed the anti-apartheid struggle. Mostly the protagonists posit no contradiction between the two. The increasing incidence of land allocation to single women described in chapter 7 in this book is a case in point, as are changes in inheritance practices that see daughters who care for aging parents inheriting the responsibility for the family home in precedence to brothers who have shirked this responsibility. The widespread phenomenon of elected development committees operating alongside tribal councils is another example, as is the practice of developing tribal 'constitutions' through participatory processes (Oomen, 2005: 229–32). The challenges to autocratic chiefly power over land described in chapter 11 are justified by reference to past precedent and underlying indigenous values as well as the need for compliance with new constitutional standards.

These processes of change and integration have taken place in a particular political context. They occurred during a decade when traditional leaders were attempting to re-establish their legitimacy after their role in apartheid; a decade during which the government was perceived to back equality and democracy unequivocally. One of the concerns about the Communal Land Rights Act is that it heralds a change of heart by government, indicating that it has shifted sides in favour of chiefly claims to power over land.

Future research and assessment about the impact of the new laws should not be limited to the areas where rights enquiry investigations and transfers take place. It is necessary to interrogate how the laws affect power relations in 'ordinary' former homeland areas and the impact they have on the processes of social change that were kick-started during the anti-Bantustan mobilisation of the 1980s and accelerated in the post-1994 political environment. Traditional leaders in Limpopo have already gone back to demanding the multiple levies of the Bantustan years. In Rakgwadi, for example, people who do not pay a R50 car levy, a R20 'celebration' levy and an annual tribal levy are refused the 'proof of residence' letters necessary with applications for identity documents, social grants and to open a bank account.

[29] Oomen (2005: 81–5) reviews attempts of the South African Law Commission to 'harmonise' indigenous law and common law in line with the Constitution. She says the commission's attempts to amend existing discriminatory 'customary law' statutes were thwarted by strong opposition from the traditional leadership lobby and that ultimately traditional leaders succeeded in 'delaying the repeal of the bulk of "old-order" customary law legislation and pleaded—often successfully—in favour of retaining a dual system of laws'.

[30] Submission dated 12 September 2003 and delivered on 16 September.

The traditional council, which now calls itself the 'Matlala Local Government', also prohibits land allocation to people who are not 'up to date' with their levies. When people objected, Kgosi MM Matlala, a former Lebowa finance minister, invited officials from the Department of Traditional Affairs to a public meeting. The officials said the levies were now 'legal' and waved a copy of the Limpopo Act at outraged residents.[31]

Even if the Communal Land Rights Act is never implemented, its enactment averted the imminent prospect of elected land administration committees and signals that the government considers traditional councils to be responsible for communal land. In addition to entrenching apartheid boundaries and institutions, the new laws bolster traditional leaders' ability to construct and enforce top-down versions of customary law. As the Shilubana case illustrates, different interpretations of customary law determine whether other sectors of rural society will be allowed to participate in the development of customary law, and whether processes of transformative social change that integrate 'tradition' and 'equality' will survive legal challenges by those whose vested interests are at stake.

AN ALTERNATIVE APPROACH

How then is law reform to acknowledge and build on the resilient underlying values and indigenous entitlements referred to in the introduction to this chapter, yet avoid the danger of reinforcing distorted constructs of unaccountable chiefly power? This section discusses possible points of departure for such an approach.

The first is that tenure reform laws should prioritise the protection of existing use and occupation by individual members of group systems. This is particularly important for vulnerable categories of people such as rural women. Securing the entitlements of individuals within family and group systems potentially reverses the flow of power by strengthening the stakeholder status of individuals within joint decision-making processes. The recognition and legal enhancement of individual user rights is consistent with pre-colonial indigenous systems that accorded women strong and specific rights in respect of fields and 'house property' within the polygamous extended family.

A key difficulty, however, is that of how to legally secure individual rights without fundamentally undermining the widening circles of relative and overlapping rights within which individual rights are socially embedded. For example, a woman's entitlement to a particular field may be strong and specific but derive from her membership of a particular family, and it may exist relative to the claims not only of other family members but also of other families within the locality or village who would be directly affected should she want to develop her field for another purpose.

To address this complexity, the 1999 draft Land Rights Bill proposed blanket legal protection for basic use and occupation rights (Claassens, 2000; Cousins, 2002). It provided that individuals could not be deprived of current use and occupation except with their consent or by expropriation. However, the ability to transact land rights or change the use of the land was made subject to discussion

[31] Interview with Patrick Mashego, 19 July 2007.

and agreement by others whose rights were thereby affected. As a result, different types of decisions would involve different and widening groups of rights-holders depending on the number of people affected by the decision at issue. Decisions affecting specific areas would be taken in the first instance by those whose land rights were directly affected (Claassens, 2000: 255). Such decisions would be referred to 'higher' structures only insofar as they affected the land rights of wider circles of people. This model implies retaining flexible and concurrent decision-making boundaries for different types of issues and decisions, but making those directly affected the primary decision-makers. Those who are only tangentially affected carry proportionately less weight in the decision-making process.

The draft Land Rights Bill provided for transfers of title from government to rural 'communities', but only on demand and where there was sufficient agreement by affected rights-holders—including in relation to the vexed issue of land and community boundaries. Land transfers are an important and necessary tenure option for particular circumstances, but are dangerous as the starting point for all tenure reform. They are bound to ignite boundary disputes in certain circumstances and elicit conflicts over ethnicity and identity in areas which—like much of Limpopo—have a history of ethnic 'homeland' removal and consolidation.[32] Moreover, transfer processes take time, consume resources and require intricate investigations into boundaries.

For all these reasons, the 1999 draft Bill provided for an additional option to enhance the content of basic protected rights where land transfers were not a viable option. This enabled groups of rights-holders to agree on and register higher content land rights within specific areas—to enable, for example, users to sell rights to residential sites, or to change land uses for development purposes. This option entailed the registration of area-specific group rules in respect of the administration of the enhanced-content rights.

Such a system, like that of protected basic user rights, enables specific types of controls to operate at different levels within multi-layered land rights systems. Both the basic content protected rights and the enhanced content rights created by registration would constitute a statutory 'deduction' from the ownership powers of the holder of the title deed—which in most instances would be the state. Once established, the newly created rights would become property rights protected by the Constitution and could not be removed except by expropriation.

This type of approach would require the hands-on involvement of district-based officials in order to support the enforcement of the basic content use rights secured by law and the higher content rights established by the registration of group rules. The role of the officials would not be to make decisions in respect of communal land, but to review the validity of decisions (for example, sales and investment deals) which excluded affected rights-holders and thereby breached the law. Litigation to enforce statutory land rights is likely to fall beyond the means of most rural people. In that context, reporting procedural breaches and problems to officials is likely to be a more viable and accessible option. However, it should not pre-empt the possibility of litigation to enforce statutory land rights.

[32] See Claassens (2003: 27).

This model is consistent with current multi-layered land rights systems. It is likely that rights-holders would continue to use headmen and traditional leaders who are legitimate and locally respected in order to convene and organise decision-making processes at different levels. However, where there are problems with existing traditional structures, it would enable rural people to use other local forums and institutions alongside or instead of them. It would also mean that decisions about communal land that are taken without adequate stakeholder involvement would be invalid and could be set aside. Key to the model is the vesting of rights in individuals, subject to oversight by others with overlapping entitlements, and the retention of current layered decision-making processes which enhance participation, promote accountability and mediate centralised power.

CONCLUSION

Parliamentary submissions about the Communal Land Rights Bill focused on the pitfalls of transferring title to units coinciding with tribal authority boundaries, and on the consequences of giving land administration powers to traditional councils. However, the State's answering papers, and in particular the affidavits of the respondent chiefs, indicate that traditional leaders consider themselves to already and intrinsically have far-reaching customary powers over land. The State's answers suggest that the impact of the new legislation will not depend on the pace at which the Department of Land Affairs can effect land transfers, but that its primary impact will be the setting apart of a protected realm of sovereign authority for traditional councils. Within this realm, the threat or prospect of countervailing authority over land is removed and chiefly versions of 'customary law' can reign supreme. No doubt traditional leaders and others will lobby for transfers of title where the land is particularly valuable, but actual transfers are likely to be limited to select high profile cases.

In addition to excluding countervailing authority by officials or alternative structures, the new laws ignore and thereby undermine indigenous, layered, decision-making forums and levels of authority. This is because they vest the legal power to exercise the functions currently undertaken by sub-groups and 'lower level' forums exclusively in traditional councils at the apex of what, in many instances, were apartheid-created 'tribes' (Vail, 1989). Yet layered decision-making forums are, and always have been, an intrinsic feature of indigenous systems of land rights and authority (Schapera, 1956; Bennett, 2004), and most land administration decisions are in practice taken at 'lower' levels. For example, decisions affecting residential land and fields are taken within the family, and decisions about allocation are made primarily at the level of the local neighbourhood[33] (Fay, 2005; Alcock & Hornby, 2004).

The consequences of ignoring existing decentralised decision-making processes are reinforced by the law providing traditional councils with fixed boundaries of jurisdictional authority. The result is that the legal authority of lower levels to make decisions about land depends on whether traditional councils 'delegate' power to

[33] See also chapters 5 by Cousins, 11 by Claassens, 12 by Claassens & Gilfillan and 13 by Claassens with Hathorn.

them. This redirects the flow of authority 'downwards' from the state via traditional councils as opposed to 'upwards' from rural citizens exercising customary entitlements through a range of interlocking and self-mediating decision-making forums.

Government's capacity to implement land reform laws and policies since 1994 has proved to be woefully inadequate. Furthermore, the system of elected rural local government has proved to be ineffectual and fraught with problems. In this context, the new laws appear to signal the government's intention to side-step responsibility for attempting to sort out the forced overcrowding and conflicting land rights in the former homelands. Instead, it appears to be entering into a cost-effective alliance with traditional leaders that looks very similar to the mutually convenient arrangements of indirect rule that characterised colonialism and apartheid. There are, however, indications of ambivalence within the government and the ANC about the approach adopted by the new laws. One is the 2007 ANC resolution that 'the allocation of customary land be democratised in a manner which empowers rural women and supports the building of democratic community structures at village level, capable of driving and coordinating local development processes'.[34] Another is that four years after having been rammed through Parliament with unseemly haste, the Communal Land Rights Act has still not been brought into operation by the president. However, the mutually beneficial arrangement between the state and traditional leaders which the new laws embody does not depend on the Act being actively implemented; it will apply by default even if it is not.

As long as the laws remain on the statute book, rural people who find themselves within traditional council jurisdictional areas have little option but to do as the director general of the Department of Provincial and Local Government advises in her affidavit and 'adjust to the rules and traditional practices of that area' (Msengana–Ndlela, para 45.1). It is ironic that the strongest support for the ANC government is concentrated in the former homeland provinces where the Acts apply, and that this support was built on struggles for equal citizenship in a unitary South Africa.

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