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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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