Part one

Introduction

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

By Ben Cousins

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A note on terminology

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

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

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

THE LEGACIES OF COLONIAL AND APARTHEID RULE

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

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

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

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

[6] See chapter 6 in this book.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

POLICY DILEMMAS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Responding to the policy dilemmas

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

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

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

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

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

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

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

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

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

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

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

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

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

The politics of policy-making

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

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

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

KEY CONTROVERSIES AND ISSUES

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

Private ownership or customary land rights?

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

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

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

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

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

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

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

The nature and content of 'customary' land rights

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Transforming gender inequalities

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

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

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

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

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

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

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

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

Land rights, authority and accountability

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

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

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

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

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

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

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

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

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

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

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

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

[19] Subsequently the Black Authorities Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

Processual or rule-bound versions of 'customary' law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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