

## **More than simply ‘socially embedded’: recognizing the distinctiveness of African land rights**

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### **Abstract**

The policy challenge of recognizing the distinctive nature of African land rights requires that we go beyond simply acknowledging their social and political embeddedness. Law and policy needs to respond to the key features of these property regimes, or risk distorting them in attempts to codify and register rights or decentralise land management. This paper discusses controversies generated by recent South African legislation, shows how these echo debates in the wider African context, and explores potential solutions to reform of ‘customary’ land tenure regimes. Land rights regimes in the communal areas of South Africa, as elsewhere, are dynamic and evolving regimes but a number of important continuities are observable. These reflect ‘persistent elements and relationships’ and ‘plausible conventions and institutions’ (Guyer 2004: 6) that in many contexts ‘work’ to organise land relations and provide a degree of predictability in everyday life. The most appropriate approach to tenure reform is to make socially legitimate occupation and use rights, as they are currently held and practised (and whether or not they are described as ‘customary’), the point of departure for both their recognition in law and for the design of institutional contexts for mediating competing claims and administering land. Legal frameworks should vest land rights in the people who occupy and use land, not in groups or institutions, while recognising that these rights are shared and relative within a variety of nested social units. This is necessary to avoid the danger of abuse of power by ‘customary authorities’ or other structures, and to render administrative structures accountable to rights holders.

**Keywords:** land rights, social embeddedness, customary, authority, South Africa, tenure policy

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# **More than simply ‘socially embedded’: recognizing the distinctiveness of African land rights**

Ben Cousins and Aninka Claassens

## **Introduction**

Debates on the dynamics of African land tenure and on policies to secure land rights have influenced policy processes in post-apartheid South Africa. This paper focuses on controversies generated by recent South African legislation, shows how these echo debates in the wider African context, and explores potential solutions to some of the intractable problems facing reform of so-called ‘customary’ land tenure regimes.

Tenure reform is the last of the three ‘legs’ of land reform in South Africa to have its legislative basis defined. The other two are redistribution of land and restitution for forced removals. The Communal Land Rights Act was enacted in 2004, but implementation has yet to begin. This is partly because of the complexity of tenure reform and the demands that implementation will make on an over-stretched bureaucracy already failing to meet its targets for land redistribution and restitution, but also because the core issues are so controversial and politically sensitive. This is particularly the case in relation to the powers and functions of traditional leaders and the role of customary law in a newly democratic African polity.

The central issue is how to recognize and secure land rights that are clearly distinct from ‘Western-legal’<sup>3</sup> forms of private property but are not simply ‘customary’, given the impacts of both colonial policies and of past and current processes of rapid social change. In some contexts there is a degree of stability in land relations and evident continuities with the past. ‘Custom’ is often invoked in describing the nature of land rights and claiming legitimacy for them. In contexts marked by social differentiation, large-scale migration, commodification of production relations and increasing institutional complexity, there is evidence of increasing levels of conflict over land rights, as well as of rising levels of land sales and other kinds of transactions. Here the term ‘customary’ is more difficult to use – but continues to be articulated by key actors, along with other kinds of claims and justifications, in discourses and struggles over property.

The analytical challenge is to characterise these complex realities using appropriate concepts and theories, and in particular to understand the dynamic processes at work within them. The policy challenge is to decide what kinds of rights, held by which categories of claimants, should be secured through tenure reform, and how. Ways to secure the land rights of women and other vulnerable categories and interest groups represents a particularly difficult challenge. Again, understanding the underlying dynamics is crucially important, given that tenure reform in Africa has tended to produce a variety of unintended consequences (Berry 1993).

Another key issue is authority over land matters and the design of appropriate institutional frameworks for land administration. Power relations are key to understanding how contemporary tenure regimes work in practice, since ‘struggles over property are as much about the scope and constitution of authority as about access to resources’ (Lund 2002: 11). In particular, the powers and functions of ‘customary authorities’ in relation to land, in the

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<sup>3</sup> Daley and Hobley (2005: 8) suggest this useful term for dominant notions of property.

past and the present but also into the future, are highly controversial and widely debated. Current efforts across the continent to decentralise democracy raises the broader issue of the role of traditional leaders in local government (Ribot 2002<sup>23</sup>). A particularly contentious issue, which the South African case clearly illustrates, is demarcation of the jurisdictional boundaries of 'customary authorities', which has key implications for how land rights are defined and administered as well as broader questions of local level governance.

We argue in this paper that the distinctive character of land rights regimes in the communal areas of South Africa arises from socially and politically embedded practices within historically specific contexts and conjunctures. These make them dynamic and evolving regimes within which a number of important continuities are observable. Exploring the policy implications of this analysis, we suggest that the most appropriate approach to tenure reform is to make socially legitimate occupation and use rights, as they are currently held and practised (and whether or not they are described as 'customary'), the point of departure for both their recognition in law and for the design of institutional contexts for mediating competing claims and administering land. Legal frameworks should vest land rights in the people who occupy and use land, not in groups or institutions, while recognising that these rights are shared and relative within a variety of nested social units.. This is necessary to avoid the danger of abuse of power by 'customary authorities' or other structures, and to render administrative structures accountable to rights holders. We hope that these arguments speak to debates on land tenure in the wider African context.

### **'Customary' land rights in historical perspective**

The contemporary reality of 'customary' or 'communal' land tenure in South Africa can be understood only in the context of a centuries-old history of dispossession, state intervention, and a variety of localised reactions and adaptations. These were accompanied by fundamental modifications of indigenous land regimes (but not their complete destruction or replacement). A complex and regionally specific history of conquest and settlement saw white settlers taking possession of most of the land surface of South Africa, and state policies attempted to reconfigure the livelihood and land tenure systems of the indigenous populations in ways that served the interests of the dominant classes. African 'reserves' were created, as a way of containing resistance and to facilitate the supply of cheap labour for the emerging capitalist economy. They also lowered the cost of colonial administration through a system of indirect rule, within which traditional leaders undertook local administration on behalf of the state. Many Africans, especially on the highveld and in Natal, continued to live on white-owned farms and for decades remained the main agricultural producers as labour tenants or sharecroppers.

Within this overall pattern there were many regional variations. In the Cape Colony various measure aimed to provide individual titles. The Native Locations and Commonage Act of 1879 allowed the Governor to divide land in the Ciskei into individual 'quitrent' titles with areas reserved as communal grazing, which appeared to offer 'the dual advantage of modernising African societies and generating revenue for the state' (Delius 1997: 10). But reserve occupants often failed to take up their titles and were reluctant to pay for survey and titling. One of the reasons, according to the Surveyor-General, was a 'preference for tribal or common tenure' (cited in Delius *et al* 1997: 10). The outcomes of the Glen Grey Act of 1894, which sought to introduce individual tenure, at first only in the Ciskei, but later extended to parts of the Transkei, were similarly disappointing. In most of the Transkei the courts applied customary law, but a new system of land administration was imposed, headmen being

appointed within wards or locations. They were responsible for allocating land, subject to confirmation by a magistrate.

In other parts of the country such as Natal, the colonists did not promote the individualisation of land rights. Pursuing a policy of indirect rule, the British provided a central role for chiefs in local administration. The British Diplomatic Agent, Theophilus Shepstone, sought to reconstruct a situation in which chieftaincies had been highly disrupted by war and population movement, and he often appointed commoners as chiefs (Delius *et al* 1997: 19). He attempted to codify customary law, on the basis of the centralized powers enjoyed by Zulu chiefs during the wars initiated by Shaka.

The 1913 Land Act entrenched existing reserves or ‘locations’ and the overall distribution of land within which scheduled “native areas” covered 7% of the land area. The 1936 Land and Trust Act added another 6% to this, bringing the amount of land reserved for African occupation to 13%. This land became the African ‘homelands’, or Bantustans, under apartheid. In these areas land-holders’ rights to transfer or bequeath land were limited, the size of allotments was set, and women’s land rights were circumscribed. Resentment of these interventions helped provoke major rural revolts in some areas (Chaskalson 1987). Trust land was also used to accommodate the victims of apartheid-era forced removals or evictions from farms. Land purchased or occupied by Africans outside of the 13% became known as ‘black spots’ and were targeted for forced removals when apartheid policies were implemented after 1950 (Small and Winkler 1992).

The Bantu Authorities Act of 1951 was a key factor in the rural rebellions of the 1950s (Mbeki 1964). It involved the establishment of Tribal Authorities that were the primary building blocks of the ‘homeland’ system of government imposed on black South Africans by the apartheid regime. The version of traditional rule involved was 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 1997: 39). In terms of Proclamation R.188 of 1969 two forms of tenure were defined - quitrent for surveyed land and “Permission to Occupy” (PTO) for unsurveyed land. Severe limitations on the rights included one man – one lot, restrictions on plot size, a rigid system of male primogeniture to govern inheritance and non-recognition of female land rights. Chiefs and headmen undertook the task of allocation, agricultural officers surveyed the boundaries of sites and fields, and magistrates issued the permits and kept registers.

Under the apartheid government large areas of land occupied by blacks (including a large number of purchased farms) were transferred to the jurisdiction of ‘self-governing territories’ and many groups were placed under the jurisdiction of government-recognised chiefs and Tribal Authorities. By the time of the democratic transition in 1994, the legally insecure and ‘second-class’ nature of land rights held by black South Africans was identified as a key issue to be addressed by the new ANC-led government’s land reform programme (DLA 1997).

### **‘Customary’ land rights in contemporary South Africa**

The legacy of the processes described above includes a range of tensions and conflicts over access to land in ‘communal’ areas, which constitute around 13% of the land area but are home to one third or more of the population. There is widespread overcrowding and forced overlapping of rights as a result of a history of forced removals and evictions, and uncertainty as to the legal status, content and strength of these rights.

Local administration by traditional authorities often involves corruption in land and other matters (Delius 1996; Levin and Mkhabela 1997; Ntsebeza 1999; Claassens 2001; Oomen 2000). This is linked to the Apartheid-era policy of placing African communities under the jurisdiction of traditional authorities, whether or not they had any historical ties to those authorities, and the assumption by many traditional leaders that this gave them control in the designated areas. Types of abuse include: (a) allocating land to or making private business agreements with outsiders, that have the effect of depriving community members of land; (b) selling plots to outsiders for private gain, these plots often being located on the common property areas of communal land; and (c) refusing to allow land to be used for development projects led by local government (Claassens 2003).

The land administration system in many areas is in state of near collapse. Magistrates may no longer play a role, PTOs may or may not be issued, the procedures followed may be *ad hoc* and unclear, and registers are not always kept up to date (Lahiff and Aphane 2000; Turner 1999; MacIntosh, Xaba and Associates 1998). Lack of clarity on land rights is 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 (eg. housing, irrigation schemes, business centres, and tourist infrastructure – see Peires 2000).

Discrimination against women in the allocation of land is common (Meer 1997; Walker 2002; Claassens 2005~~nd Ngubane 2003~~). Although some communities have moved in the direction of allocating independent rights for single women, divorcees and widows, many have not, and evictions of vulnerable women still occur. Some women are now in favour of individual title as a way to secure independent land rights (Claassens 2005).

Some rural ‘communities’ are much less culturally homogeneous and socially integrated than they used to be, due to strong links and movement of people between urban and rural areas, the acceptance of outsiders, and increasing socio-economic differentiation. In communities close to national borders, inflows of legal and illegal immigrants have occurred and large numbers of local residents have no clear rights at all (Pollard, pers. comm.).

The wider economic context of the gradual decline over several decades of agricultural and natural resource based livelihoods, with the corollary of increased dependence on wages, remittances and social grants (May 2000), is another factor impacting on land rights. The relative insecurity of urban livelihoods means that many people seek to maintain their rights to land in rural areas, not always in those of their social origins, and have cash available to invest in acquiring rights. This may be contributing to the increasing incidence of payments for the right to access land, made to either community members or to chiefs and headmen (and often justified in terms of the custom of ‘chiefs’ dues, or the practice of *khonza* - paying homage to a traditional leader).

In many areas the existing regimes appear to work reasonably well on a day-to-day basis and occupants of communal land still appear to enjoy *de facto* tenure security (Adams *et al* 2000). Furthermore, some of the key features of communal tenure have persisted over time, for example, the shared and relative character of land rights, acquired mostly through membership of social groups, rights of access to common property resources, and the flexibility of social and territorial boundaries. On the other hand, these systems are also under increasingly severe strain, as a result of overcrowding, breakdowns in administrative systems,

abuses by some traditional leaders, tensions over common property resource use, and lack of clarity over the role of traditional authorities and local government bodies. This can lead to heated debates about how land rights and administration should be reformed (Claassens 2003).

It is clear from this sketch of processes of subordination, regulation, resistance and adaptation, across three and a half centuries of South African history, that people with 'customary' land rights were forced to modify their tenure systems and adjust them to radically changed circumstances. Change is the one face of this history; the other shows a certain degree of continuity, reflecting the 'persistence and resilience' of the underlying principles of customary law (Okoth-Ogendo 2002: 10) or perhaps continued adherence to an 'African land ethic' (Cross 1992: 319). This mixed and messy reality presents challenging dilemmas for tenure reform policy.

### **Dilemmas of tenure reform in democratic South Africa**

The South African White Paper on Land Policy of 1997 (DLA 1997: 57-58) sets out some guiding principles to inform policy-making. Tenure reform must 'move towards rights and away from permits' and aim to build a 'unitary non-racial system of land rights for all South Africans'. It must 'allow people to choose the tenure system which is appropriate to their circumstances' (including both group based and individually based ownership) but these 'must be consistent with the Constitution's commitment to basic human rights and equality'. In order to secure tenure, 'a rights based approach has been adopted' which must 'recognize and accommodate the *de facto* vested interests which exist on the ground', including legal rights but also 'interests which have come to exist without formal legal recognition'. Where overlapping and conflicting rights cannot be 'upgraded' within one area, additional land will be required to relieve land shortages, to ensure that strengthening the rights of some does not lead to the eviction of others.

Tenure reform in South Africa is also a constitutional imperative. Section 25 (6) of the Bill of Rights in the 1996 Constitution asserts 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 provide by an Act of Parliament, either to tenure which is legally secure or to comparable redress'.

The controversial Communal Land Rights Act of 2004 is the state's response to this requirement.

Explicitly recognised in the White Paper is the great diversity of forms of tenure insecurity requiring a policy response<sup>4</sup>. Focusing specifically on 'communal tenure', a wide range of situations can be identified. These include 'tribal' areas where occupation has been continuous over long periods of time, people were not subject to forced removals, and the South African Development Trust (SADT) was largely absent. In others, by contrast, a great deal of relocation has occurred, land was intensively administered by the SADT under so-called 'trust tenure', state bureaucrats closely monitored Permissions to Occupy (PTOs) and betterment was systematically implemented (Claassens 1991). Forms of communal tenure are

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<sup>4</sup> These include the vulnerability of farm workers, farm dwellers and labour tenants living on privately-owned commercial farms, for which specific laws and policies have been developed; see DLA 1997; Hall 2003).

found on land restored to groups forcibly removed by the apartheid state; after 1994 some of these have successfully claimed restitution, and the land is now owned by either a Communal Property Association or a Trust. Yet another kind of situation prevails where groups subject to forced removals were placed under the jurisdiction of traditional leaders whose authority they did not recognize. Other areas (eg. in the Eastern Cape) were subject to colonial policies aimed at individualising land tenure, but in many of these key elements of a 'communal' system persisted or re-emerged over time (Kingwill 1996).

In practice these categories can overlap. Land owning communities which were forcibly removed were sometimes placed on SADT land and subjected to 'trust tenure', and people on SADT farms sometimes suffered forced removal in the process of homeland consolidation and ended up as tenants on another community's land. These situations sometimes co-exist within one district, to create extremely complex and messy 'patchworks' of land tenure and administration systems (see the cases described by Claassens 2001; de Wet 1995; Kingwill 1996; Lahiff and Aphane 2000; Liversage 1993; Small and Winkler 1992).

The political context and timing of tenure reform in South Africa creates its own imperatives and dilemmas. One dilemma arises from complexity and diversity and the need for differentiated solutions, but policies must also be realistically tailored to the capacities of a state apparatus that has struggled to cope with the demands of land and agrarian reform (Cousins 2002). Another arises from the principle of democratic choice of tenure system that the White Paper affirms so strongly: if groups and 'communities' which hold rights in common are to collectively decide on the nature of their preferred tenure system, how are the boundaries of these groups to be determined?

A third and connected issue relates to local authority structures and their role in administering land – should these bodies be elected and democratic, in line with other new governance structures, or can 'traditional leaders' play a role? Does the principle of choice apply also to the kind of land administration structure to be installed? Again this raises the question of the boundaries of the group or 'community' within which jurisdiction over land matters would apply. The issue of choice has implications for the accountability of local structures whose basic function is to help secure the rights of residents – and in particular, the *downward* accountability that many see as a key requirement if local governance, of land as well as other matters, is to be truly democratised (Ribot 2002; Ntsebeza 2004).

A fourth dilemma is how to adjudicate between overlapping and conflicting claims, which are likely to generate disputes even if additional land is made available for settlement and the 'unpacking' of situations of forced overcrowding (Makopi 2000). Which principles or criteria should guide negotiations and decision-making? A fifth dilemma also relates to evaluative criteria: the principle that the law be brought in line with *de facto* realities on the ground assumes (probably correctly) that most established occupation and use of land is socially, if not legally, legitimate, but there are undoubtedly many cases where land rights were acquired through bribery or corruption. This means that criteria and procedures for adjudicating such cases are required.

In addition, women have been discriminated against in the allocation of land because most apartheid regulations provided that land could be allocated only to the male "household head". In practice more women than men live on communal land, many of them as single mothers, and often women remain primarily responsible for the cultivation

of arable land. Yet often the records that exist reflect men as the exclusive holders of 'Permission to Occupy' certificates. The records and established pattern of land holding is at best a partial guide to what most rural residents consider to be fair and just. In securing existing rights, a difficult question is thus – whose rights to which land?

The overarching question is precisely what kind of rights are to be secured within group, or community-based systems, and what their legal status would be within a larger society, economy and legal system dominated by private property. The challenge for policy is to provide legal recognition for land rights that are distinct from those of 'Western-legal' forms of private property, that may or may not be viewed by their holders as deriving from past 'customs' and in some cases may be based simply on established occupation. The basis for conferring these rights to those who claim them must also be clear, since the answer to the question 'who has rights?' is closely linked in practice to the question of what kind of rights are to be conferred.

### **The Communal Land Rights Act of 2004**

Two very different kinds of approaches to tenure reform in 'communal' contexts were developed in the years following publication of the 1997 White Paper. They shared some key features: neither proposed individual titling as the solution, both focusing instead on strengthening the legal status of rights within 'communal tenure systems', with 'custom' as one basis for claiming such rights. A Land Rights Bill drafted in 1998/99 attempted to provide full recognition of the underlying land rights of people in communal areas but through statutory protection of rights vested in individuals within groups, rather than in private ownership. In June 1999 a new Minister of Agriculture and Land Affairs took office<sup>5</sup>, and the bill was scrapped; in her view the approach was too complex and would be costly to implement. She was in favour of a law that transferred title of state land to 'tribes', allowed traditional leaders to administer land, and did not require high levels of institutional support. Following several false starts a Communal Lands Rights Bill was drafted and eventually enacted in early 2004.

The key choice made in the Communal Land Rights Act (CLRA) is to extend ownership to rural communities and use modified Tribal Authority structures to administer the land and represent the 'community' as owner. Within areas of communally owned land it proposes the establishment of a register of 'new order rights' vesting in individuals. This approach raises a number of questions about: (a) the nature of the land rights recognized in law; (b) where land rights are vested; (c) measures to promote gender equality; (d) the constitution of local land administration bodies; (e) the definition of group boundaries; and (f) the decision-making powers of rights holders and land administration structures<sup>6</sup>.

#### *Nature of land rights*

The CLRA transfers title of communal land from the state to a 'community', which must register its rules before it can be recognized 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. The Minister must make a determination on whether or not 'old order rights' (ie. communal land rights

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<sup>5</sup> Ms Thoko Didiza, formerly Deputy Minister.

<sup>6</sup> For more detailed analyses see Claassens 2005, Cousins 2005a and 2005b, and Cousins and Claassens 2004.



derived from past laws and practices, including ‘customary law and usage’) should be confirmed and converted into ‘new order rights’, and must determine the nature and extent of such rights. New order rights can be registered in the name of a ‘community’ or a person, but where transfer of title occurs to a ‘community’ as owner, the individual new order rights are not equivalent to title. A key problem is that the minimum content of new order rights is not set out in the CLRA.

The consequence of this paradigm of transferring ownership is that the boundaries of the ‘community’ must be surveyed and registered. Before any transfer is approved a rights enquiry must take place, to investigate the nature and extent of existing rights and interests in land (including competing and conflicting rights), options for securing such rights, measures to ensure gender equality, and spatial planning and land use questions. The Minister will then determine the location and extent of the land to be transferred, whether or not the whole of an area or some portion of it should be transferred to the ‘community’. A part of the land may be subdivided and transferred to individuals, and portions may be reserved to the state.

The CLRA requires that community rules be drawn up before transfer of land, and these must 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, nor its timing (eg. whether or not the drawing up of such rules precedes the establishment of a land administration committee).

#### *Vesting of rights*

The CLRA vests ownership in the ‘community’, defined as ‘a group of people whose rights to land are derived from shared rules determining access to land held in common by such group’. Senior government officials have stated that they view the population of areas under the jurisdiction of Tribal Authorities, headed by chiefs, as such ‘communities’<sup>7</sup>, and planning for implementation has proceeded on that assumption. Land administration committees represent the ‘community’ and take decisions on its behalf. These boundaries are, however, extremely contentious having been established during the creation of Tribal Authorities under apartheid.

#### *Gender equality*

The CLRA contains a general provision that a woman is entitled to the same tenure rights as a man, and no laws, rules or practices may discriminate on the grounds of gender. It provides for the Minister to confer a ‘new order right’ on a woman, even where old order rights such as Permission to Occupy certificates (PTOs) were vested only in men. New order rights are deemed to be held jointly by all spouses in a marriage, and must be registered in all their names. Female members of households who are not spouses are not provided for. The CLRA also requires at least that one third of the membership of a land administration committee be female.

#### *Constitution of land administration bodies*

In the CLRA, a ‘community’ which applies for title must establish a land administration committee, which ‘represents a community owning communal land’, and has the powers and

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<sup>7</sup> Dr Siphso Sibanda of the Department of Land Affairs, addressing a meeting of the Portfolio Committee on Agriculture and Land Affairs, 26<sup>th</sup> January 2004

duties conferred on it by the CLRA and by the rules of such a community. It must 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 other land administration functions. Where they exist, traditional councils established under the Traditional Leadership and Governance Framework Act (TLGFA) of 2003 will exercise the powers and functions of such land administration committees<sup>8</sup>. The TLGFA allows existing Tribal Authorities to be deemed traditional councils, 40 percent of the members of which must be elected and 30 percent of which must be women.

### *Definition of group boundaries*

The CLRA provides for the Minister to make a determination of 'community' boundaries, on the basis of the land rights enquiry. Transfer of title involves demarcating and surveying the boundaries of the 'community' that will become the legal owner of communal land, as well as of internal boundaries in terms of a 'communal general plan'. As described above, government envisages 'communities' as coinciding with Tribal Authorities, reconstituted as 'traditional councils'. These areas typically have populations of between 10 000 and 20 000, and Tribal Authorities and the chiefs that head them have jurisdiction over a great many wards and villages, under the authority of sub-chiefs, headmen, or sub-headmen; they are thus aggregates of a large number of smaller 'communities'. The problem of many people having been placed under the jurisdiction of chiefs and Tribal Authorities that they had no previous connection to, is not recognised.

### *Decision-making on land rights*

The CLRA provides for land administration committees to make most key decisions in relation to land, and to exert ownership powers on behalf of the 'community' they represent. It does not require land administration committees to consult with the community members it represents in relation to major decisions such as disposal of land or of rights in such land. The only requirement in such a case is ratification of a decision by a provincial Land Rights Board. The CLRA does not set out procedures for decision-making (eg. in relation to the adoption of community rules or the holding of a land rights enquiry), but states that rights enquiries must be open and transparent, and that decisions must be informed and democratic.

## **Debating the CLRA**

The key policy decisions embodied in the CLRA are to transfer private ownership to 'communities', to view 'communities' as people living within Tribal Authority boundaries, and to recognize 'traditional councils' as land administration committees which can exercise powers of ownership on behalf of 'community' members. Deeds of Communal Land Right, the form in which the 'new order rights' of community members are to be registered, are clearly secondary rights of occupation and use, subordinate to group ownership. The approach adopted has been widely criticized and was debated at length in parliamentary processes before the law was enacted, with the powers of

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<sup>8</sup> Section 21 (2) of the CLRA states that "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". However, the word 'may' appears to be permissive, enabling a traditional council to exercise the powers of a land administration committee, rather than to create a choice for rights holders. No other provision of the Act allows for such a choice.

traditional leaders being one of the most controversial aspects (Cousins and Claassens 2004; Murray 2004).

Some critics have focused on the legal aspects of the Act and argue that it is unconstitutional<sup>9</sup>, given that the nature and content of ‘new order rights’ are not clearly defined and instead the Minister of Land Affairs is given wide and sweeping powers to determine these rights on a discretionary basis. No clear criteria and factors to guide the Minister’s decisions are provided, and few opportunities to either participate in making these crucial decisions or to challenge them are provided. Other critics have raised doubts about the capacity of the state to implement a ‘transfer of title’ approach given the complexity and time-consuming nature of rights enquiries and the likelihood of boundary disputes. NGOs have pointed out that a critical omission is the absence of community consultation on whether or not they desire a transfer of title.

The provision that where traditional councils exist, they will act as land administration committees was greeted with jubilation by the powerful traditional leader lobby, but with dismay by community groups and NGOs, which saw this as undermining fundamental democratic rights. Criticism focused on the fact that the Act does not adequately provide for democratic and accountable institutions for land administration. Some observers have seen the last-minute inclusion of this provision in the draft law as the result of a back-room political deal in the run-up to a national election (Govender 2004; Murray 2004).

Some critiques, our own included, have suggested that the approach embodied in the CLRA entrenches key distortions of ‘customary’ land tenure that resulted from colonial and apartheid policies, which will have the effect of undermining rather than securing land rights. We have argued, for example, that in African tenure systems the rights of individuals and families are generally strong and secure, deriving from accepted membership of a group. Decisions in relation to residential and arable land (including decisions around disposal) are made primarily at household level, although there is often a degree of ‘community oversight’ (at the local level) of transactions that bring in new group members. Security of rights derives from the ‘relative balance’ between these elements, including the balance of power between authority structures, on the one hand, and rights holders, on the other. In our view the CLRA shifts the balance of power away from individuals and families, and towards the group and its authority structures, on the one hand, and towards the Minister (as advised by officials), on the other. Ownership at the level of the traditional council/chieftaincy will ‘trump’ the rights that exist at lower levels eg, family and individual rights to residential and arable land. (Claassens 2005: 20; Cousins 2005: 433).

We have further argued, following Okoth-Ogendo (1989), that in African property regimes the role of authority structures in relation to land was primarily to guarantee rights of access to productive resources, to regulate use of common property resources and to help resolve disputes. Rights to land did not derive from an allocation by a land-owning political class, but from an entitlement of ‘citizenship’. There was a relative balance of power between the leadership and rights holders, as well as between different levels of socio-political authority (chiefs, headmen etc), which created a degree of ‘downward accountability’ of authority structures to commoners.

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<sup>9</sup> The Legal Resources Centre, representing four client communities, has recently initiated a constitutional challenge of the Act.

After conquest, however, structures of traditional authority were co-opted into the lower rungs of colonial administration, with requirements for 'upward accountability' to the state rather than downwards to 'citizens'. Accompanying these processes was the emergence of a (colonial) model of communal tenure premised on 'ownership' of land by chiefs, as 'trustees' of the community, and allocation of plots to his subjects, which suited both colonial rulers and chiefs, but was at odds with indigenous notions of land rights.

We argue that by vesting ownership of land in a 'community' seen as the population under a traditional council (ie a re-invented Tribal Authority), and recognising such councils as land administration committees, the CLRA represents a decisive shift of the 'relative balance of power' at the expense of both individual rights holders and of other levels of authority such as village headmen or sub-headmen. It moves the authority for land allocation to the pinnacle of the traditional hierarchy, providing the chieftainship with 'even more powers than it previously enjoyed' (Malaudzi 2004: 129). This shift is most evident in the lack of choice available to rural residents in respect of the body that will represent their interests as land rights holders; in effect, power is exerted 'from above' rather than 'from below'.

We have also argued that the transfer of private ownership of communal land from the state to 'communities', with the requirement that outer boundaries be surveyed and registered, conflicts with the nested, layered and overlapping character of land rights in South African land tenure regimes. As a result, implementation of the CLRA is likely to increase rather than reduce boundary disputes. Given the near-irreversibility of a transfer of title, except by expropriation, boundary demarcations will assume great importance to potential title-holders, and existing tensions and disputes over the boundaries of Tribal Authorities (including disputes with sub-groups placed under the jurisdiction of chiefs under apartheid) will be exacerbated. Demarcation of exclusive outer boundaries will also undermine the inherently flexible and negotiable boundaries in terms of which community members access and use common property resources.

In relation to gender equality, we have suggested that the CLRA undermines 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. There appears to be a strong presumption that a Deed of Communal Land Right is akin to individual ownership, albeit ownership that must vest in spouses jointly. This is evident in the provision that these Deeds can be converted into freehold ownership if the community approves. There is no provision for a Deed of Communal Land Right to be issued to a family. In addition, it is unclear what land rights can be claimed by women who are female divorcees at the time that a determination is made by the Minister, since they will no longer be married and thus cannot be deemed to be the joint holder of an old order right. The problem is that land occupied by an extended family will be vested in a married couple who will potentially be able to sell their rights in the land. There are no provision asserting the rights of other family members or requiring their consent prior to transactions. Widowed mothers or divorced sisters who are currently entitled to live on family land will have no rights in the land and could find it sold from under them.

For single women this entrenches the weaker form of women's land rights that resulted from the distortions of the early colonial period, when particular versions of 'custom' were officially recorded, and in most cases women's rights were subordinated to those of married men. Quitrent titles, Permission To Occupy certificates and betterment regulations all vested land rights and decision making power in male household heads, and the occupation and use rights of women were defined as secondary. Yet in pre-colonial societies land was allocated

to families, and women had strong rights within the family (Preston-Whyte 1974: 180; Simons 1968: 194; Wilson and Elton Mills 1952: 133). Despite the strengthening of male control over land, women are often the primary users of arable land, the obligation to provide family members with access to the means of livelihood has remained a strongly held value and norm, but this is not given effect to in the CLRA.

Underlying these debates over the CLRA (and the Traditional Leadership and Governance Framework Act) are competing interpretations of two core concepts, African custom, on the one hand, and democracy, on the other. These embody value systems that some seek to reconcile, rather than see as opposed to one another, within South Africa's transition to democracy (Nhlapo 1995). Government defends the approach adopted in the CLRA as being consistent with the nature of customary land tenure, but also consistent with democratic rights (Sibanda 2003). The Congress of Traditional Leaders of South Africa agrees (Holomisa 2004). The memorandum attached to the CLRA explains the objects of the Act as, *inter alia*, seeking to 'legally recognise and formalise the African traditional system of communally-held land within the framework provided by the Constitution', and to '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' (RSA 2004). Some critics, however, see the CLRA and the TLGFA as a betrayal of democracy, and assert that attempts to reconcile custom and rights are inherently contradictory (Ntsebeza 2004). Others assert that neither democracy nor custom is embodied in the CLRA (Claassens 2005; Cousins 2005a, 2005b). The terrain of this debate is highly polarised and contested.

These policy debates echo those in the wider African context. The 'turn to the customary', and associated notions of devolving responsibility for land management to local institutions, a reaction to the evident failures of individual land titling, has been criticised recently for 'positing a panacea' (Daley and Hobley 2005: 34) that fails to adequately acknowledge both socio-economic differentiation and the realities of local politics and power relations, within which 'the democratic substance of village governments ... is often unclear' (Daley 2005b). Disquiet over the manipulation of ideas about the 'customary' by powerful men leads Tsikata (2004) and Whitehead and Tsikata (2003: 103) to agree with many African feminist lawyers that there are 'too many hostages to fortune in the language of the customary at a national level for it to spearhead democratic reforms and resistance to centralized and elite-serving state power'.

Is there a way beyond these polarities (eg. 'customs versus democratic rights', 'custom as elite power versus custom as popular control')? We suggest that tenure reform policies should take cognisance of, and build upon, the realities of current occupation and use and the claims they rest upon, ie. how 'actually-existing' tenure systems operate in practice, while at the same time opening up political and institutional space for decision-making by the majority of those who occupy and use land. This raises key questions about the nature of 'customary authority' and how decisions are currently made about land. Before discussing what this might mean in the South African context, the next section reviews some of the analytical literature on the dynamics of Southern African tenure regimes, how the articulation of land use, land rights and structures of authority has evolved over time, and reasons for the continued salience of notions of 'custom' in relation to these issues.

## The dynamics of 'customary land rights' in Southern Africa

Studies by historians and ethnographers reveal a broad pattern of both radical change and significant continuities in the character of African land rights, a pattern that is somewhat paradoxical and allows them to be characterised at one and the same time as both 'transformed' and 'customary'. How can this be explained? It is useful to begin with the early colonial period, and locate analyses of processes of change in specific historical conjunctures, bearing in mind Kuper's (1997: 74) reminder of the dangers of 'abstracting institutions from the specific historical circumstances of the time'.

A fascinating case that illuminates the dynamics of 'continuities-within-change' is William Beinart's study of Pondoland (Beinart 1982). The Mpondo became a large centralized polity in the aftermath of the Mfecane in the early 19<sup>th</sup> century, in a similar manner to the rise of the Swazi, Sotho and Ndebele states. Under the paramountcy of Faku (1820-1867) the chiefdom emerged as the most powerful south of the Zulu (*ibid*: 10). A period of 'close settlement' around the royal place ensued after the loss of Mpondo cattle to Shaka in 1828. The paramount controlled military and hunting activities as well as trade, and power became highly centralized. After 1840 the Mpondo expanded back into the zone east of the Mzimvubu river and elsewhere in search of grazing, communal activities controlled by the paramount became less important, and production became focused on the homestead again. There was thus a decline in the immediate authority of the paramount chief, the relative importance of various sub-chiefs increased (*ibid*: 11-12), and this meant that 'centrifugal forces' became dominant in the chiefdom as the 19<sup>th</sup> century progressed.

Relationships between chiefs and their people in this period were structured mainly by the social relationships governing the circulation of cattle, in the form of loans and bridewealth payments, through which followings were built and homesteads extended. According to Beinart,

*Chiefs certainly did not exercise their power primarily by controlling access to specific pieces of land. Once a group had been accepted by the chief and had an area of settlement pointed out, the distribution of land for cultivation was largely left to individual homestead heads.... Chiefs did, however, exercise more direct control over communal resources such as the major forests (ibid: 18).*

In the second half of the 19<sup>th</sup> century Pondoland was penetrated by traders, who brought in new goods such as blankets, firearms, metal agricultural implements and ploughs, as well as horses, and bartered these for livestock (*ibid*: 22-30). The new technologies helped initiate fundamental changes in systems of production and in social and political relationships. Ploughs allowed the area under cultivation to be extended, and promoted the 'atomisation of major productive activities to the level of the homesteads.... [which were] able to become more independent from the chiefs in their basic food resources' (*ibid*: 29). Ploughing required the involvement of men in crop production (only men could handle oxen) and homesteads 'were no longer entirely dependent on their access to women through marriage to maintain cultivation' (*ibid*: 30).

Pondoland was annexed by the Cape in 1894 and a new system of administration was established, designed to limit the powers of the 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, who built local power bases for themselves,

and this undermined the system of paying 'customary dues' to chiefs. The first decades of the 20<sup>th</sup> century saw an ongoing struggle between the state, the paramountcy and headmen over political control (*ibid*: 112-122). Changes in production systems occurred since households' need for cash to pay taxes or buy trade goods could only partially be met from local production, and wage labour and migrancy became increasingly important (*ibid*: 94-95). Younger migrant men gained more independent access to wives, did not have to enter into relations of dependence on their fathers or homestead heads, and could establish their own homesteads earlier than before. Homestead heads began to play a less central role in the allocation of land, in any case seen by the state as a function of headmen (*ibid*: 97).

In the early decades of the 20<sup>th</sup> century chiefs and headmen resisted any attempts to dispossess Mpondo of their land or to completely alter the system of 'communal' tenure. Traditional leaders had their own reasons for defending the tenure system, bound up with their political status, but they were not alone. A minority of wealthier cultivators who wanted to grow cash crops and extend their arable lands found communal tenure a constraint, but the majority of the rural population supported communal tenure because it was 'their ultimate guarantee of access to both arable plots and grazing; (*ibid*: 126). Furthermore, the allocation of land through chiefs and headmen enabled ordinary people to 'exercise some control over land' through influencing local political processes, and communal tenure 'was symbolized by the powers of the chieftaincy' (*ibid*: 126). This convergence of interests in the defence of communal tenure, as a means to protect access to key livelihood resources, should not, however, obscure the fact that significant changes in the operations of the tenure system occurred and that 'there were different shadings of interest at work' (*ibid*: 126), that explain the tensions between chiefs, headmen, the administration and commoners.

These interests were deeply gendered, as Beinart's account makes clear. Walker (2002) emphasises shifts in the character of women's land rights, in the context of pressures towards individualised interpretations of custom:

*..., 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 precolonial 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' (Walker 2002: 11)*

Moving beyond South Africa, a number of scholars have described the extensive reconfiguration of 'custom' that took place in the early colonial period. Chanock (1991), for example, suggests that:

*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 development of the concept of a leading customary role for the chiefs with regard to 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. (Chanock 1991: 64)*

This 'feudal' model fitted well with British ways of thinking about states and societies, linked British land law and colonial contexts, and served the interests of regimes seeking to acquire land for settlers. The Privy Council pronounced in 1926 that 'the notion of individual ownership is foreign to native ideas. Land belongs to the community not to the individual' (*ibid*: 66). In contrast with these models, there is much evidence in the early colonial period of both the vigorous assertion of individual rights and of land sales, during a period of major changes in settlement and land use, and when new economic opportunities were emerging. People spread out from fortified villages and hilltop settlements to cultivate new lands they had been unable to use safely before, and were less dependent on immediate kin for security. The colonial state was generally happy to concede to them rights of permanent occupation and use, which accorded well with the promotion of new crops and markets, but the question of whether these rights could be bequeathed, and by whom to whom was more contentious (*ibid*: 69-70). Prohibition of sales of 'communal' land became a central feature of colonial land policy.

In addition, there was 'spirited opposition to individuation' from within African society itself. This was partly because the ambitions of settlers and corporations to increase their land holdings and to limit those of Africans aroused the resentment and anxiety of peoples already displaced and fearing further loss of their land. Given the politics of the colonial situation, land rights had to be discussed in terms of groups, and the land, Africans strongly asserted, was *ours*, not yours. Thus communalism was 'a way of certifying African control of occupation, use, and allocation of land, rather than a description of rights exercised. Individualism was a code word for sale to Europeans' (*ibid*: 66). Under these conditions, what had previously been porous boundaries between villages and chieftaincies were now vigorously enforced.

Chanock recommends stepping back from attempts at systematization, and from 'ideologies of traditional communalism' (*ibid*: 70). Instead, he says, questions should be asked about specific conflicts of interest over land during the colonial period: just who was pressing for a greater individualization of rights? What sort of rights did they have in mind? Who was resisting this pressure, and why?

*A cultivator might say 'mine' when title was challenged, or if it was advantageous to sell or mortgage, may think in terms of 'ours' – in terms of nuclear family – when asserting a right of inheritance against a larger group of kin, or 'ours' in terms of a lineage – if the claimant was outside the lineage (as a spouse might be) (ibid: 72-73).*

Chanock concludes that 'an indigenous *system* of land tenure did not exist under colonial conditions', and that its 'shadow' was used to deny the establishment of freehold tenure for Africans in an increasingly capitalist economy; this also 'distorted the rights recognizable and assertable in the customary one' (*ibid*: 82). Colson (1971) outlines a similar argument, noting that customary courts were under the control of colonial officials, whose stereotypes of African land tenure were used to assess the legality of decisions. Systems of communal tenure with 'precisely defined rules' came into being, that now inhibited the development of individual rights in unused land because it was deemed that 'such rights encroached upon the ancient right of some community, lineage, or 'tribal' polity' (*ibid*: 197). In Zambia (then Northern Rhodesia), Reserves and Trust Lands were defined as areas for African use, and here government refused to recognise the legality of private transactions in land, which were 'assumed to be the permanent possession of African political communities, who in turn gave rights of occupation to their members' (*ibid*: 209). This was despite the fact that in those parts



of the reserves located near railway lines, where commercial farming proved to be profitable, ‘cultivators improved their fields, passed them on to heirs, and treated them as though they were a form of private property’, engaging in both sales and rental (*ibid*: 209).

Biebuyck’s (1963) overview of changes in land tenure in the early colonial period notes the influence of a growing scarcity of land due to increased population, agricultural development, the development of new markets and growing 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. He emphasises the wide range of responses by people to these changes – 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 or political authorities. A general tendency where land was held in common by villages was for inheritance rights to fields to be exercised more strongly by individuals and families; where it was held by kinship groupings, the size and genealogical depth of these groups tended to shrink (*ibid*: 59). He also notes that:

*... in many situations the growth of a feeling of insecurity and of hostility towards outsiders, as the outcome of increased land scarcity and greater demand for land, have resulted in stressing the concepts of inalienability, of group ownership and of ritual sanction in land tenure (ibid: 60).*

These analyses of ‘customary’ land tenure in the colonial era suggest that the character of these regimes cannot be understood using abstract and simplistic models that stand outside of specific and changing historical circumstances. Jane Guyer’s approach to the analysis of monetary transactions in Atlantic Africa is apposite: she suggests that analyses that seek to ‘establish... the persistent elements and relationships by which people individually and collectively create economies’ should also acknowledge that ‘local constructs emanate from experience and not from modular principles, either as these might be conceptualized in the Western model of a formal sector or as they might derive directly from local cultural principles’ (Guyer 2004: 6-7).

In this perspective, land tenure is always historically situated and patterns of change and continuity emerge from the interactions of heterogeneous interest groups who are both enabled and constrained by wider political dynamics, unequal economic structures, the operation of markets and cultural discourses and practices (Moore 1986). Historically informed ethnographies suggest that land-holders and land authorities have sometimes retained elements of ‘customary land tenure’, sometimes radically reinvented it, and sometimes moved on and effectively abandoned claims to land based on past identities and values. Competing strategies have also interacted with each other in complex ways to produce outcomes that were not intended by any of the actors involved (Moore 2005). Power relations have been key, at a variety of levels, and in interactions across these levels (Berry 2002; Lund 2002; Peters 2004). As a result, some interest groups have tended to benefit more than others, notably chiefs and headmen (eg in relation to powers of land allocation) and men (eg. in relation to control of productive land and its income streams). Both authority and rights have been constructed in ways that are ‘historical, contextual and contingent’ (Lund 2002: 33).

### **Change and continuity in contemporary land tenure across Africa**

The early colonial period was one of rapid and fundamental social change, and the perspectives reviewed above might also usefully inform our understanding of current dynamics around land in Africa, given that, as before, local situations and small-scale events and processes 'bear the imprint of ... complex, large-scale transformations' (Moore 1986: 11)?

Recent writing on land focuses strongly on change rather than continuity. Sara Berry's (1993; 2002) influential view of property in rural Africa as involving multiple interests, the centrality of social identity and status, and hence ongoing social processes and 'conversations' (conflicts, litigation, negotiation) as the key to understanding the *de facto* realities of land rights, is being challenged. Pauline Peters (2002; 2004), for example, take issue with dominant images of African land tenure as 'relatively open, negotiable and adaptive customary systems', and stresses instead 'processes of exclusion, deepening social divisions and class formation'. She suggests that 'commodification, structural adjustment, market liberalisation and globalization' tend to 'limit or end negotiation and flexibility for certain social groups or categories' (Peters 2004: 270).

Competition and conflict over land are increasing in Africa, she argues, because of the confluence of a number of intersecting processes: the need of many rural families to produce more from their land even though inputs are declining; civil servants and others in employment seeking to produce food and cash crops from family land; the state and environmental groups trying to extend the area under conservation; and the intensification of the exploitation of resources such as minerals, wildlife, water, trees etc (*ibid*: 286). According to Peters and other scholars (Daley and Hobley 2005; Woodhouse 2003) these realities require analysts to go beyond formulations of land being 'socially embedded' in order to raise questions about 'the type of social and political relations in which land is situated, particularly with reference to relations of inequality – of class, ethnicity, gender and age' (Peters: 278). Peters sees a key 'socio-cultural dynamic of differentiation' emerging within social units such as the family, lineage, village, 'tribe' or ethnically defined group', which can be understood as 'a process of narrowing in the definition of belonging', with 'group boundaries [becoming] more exclusively defined' (*ibid*: 302).

Other scholars have drawn attention to the increasing prevalence of land being acquired through a variety of market transactions, including purchase, rental and sharecropping, in defiance of the idea that 'customary' land tenure prohibits such alienability (Andre 2003; Daley 2005a and 2005 b; Chimhowu and Woodhouse 2005; Lund 2001; Mathieu *et al* 2003; Sjaastad 2003; Woodhouse 2003). This brings with it 'an increasing individualisation of control of land and in some instances its alienation from any form of customary authority, amounting to effective privatisation of land' (Chimhowu and Woodhouse 2005: 392). In most cases, however, market-based access 'remains governed by customary tenure', and hence transactions in these 'vernacular' land markets have no form of statutory protection (*ibid*: 392). Scarcity of land due to population growth is only one driver of this process; others include the growth of markets for agricultural commodities (eg, horticultural products for urban markets), the impact of new technologies for water management, tree cropping or crop transport, growth in non-farm and wage income, population migration, and urbanisation and the emergence of land markets in 'customary' areas around towns and cities (*ibid*: 393-96). Three main categories of buyers are identified – 'new big men' with jobs and influence, migrants without claims to customary rights, and those with kinship ties in areas where land is scarce, who purchase or rent from senior male relatives. Key sellers are 'senior men' and especially tribal chiefs (*ibid*: 401). For Chimhowu and Woodhouse, the 'idealised models of

communal tenure' that abound in land policy discourses are an obstacle to developing policy responses to vernacular markets that could make them 'work for vulnerable groups' (*ibid*: 409).

Other analysts describe the emergence of informal institutional innovations in the recording of signed documents to legitimise increasingly widespread transactions in land, in an attempt to reduce the ambiguity and uncertainty associated with the rights so acquired (Andre 2003; Lavigne-Delville 2003; Mathieu 2001; Mathieu *et al* 2003.) They can involve local officials (who witness these transactions in the name of the government department they represent, but according to 'unofficial rules') as well as private individuals with local legitimacy (Lavigne Delville 2003: 102). These records are often not sufficient however, to prevent their being contested by others with prior claims based on kinship or custom (Chimhowu and Woodhouse 2005: 400; Mathieu *et al* 2003: 123), and 'idioms of tradition' together with 'the perseverance of local politics and the logic of inclusion' preclude easy assumptions as to the exclusionary outcomes of such processes (Benjaminsen and Lund 2003: 9).

The picture that emerges from these studies is thus not one of steady evolutionary change towards individualised forms of property and the disappearance of 'customary' identities and claims to land. Mathieu *et al* (2003: 126-27) suggest that where land becomes scarce and has increasing economic value, 'there is a social demand for more individualised, precise and formalised land ownership rights', but that 'this change is not so simple, not is it linear or automatic'. The process is 'totally embedded in social relationships' and hence 'contradictory, complex and ambiguous', since past meanings of land 'retain their significance in the local social reality'. Chimhowu and Woodhouse (2005: 401) acknowledge that 'the transition from the "gifts" expected as tokens of acknowledgement of customary authority and of anticipated reciprocity, to payments more closely related to exchange values of the land, is not always easy to define'. Lund (2001: 157-159) points out that formalisation of individual and private titles, as in Kenya, has not necessarily produced greater certainty and security of land rights because of a lack of social legitimacy, and that processes of 'informal formalisation' probably depend on a degree of uncertainty remaining as to the status of such transactions at the 'margins of the law as well as of customs'.

More generally, processes of change often generate resistance, contestation and the re-assertion of 'customary' claims to land. As Peters (2004: 302) suggests, (citing Woodhouse *et al* 2000: 2) they are inevitably 'uneven and contradictory' in character. 'Moreover, boundaries, physical and legal, do not automatically ensure exclusion where (some of) the excluded reject the legitimacy of the exclusion' (Peters 2004: 303). Alongside change is continuity in the nature of land rights, argued for and actively reproduced because of its advantages for many within the rural population, including, in some contexts, women (Odgaard 2003: 83). Characteristics of flexibility and negotiability, which in many places have given way to 'differentiation, displacement and exclusion', nevertheless 'remains an important asset to small-scale producers across the continent' (Peters 2004: 305-06).

Recent scholarship emphasises that while the term 'customary' is of limited use as an analytical tool, it is important to understand its deployment as a strategic resource by actors engaged in 'struggles over meaning', as one key dimension of struggles over access to and control of strategic resources such as land. Thus some features of 'customary' systems have been reinforced over time, in particular the origin of rights in recognised group membership and social identity, and the shared character of rights to a variety of resources. But this is not universally so and at some times and in some places people have sought to expand the scope

of their individual control over land, building on the socially legitimate rights of families and individuals found in many ‘customary’ systems, to the point of alienating their plots and fields and acquiring land through purchase (see Daley 2005a and 2005b for a Tanzanian case). The intersection of local processes and wider political-economic change also creates ‘opportunities for opportunists’, who sometimes appeal to ‘tradition’ as the basis for claiming land, sometimes to notions of modernisation and economic growth. Diverse outcomes are the result of the actions and interactions of the state and a range of local actors with different interests.

### **Do African land rights have ‘distinctive features’?**

The analytical literature is rich and suggestive, but what does it tell us about policy options, and in particular, about how land rights should be recognised in law? Leading scholars such as Sara Berry tend to be sceptical about attempts to redefine the legal status of land rights, and suggest instead that policy could focus on ‘strengthening institutions for the mediation of what, in changing and unstable economies, will continue to be conflicting interests’ (Berry 1990, cited in Bruce 1994). This echoes Sally Falk Moore’s call to ‘create an appropriate space where legitimate claims [can] be acknowledged’ (Moore 1998: 47). Berry asserts that

....contested claims to land both invoke historical precedents, and promote debate over their meaning. To the extent that such debates enable negotiation, their inconclusiveness may be neither economically dysfunctional (as advocates of privatisation are wont to argue) not politically disabling, but a sign that the conversation continues (Berry 2002: 654-55).

Pauline Peters (2004: 279) questions this emphasis on negotiability, suggesting that it obscures ‘for whom and with what effects “the conversation continues”’. Not everyone is able to be an interlocutor, and many lose in such negotiations and “conversations”’. However, she does not suggest alternative intervention points or strategies for policy makers or activists concerned to protect and advance the interests of the poor and vulnerable. Similarly, Chimhowu and Woodhouse (2005) do not propose ways of intervening in vernacular land markets so that they ‘work for’ the poor, although Woodhouse (2003: 1717-18) has suggested that key issues to consider are representation of the full range of land-use interests, including those of vulnerable groups such as women or pastoralists, in local institutions, the voluntary registration of rights, and oversight of decentralised institutions by central government.

But in contexts like South Africa the legal status of land rights that are very different from those protected by a dominant system of private property is an issue that cannot simply be ‘bracketed’, for all the reasons described above. Furthermore, we argue, the law, for all its limitations, does provide a potentially useful tool or resource for the poor and vulnerable who need to both protect their land rights and to use them to enhance their livelihoods (Cousins 1997). How to define and secure these kinds of land rights remains a key question for policy, and answers need to be informed by the nuanced understandings of scholarship. The question then arises: are there key features of these ‘other’ forms of land rights that can be written into law and policy – but in ways that will not merely ‘add to possibilities of manipulation and confusion’ (Shipton and Goheen 1992: 318)?

In our own contributions to debates on the Communal Land Rights Act, as described above, we have criticized the Act for entrenching ‘distortions’ of custom that will benefit traditional elites and men, weaken accountability mechanisms, and set in motion intractable disputes over the boundaries of privately owned land. This seems to imply the existence of forms of land rights that are indeed distinct and should be recognised in law.

Posing the question in this way is somewhat hazardous. Moore (1998: 39) argues that Le Roy’s attempt to define, label and model African land relations, as the basis for his critique of private property prescriptions by the World Bank, is essentialising and reductionist, ‘at quite a distance from the multiple, shifting, permutating, recombining practices of rural Africa’. This is why she prefers to stress ‘practical institutional possibilities’ (*ibid*: 47) as an entry point for intervention. Similarly, Berry has little truck with attempts to develop specific models of property and power in Africa; the only generalisations that make sense for her are those that acknowledge the multiple meanings, interpretations and claims around land and authority and the inherently dynamic character of negotiation over property and power. She allows that African societies may be distinctive, in their ‘frank acknowledgment that individual accomplishment is inseparable from interaction with others’, but stresses that this kind of comparative analysis ‘walks a fine line between specificity and essentialism’ (Berry 2001: 199-200).

In our view comparative analysis of case studies of land relations in Southern Africa reveals some broad commonalities in underlying principles that can inform attempts to secure land rights in law. These commonalities reflect ‘persistent elements and relationships’ and ‘plausible conventions and institutions’ (Guyer 2004: 6) that in many contexts ‘work’ to organise land relations and provide a degree of predictability in everyday life. They help explain the many continuities evident in land relations across time, through periods of great fluidity and instability, and may derive from what Adam Kuper, with reference to social and political structure more generally, identifies as ‘common circumstances and shared traditions’, which ‘produced a series of similar structural transformations, so that the various societies in the region can be analysed as variations on common themes’ (Kuper 1997: 74). In other words, a non-essentialising analysis of the character of land rights in Africa is possible and provides useful pointers for policy-making.

This argument is based on our recent review of the Southern African literature on land commissioned by the Legal Resource Centre (LRC), which has launched a constitutional challenge to the Communal Land Rights Act on behalf of four client communities. The review encompassed ethnographic research in different historical periods including the present, historical studies and socio-legal analysis (Cousins 2005b; Claassens 2005). Although there is clearly a great deal of variability across both time and space, what is remarkable is the presence of ‘persistent elements and relationships’ that surface again and again. (One core issue on which there is a great deal of disagreement within the literature, however, is that of the land allocation powers of traditional leaders; we discuss this in more depth below).

The review also revealed, however, that in some circumstances, such as some peri-urban areas notionally under ‘customary’ tenure, these features might *not* be found (Cross 1992). In others the open-ended dynamics of contestation and redefinition of land and authority described by Berry are more apparent. Whether or not the characteristics we identify below are present, and to what degree, are therefore empirical questions. Where these features *are*

present within ‘actually-existing’ tenure regimes, however, law and policy need to respond to them in appropriate ways.

In our attempt to make sense of a host of richly detailed case studies, we have found Okoth-Ogendo’s (1989) analytical framework to be particularly useful. He provides a persuasive analysis of the nature of property rights in Africa. 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 (ie. a ‘right’) and its *control* are distinct, and there are diverse social and cultural rules and vocabularies for defining access and control<sup>10</sup>.

In Africa, 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 organization. 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, according to Okoth-Ogendo, occurs primarily for the purposes of guaranteeing access to land for production purposes (*ibid*: 11).

In African land 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 (ie. private property), and variations in power (ie rights) derive from social relations, not the market. Rights over land are trans-generational and 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 organization (eg. allocations of arable are often controlled at the family level, while grazing is the concern of a wider segment of society (*ibid*: 11).

Using this conceptual framework, the distinctive features of African tenure regimes can be listed:

- Land rights are embedded in a range of social relationships and units, including households and kinship networks and various levels of ‘community’; the relevant social identities are often multiple, overlapping and therefore ‘nested’ or layered in character (eg. individual rights within households, households within kinship networks, kinship networks within local communities, etc).
- 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 and 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 citizenship entitlements in modern democracies.
- Access to land (through defined rights) is distinct from control of land (through systems of authority and administration).

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<sup>10</sup> See also Bennett’s (2004: 380) discussion of Allott’s analytical framework in which he distinguishes between interests of ‘benefit’ and ‘control’.

- Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access (eg. trans-generationally), and resolving disputes over claims to land. It is often located within a hierarchy of nested systems of authority, with many functions located 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.

The Southern African literature reveals also that, as elsewhere, ‘social embeddedness’ has become ever more complex in the wake of rapid socio-economic and political change, generating dynamics of contestation and negotiation over property as well as the unequal outcomes noted in recent writing. The political embeddedness of land relations is also more complex and multi-levelled than before. Discourses of ‘custom’ and ‘tradition’ are key resources for political actors, and the precise meaning of these terms is often highly contested. Where these processes have not led to radical shifts in the way that rights to land are held and exercised, however, many of the key features listed above can be observed. To illustrate, Annex 1 contains a contemporary description of land tenure in the Mkambati area of Pondoland, South Africa, the region described in Hunter’s 1930’s ethnography (Hunter 1979) and in Beinart’s (1984) historical study.

With regard to the land allocation issue, the scholarly literature contains two very different views. Some scholars (eg. Sansome 1974) assert that the primary role of authority structures was to regulate resource use and resolve disputes, but others have described land rights as deriving from allocations by chiefs acting in an ‘ownership’ or ‘trusteeship’ role. Reader (1966: 65), for example, describes Zulu land tenure rights as ‘usufructory’ and not ‘absolute’, 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 (1961: 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’, and ‘as representative of the nation, the king allots land to his people’ (*ibid*: 45)<sup>11</sup>. In contrast, Gluckman (1965: 78) asserts that the underlying principle of African land tenure is that rights to land ‘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, from the king or chief, or from such political unit as exists in the absence of chiefly authority’. According to Hunter (1979: 112-13) a chief in Pondoland in the 1930s had ‘jurisdiction over people but also over land’. When asked, a Pondo would say that an area ‘belongs to’ the paramount chief, or the chief of a district, or the name of a tribe or predominant clan, but this implied political overlordship not ‘ownership in the European sense’.

As discussed above, many historians (and some anthropologists) have suggested that the land allocation powers of chiefs were a ‘distortion’ of the early colonial period (eg. Colson 1971, Chanock 1991, Cheater 1989, Mamdani 1996, Ranger 1993). We concur with this interpretation, finding confirmation in the testimony of members of communities challenging the Communal Land Rights Act (eg. Makgobistad) that their land rights derive in the first instance from their legitimate membership of the tribe. Despite continuing ambiguities in

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<sup>11</sup> It might be significant that both the Zulu and Swazi cases involve societies in which state power became highly centralised in the period immediately before colonial subjugation.

some contexts, the contemporary South African literature<sup>12</sup> suggests that in most communal tenure situations land rights are seen as a primary entitlement of legitimate group membership, that 'allocation' is primarily an administrative procedure to ensure that the same land is not claimed by different people, and that land administration occurs largely at the local level rather than at the apex of the institutional pyramid (cf. Schapera's description of the Tswana system in the 1930s as '... one of ever-widening jurisdiction extending upwards from the household' - (Schapera 1955: 89).

Does the emergence of transactions such as land sales or rentals (within a so-called 'vernacular land market') indicate that these distinctive features have begun to erode? Not necessarily, in our view. In many cases, as Mathieu et al (2003) suggest, these transactions remain deeply socially embedded, and provide a means for outsiders to become accepted community members, with the duties and obligations that this implies, rather than indicating the effective privatisation or commodification of land. Community members sometimes bitterly resent the sale of land rights to outsiders by traditional leaders, not because transactions violate a fundamental 'customary' principle, but because they are seen as an abuse of authority and can lead to a shortage of land for the next generation. This suggests to us that regulation of 'vernacular' land markets in the interests of the vulnerable, which Chimhowu and Woodhouse (2005) suggest is necessary, could take place within a framework constructed on the basis of the key features of African land tenure identified here.

### **Beyond the 'custom vs rights' contradiction**

What are the implications of this analysis for policy? In the South African context, debates around the Communal Land Rights Act demonstrate how problematic attempts to recognise 'customary' land rights can be in practice. In a larger context where private property dominates and security of tenure is equated with exclusive ownership, but chiefs continue to be a significant political interest group, transferring private ownership to 'traditional communities' under the jurisdiction of traditional councils, and without effective mechanisms for downward accountability, threatens rather than secures the land rights of the majority. One reason, we argue, is that this approach entrenches a version of 'custom' that emerged during the colonial era, continues to lead to abuses of power, and is at odds with some of the distinctive features of African land tenure.

These features have proved remarkably resilient, and are often present even when groups no longer recognise traditional leaders, are ethnically mixed, readily accept newcomers, and are keen to assert their democratic rights as citizens of a liberal democracy (Cousins and Claassens 2005). They are persistent, but expressed in specific practices that evolve over time, and are 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 versions of 'custom', and in a manner that promotes democratic decision-making? Is there an approach that secures rights within the wide range of communal tenure situations that exist on the ground, and also allows rights-holders to adapt or alter their tenure system over time in response to changing circumstances? Relevant here are the principles set out in the 1997 White Paper. These require that the law be brought in line with *de facto* realities, but that these realities be transformed to bring them in line with

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<sup>12</sup> See Alcock and Hornby 2004; Ferguson and Sithole 2004; Hornby 2004; Liversage 1993; Sithole 2004; Zulu 1996 (for KwaZulu-Natal); Fay 2005; Kepe 1999, 2001; McAllister 2001; Ntsebeza 1999; Turner 1999 (for the Eastern Cape); Lahiff and Aphane 2000; Letsoalo 1987; Oomen 2000 (for Limpopo) and Levin and Mkhabela 1997 (for Mpumalanga).



constitutional principles of democracy and equality, and thus to include freedom of choice in relation to both land rights and the institutions that will administer those rights.

The way beyond the ‘customs versus rights’ polarity, we suggest, is to vest land rights in individual members, rather than in groups or 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’. In the South African context, for example, 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 20<sup>th</sup> 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 (eg. by keeping records, enforcing rules and mediating disputes). Accountability of these representatives would be downwards to group members, not upwards to the state. Gender equality would be a requirement before legal recognition of rights could occur.

A key question is the nature of those individual rights. We are *not* suggesting a form of individual titling, which has been so problematic in Africa, but rather a form of statutory right that is legally secure but also qualified by the rights of others within a range of nested social units, from the family through user groups to villages and other larger ‘communities’ with shared rights to a range of common property resources. Women’s rights within the family as well as other units need to be explicitly recognised. This focus on ‘socially embedded individual user rights’ is not inconsistent, we think, with the nature of such rights in African tenure systems, which are ‘everywhere both “communal” and “individual”’ (Biebuyck 1963: 55).

Another central issue is the boundaries of the relevant social units within which land rights are held, and should therefore be the key decision-making units. Again, existing practice that is socially legitimate could provide the basis for decisions by groups of rights-holders as to their social and territorial boundaries, and allow legal recognition of grounded institutional realities, within a framework that requires the democratisation of decision-making. A key requirement, however, would be recognition of the relatively flexible nature of those boundaries, depending on the resources and decisions in question, given the nested or layered character of rights to shared resources. There would thus need to be acknowledgment of the multiple ‘communities’ within which land rights are held.

This approach does not require attempts at codification of what are likely to be dynamic and changing practices of ‘actually-existing’ communal tenure. It allows the key features of property regimes that are distinct from ‘Western-legal’ regimes to be secured in law. We agree with Moore (1998) and Berry (1990) that strengthening institutional spaces for the mediation of competing claims to land is critically important, but also with Lavigne Delville (1999), Peters (2004) and Woodhouse (2003) that unequal power relations within local institutional contexts are critically important and have to be addressed. Democratising land administration requires support to be provided to rights-holders within local institutional processes, and a degree of central government oversight (Woodhouse (2003). In addition to clarifying the nature of the rights at stake, this approach could provide ‘a framework for their further evolution’ (Sawadogo and Stamm, 2000, cited by Daley and Hobley, 2005: 35).

How could these suggestions be framed in legislation and institutional design? One attempt to do so was South Africa’s 1999 Land Rights Bill, which was set aside by new political

leadership before it could be enacted<sup>13</sup>. Its main features are summarised in Annex 2. Despite some unresolved problems in the draft, we think these might be of some interest outside of South Africa.

## Conclusion

Land tenure reform remains a key policy issue in Africa, given the large proportion of the population that relies on land and natural resources for their livelihoods, and the central role that agriculture is accorded in development initiatives such as NEPAD. Recent research has revealed the exclusionary character of many current processes around land, leading to heightened social divisions and contributing to class formation. This means that the increasing vulnerability of the poverty stricken majority should be a central focus of land policies, and that democratisation of decision-making around land rights should be integral to these policies. It should also, we suggest, inform thinking about the nature of the rights to be secured.

This paper has argued that it is not enough to recognise the socially, politically and historically embedded character of land rights, or the unequal outcomes of contemporary forms of 'enclosure'. Privatisation and complete individualisation of land are uneven and contested, and in many places the nature and content of land rights remain quite distinct from Western-legal forms of property. In these situations, individual titling is not a feasible solution. If one adopts a 'rights without illusions' perspective (Hunt 1991), legal recognition of these distinctive forms of land rights can form part of a broader strategy to secure rights in reality, and must also involve support for rights holders within local institutional and political processes.

The alternative to individual titling is not a simple ratification of current systems of 'customary' land rights, which often privilege both traditional and non-traditional 'big men' (and men in general) – but is vesting rights in individuals who share rights with others within a variety of nested social units, the territorial boundaries of which vary with the resource or decision at issue, and are thus flexible. The alternative approach also involves decisions with regard to these shared and relative rights being subject to the democratic principle of downward accountability to a majority of rights-holders. This in turn implies a key role for the central state in overseeing local governance. This takes us beyond the 'custom vs rights' polarity, in a manner that accords with the perspectives of many ordinary women and men on the ground, such as members of the client communities that are challenging the constitutionality of the Communal Land Rights Act.

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<sup>13</sup> We were both members of the team that drafted the LRB, and might be seen by some as having a vested interest in promoting this particular solution and suffering from 'sour grapes' as a result of its scrapping. We continue to believe, however, that the core of the approach adopted in the draft does constitute a viable alternative to the flawed model adopted in the CLRA.

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## Annex 1: Land tenure in Mkambati, Pondoland

This description draws heavily on in-depth research into land, livelihoods and natural resources carried out by Kepe (1997; 1999; 2001; 2002) in the Mkambati area of the Lusikisiki district in Pondoland. Mkambati is located within the Thaweni Tribal Authority, headed by Chief Mhlanga, but the chief has little to do with the day-to-day administration of land or other matters. These are primarily the responsibility of lower levels of the administrative structure. The Tribal Authority is divided into six ‘administrative areas’, each under a headman (*inkosi*<sup>14</sup>). Each administrative area is in turn made up of a number of villages, which are further divided into *izithebe* or neighbourhood associations<sup>15</sup>. Each *isithebe* has a leader, a sub-headman or *unozithetyana*, who is appointed or elected by residents (ie. this is not a hereditary position). Levels of social organisation and corresponding levels of administrative authority are ‘nested’ within a hierarchy (see Table 1).

**Table 1. Traditional administrative structures in Mkambati**

Administrative level	Leadership position	Basis of authority
Thaweni Tribal Authority	Chief ( <i>inkosi</i> )	Hereditary
Administrative area	Headman ( <i>inkosi</i> , or <i>isibonda</i> )	Hereditary
Village	none	-
Neighbourhood <i>Isithebe</i>	Sub-headman ( <i>unozithetyana</i> )	Appointment or election by residents

### Land allocation procedures and tenure security

a) Married male residents of an *isithebe* are entitled to land, on the basis of their recognised community membership. Such a person makes a request to the sub-headman, who, if there is sufficient land available, decides on the size and the location of the residential plot and the fields, and informs the neighbours. No ceremony takes place and no ‘chief’s dues’ (*imfanelo zakomkhulu*) are paid. Once the land has been allocated the holder has secure rights to it, but if it is not used for a period of between 5 and 10 years it may be reallocated or claimed by another resident.

b) A man from a neighbouring village or administrative area within the same Tribal Authority area who wants to obtain land can approach the sub-headman in an *isithebe*, who informs the potential neighbours (ie. all members of the *isithebe*) of the application. The applicant is then ‘interviewed’ by residents, to decide if he is acceptable or not as a prospective member of the local community. The sub-headman also informs the headman (*inkosi*). Residents can veto the application, since, as local people express it, ‘it is the neighbours who will live with the new community member, not the sub-headman or headman’. If everyone approves the application, a day is set and a ceremony is held to ‘tie the knots’ ie. walk the boundaries of the plot and the fields and tie grass into knots to mark the corners. The newcomers provide food and drink for the neighbours of the *isithebe*. ‘Chief’s dues’ (*imfanelo zakomkhulu*) which today are usually paid in cash, usually amount to between R50 and R100 depending on the wealth status of the newcomer, but can be up to R200 for a rich person. Of this a small amount is retained by the sub-headman, and the rest goes to the headman. Occasionally payment takes the form of alcohol, which is then consumed socially by the sub-headman and headman.

<sup>14</sup> Most headmen in Pondoland are minor chiefs by birth, hence they are referred to as *inkosi*.

<sup>15</sup> *Isithebe* is the name of a grass mat used for serving food during feasts, which members of the neighbourhood may attend. Originally *izithebe* were made up of families of the same lineages, but this is no longer the case because of population mobility.

c) Land can also be purchased, either as a residential plot and fields together, or as either of these categories separately. A would-be purchaser and a would-be seller approach the sub-headman together, and if the purchaser is unknown, an 'interview' with the prospective neighbours must be held. Often the purchaser is from a neighbouring village or *isithebe* and is already known to residents. The transaction must be endorsed by both the sub-headman and the headman, who are unlikely to veto it unless the decision to sell is disputed (eg. within the family concerned). Land cannot be sold if a member of the family does not agree, or if *isithebe* members do not accept the newcomer. In the case of purchase, there is no ceremony to mark the entry of the person into the community, but a small fee must be paid to the sub-headman and the headman. Purchasers of land are seen by residents as becoming part of the local community, and newcomers who do not integrate themselves into local social relationships are complained about.

d) Women gain access to land through their husbands, or if unmarried, through their fathers, brothers or other male relatives. A husband allocates fields to his wife or wives, and their rights are secure as long as the marriage survives; if the marriage breaks down the wife has to return to her parent's home. Rights to those fields are inherited by the eldest male grandchild of the wife, since it is expected that adult sons will be allocated land of their own before their parents die. A widow is entitled to retain access to her allocated land until one of her male children or grandchildren become adults and can claim his inheritance.

### **Common property resources and boundaries**

Accepted membership and residence of a local community also entails legitimate access to common property resources such as grazing, timber, wild foods, medicinal plants, thatching grass, water, and materials for craftwork and building purposes. The outer boundary of the area within which such use is permitted is generally the administrative area. However, most such resource use takes place within the boundaries of the village, which are well known. There are less clear boundaries between *izithebe*, but co-ordination of the timing of post-harvest grazing of crop residues in arable lands takes place through the sub-headmen of *izithebe*<sup>16</sup>.

Common property boundaries are flexible and somewhat porous, both formally and informally. Use of these resources across the boundaries of administrative areas does occur, but should properly take place only after seeking the permission of residents and the endorsement of the headman. Purchase of common property resources such as river sand for building should involve payment of 'chief's dues' (*imfanelo zakomkhulu*). Informally, people wanting to gain access to high quality grazing outside their home administrative area often do so through the system of loaning cattle to other households (*ukusisa*).

Common property resources are not shared on the basis of Tribal Authority boundaries. Recently, however, the notion of sharing the benefits of 'development' amongst all Tribal Authority residents, was put forward by certain interest groups (including the chief), following a successful land claim on a neighbouring nature reserve and subsequent external investment in a coastal tourism venture. Despite opposition from the home village of those forebears who has been forcibly relocated in the 1930s, this has been accepted by government as legitimate, on the basis that in the past coastal grazing areas were used by members of the Tribal Authority as a whole.

### **The role of traditional leaders in land administration**

The Tribal Authority under the chief does not play a major role in land allocation or the management of natural resources; the sub-headman of *izithebe* are most involved, while headmen of administrative areas play a largely ceremonial role, although they are also active in dispute resolution over land (as

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<sup>16</sup> This is because members of an *isithebe* often co-operate in tasks such as ploughing and hence tend to plant and harvest their crops at roughly the same time.

well as other) matters. However, with an increase in recent years of land purchases mediated by the sub-headman and the headman, there have been new opportunities for ‘under the counter deals’ involving the payment of large sums of money, and local residents, who ‘detest corruption’, are uneasy about the role of leadership figures in such transactions.

## **Annex 2: The Land Rights Bill of 1999**

The LRB sought to provide recognition of the underlying rights of people who occupy communal areas currently registered as state land. Land rights were to be vested in the members of group systems, not in institutions such as legal entities or Tribal Authorities. Group members would have the right to choose which institution should manage and administer land rights on their behalf. Group systems had to provide ‘bottom line’ protections for their members, consistent with constitutional principles of democracy, equality and due process. Where rights are overlapping and contested, transfer would only take place after a ‘rights inquiry’, with government providing incentives to stakeholders to negotiate acceptable solutions, mainly in the form of additional land to relieve overcrowding.

Policy was initially based on a paradigm of transferring ownership from the state to its ‘rightful owners’. However, experience in pilots or test cases revealed inherent difficulties (Claassens 2000). One key challenge was how to define the ‘unit of ownership’ in communal areas: should land be transferred to ‘tribes’, or ‘nations’, often consisting of hundreds of thousands of people, or to wards, or to villages, or to groups at Tribal Authority level? Vesting land ownership in the larger group could make it difficult for smaller groups to make meaningful decisions about land within their own localities but vesting rights at the local level might deny some rights inherent in the larger group. Investigation and consultation with the prospective rights holders was necessarily resource intensive, intricate and time-consuming. They also showed that the prospect of a transfer of ownership can trigger intractable conflicts.

As a result of these difficulties policy thinking shifted moved towards a paradigm of ‘statutory rights’ which are secure but do not convey full private ownership (Claassens 2000; Cousins 2002). The LRB creates a category of protected rights for which the majority of those occupying land in the former ‘homelands’ would qualify. Rights holders would be the key decision makers on matters related to their land, and derive the full benefit from its use or transfer. The Minister of Land Affairs would continue to be the nominal owner of the land, but with strictly delimited powers. Protected rights would vest in the individuals who use, occupy or have access to land, but in group systems these rights would be subject to those shared with other members ie. individual rights would be relative to ‘group rules’, as decided upon by the majority of members. These in turn would require the definition of the boundaries of the group – also a key difficulty, as pointed out above, for the transfer of ownership’ paradigm. The solution proposed in the LRB was as follows:

*..... ‘boundaries’ must be seen as flexible. In other words, the boundary of the group would be determined with reference to who (which group of people) is affected by the particular decision. Thus, if the decision is about a change in grazing practice then the people affected by the change must be consulted, not the entire ‘tribe’ (Claassens 2000: 255).*

Protected rights, defined by statute, would thus confirm in law the rights of the 2.4 million households (the *de facto* rights holders), occupying and using land in the communal areas of South Africa, without having to first resolve, in each and every case, disputes over the extent of rights. The possible content was set out in the LRB, which specified that rights could include occupation, use, benefits and the right to evict others, and that they could be bequeathed, transacted and mortgaged. To balance individual and group rights, and to maintain a necessary element of flexibility, a local process of defining or limiting the specific detail of the content of rights would take place.

The LRB established the right of those with protected rights to choose or create their own preferred local institution for the purpose of managing land rights. Where existing local institutional structures were able to meet certain criteria (eg. majority support), they would be accredited by government, but would require support from government in order to carry out their functions. This would be provided by Land Rights Officers, who would help rights holders enforce their rights and both assist and monitor the accredited structures.

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