

'Communal Land', Property Rights and Traditional Leadership

Current context – what is at stake?

The topic I was asked to address, as indicated by the title, is restricted to a discussion of land tenure, property regimes and traditional leadership in 'communal areas'. Broader issues of land reform, including redistribution, are beyond the scope of this paper and will, presumably, form the subject of other public dialogues. I have focused on questions concerning the nature of land rights within customary systems, and whether, and for whom, they create property rights.

The Constitution provides in section 25 (6) 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 tenure which is legally secure or to comparable redress. Section 25(9) provides that Parliament must enact the legislation referred to in s 26(6)

Eighteen years later however, legislation to secure the tenure rights of the 17 million South Africans living in the former bantustans is not yet in place, despite the fact that they bore the brunt of forced removals and the discriminatory Land Acts of 1913 and 1936.

The delay relates to contestation concerning the content of chiefly power over communal land relative to the rights of families and individuals who have inherited residential sites, fields and access to grazing land over generations. Various lobbies of traditional leaders including the Inkatha Freedom Party and the Congress of Traditional Leaders of South African (Contralesa) claim that title to the land in the former homelands should be transferred to them as the 'custodians of custom'. Many rural people on the other hand, insist that they are the rightful owners of the land according to both history and customary law.

Section 211 (1) of the Constitution provides that the "institution, status and role of traditional leadership, *according to customary law*, are recognised, subject to the Constitution" (emphasis added).

The content of customary law is, however, deeply disputed, both in relation to the scope of chiefly power, and to the indigenous entitlements to land vesting in individuals, families and groups. The Constitutional Court has rejected the 'official' version of customary law inherited from colonialism and apartheid as politically motivated and fundamentally distorted. It directs us to 'living customary law' based on the observation of actual and changing practice rather than the 'rules' set out in statutes such as the Native Administration

Act of 1927 and precedents handed down by the Native Appeal Court.

Apartheid laws denied black people both statutory and common-law rights to the land they occupied. People therefore need another way to show that their rights to the land in question are well established, and would be legally secure but for the impact of past discrimination. In many instances family narratives of how land rights were first acquired and passed down over generations are framed by reference to custom. The Constitution specifically recognises customary law as a source of rights. In a context where colonial and apartheid law denied black land rights, customary law provides a crucial source of countervailing rights.

The question is for whom? Much (but not all) land in the former bantustans is registered as owned by the state, which holds it 'in trust' for various groupings of African people. The 1997 White Paper on Land Policy recognised those with *de facto* occupation and use rights on that 'state land' as the underlying owners, and the Interim Protection of Informal Land Rights Act of 1996 provides that no-one can be deprived of such 'informal' land rights except with their consent or by expropriation. Since 2003, however, law and policy have come down squarely in favour of transferring title of communal land to traditional leaders and institutions, as opposed to the people who live on and work it.

Traditional leaders threatened in 2003 to boycott the forthcoming national elections because the new Traditional Leadership and Governance Framework Bill did not give them enough power. They backed down when the Communal Land Rights Bill (CLR) was amended at the eleventh hour to give traditional councils the power to represent rural communities as the 'owner of the land'. The amendment sparked an immediate outcry from rural women and land rights organisations.

Key to the controversy generated by the CLR is that the 2003 Framework Act had resuscitated the discredited tribal borders created by the Bantu Authorities Act of 1951 as the boundaries of 'communities'. The treatment of 'community' as coterminous with the apartheid map of Bantu Authorities has serious consequences for the many people and groups who were historically subsumed within apartheid-era tribal boundaries against their will. They become structural minorities in overarching 'tribes', subject to traditional leaders who are legally empowered to represent them.

Many such groups can demonstrate independent ownership rights. This includes groups who clubbed together to buy land before the enactment of the 1913 Land Act, and others who managed to buy land subsequently through exemptions from the Land Act. In some

cases, clans and other groups managed to secure recognition of elected 'Community Authorities' rather than 'Tribal Authorities' when they steadfastly rejected tribal identities during the implementation of the Bantu Authorities Act.

Such groups have been at the forefront of historical land struggles, and strongly opposed the provision in the CLRB that enabled the Minister of Land Affairs to endorse their hard-won title deeds over to larger encompassing 'traditional communities'. Title deeds acquired by groups who were granted land as a result of restitution and redistribution after 1994 were similarly put at risk of being endorsed to overarching 'tribes'. The Constitutional Court declared the Communal Land Rights Act invalid in 2010, on procedural grounds.

Opposition to the CLRA was not limited to those with independent ownership rights. People on state-owned 'communal' land argued that the Bill centralised power to 'traditional councils' in ways that undermined decision-making at family and village level. They argued that a key component of customary land rights is decision-making authority at the level of smaller social units such as families, clans and user communities. The fact that land is held and managed at different co-existing levels of social organisation encourages accountability and mediates power. When unilateral authority is vested at the apex of superimposed 'tribes', these internal balancing mechanisms are undercut.

Others who rejected the Act were groups who argued that they had been put under the wrong 'tribal' boundaries during apartheid, and groups who insisted that their customary land rights had always been based on family, community or clan rather than tribe.

Minister Nkwinti has now announced that the CLRA is being re-developed. Policies announced during 2013 re-assert its central premise – that the 'outer boundaries' of communal land will be transferred to traditional councils. Minister Nkwinti has also announced that it is inappropriate for elected land holding structures such as Communal Property Associations to own land within the former homelands, and that he is investigating legislative amendments to disestablish them retrospectively.

Alongside this we have seen traditional leaders launching restitution claims to vast swathes of 'historical tribal land' in response to the recent enactment of the Restitution of Land Rights Amendment Act, and President Zuma's encouragement to do so when he opened the National House of Traditional Leaders in DATE.

The historical determinants of the problem

State support for 'tribal control' and denial of independent land rights for rural Africans is intimately bound up with our colonial and apartheid past, and shared with other former colonies in Africa. As the Kenyan scholar Okoth-Ogendo highlights, one of the key colonial justifications for the appropriation of land in Africa was that customary systems were too 'primitive' to confer property rights. African land was therefore 'free for the taking'. Together with the denial that these systems created property rights for their members, went the colonial assumption that the only form of authority respected by, and suitable for Africans, was autocracy.

Africans were prohibited from buying and owning land independently of tribal control throughout the colonial and much of the apartheid period, with a few exceptions. The 'six native rule' stipulated that groups of six or more Africans were forced either to affiliate with existing 'tribes' or constitute themselves as tribes in order to register transfers in the Deeds Office.

Officials of the Department of Native Affairs also insisted that land purchased by Africans must be held in trust on their behalf rather than owned outright. State trusteeship of bantustan land takes a variety of forms. Trusts created for specific groups of purchasers, or for groups included in the initial schedule to the 1913 Land Act entail particularly strong rights for the beneficiaries. However land bought up for bantustan consolidation by the South African Development Trust (SADT) entails weaker rights for the beneficiaries, who were characterised as 'trust tenants'. The situation is further complicated by land deals brokered between the National Party government and various bantustan leaders during the dying days of apartheid. Swathes of land in the former Lebowa were transferred to 'tribes' headed by members of the Lebowa cabinet. Similarly the KwaZulu Ingonyama Trust Act of 1994 transferred the trusteeship of much land in KwaZulu-Natal to the Zulu King.

Notwithstanding these transfers, traditional leaders-as-trustees remain subject to various legal restraints in relation to how they treat the rights of beneficiaries, both in terms of the fiduciary duties placed on them as trustees, and in term of customary law.

There was, and is, much litigation and agitation by African owners in respect of the trusteeship restrictions placed on them at various points of time. An example of current litigation concerns the Bafokeng chieftaincy's application to court to force government to transfer title to all the land held in trust for the Bafokeng to them outright. The application is being contested by the Bafokeng Land Buyers Association that is made of the descendants of the purchasers of particular platinum-rich farms. They point out that much of the land claimed by the Bafokeng was actually purchased by independent groups and that the construct of 'tribal ownership'

hides more than it reveals about the discriminatory laws and restrictions placed on black landownership historically.

The imposition of trusteeship and tribal models arose partly from administrators viewing customary systems through the prism of European constructs of absolute ownership. Bennett suggests—as does Okoth-Ogendo—that this model disguises the real nature of indigenous land rights, which should be viewed as a ‘system of complementary interests held simultaneously.’

Distorting prisms are, however, only part of the story. There is a rich literature that describes customary law as the outcome of a conversation between colonial officials and African male elders. It was in the interests of both to elevate the power of chiefs, and downplay the rights of ordinary people, particularly women. This contributed to the idea that rights in land were a male prerogative, resulting in the denial of land and inheritance rights for women. Empirical accounts by Soga, Schapera and Hunter (among others) describe women as the owners of fields, and provide evidence of women, including single women, inheriting land from their parents.

The customary law of inheritance illustrates the consequences of the collision between political imperatives and actual practice. The reality that land is passed down over generations presents an awkward challenge to the colonial view that customary law precludes property rights. According to official customary law, land may not be bequeathed, but instead reverts to the state or the tribe on the death of the holder, which then has the power to re-allocate it. The same textbooks that propound this principle, nevertheless also describe the customary law of succession, setting out processes of devolution of houses, fields and land rights according to principles of male primogeniture.

Litigation by individuals and groups during the last century reveals both the scale of African resistance to colonial conceptions of unilateral chiefly power, and the politically instrumental reasoning applied by the courts. Time and again the courts rejected the testimony of African witnesses as inconsistent with their own assumptions about the despotic nature of chiefly power, which was used to justify the status of Governor-General as ‘supreme chief’. In the 1907 case of *Mathibe v Lieutenant-Governor* Judge Bristow finds that:

“It is hardly disputed ...that the powers exercised by chiefs .. were of a despotic character. That this despotic power included the power to remove a sub-chief at will I think cannot be doubted. I think, therefore, that this power has been transmitted from the Zulu chiefs to the late State President and the present Governor, as the paramount chiefs of this

country. That being so, I think that the Government had the power to depose Amos Mathibe at will.

A particularly contentious issue was whether chiefs had the power to transact land unilaterally, or were bound to consult and obtain the consent of all at a properly constituted general assembly or *pitso*. In the 1927 case of *Rathibe v Reid* a range of witnesses including Dr Modiri Molema, Sol Plaatje, Kgosi Darius Mogale, and the local Native Commissioner gave evidence that 'according to native law and custom' consultation and consent were required before a chief could transact land. Their evidence was corroborated by a letter from the late Basotho King Moshweshwe. The Court rejected all of this evidence. It said:

what such an astute diplomatist as Moshesh found it necessary or expedient to say under certain circumstances can hardly be taken as a sober contribution to native law and custom. There is therefore ample evidence ... that in the purchase or sale of land there is no obligation on the chief to obtain the consent of, or even to consult his people in *pitso* assembled.

Another series of cases was initiated by groups of land purchasers who had clubbed together to buy particular farms, only to find the land registered as held in trust for chiefs and tribes. Their application that the title be rectified to reflect the names of the purchasers was dismissed in the case of *Petlele v Minister for Native Affairs and Mokhatle*. Judge Bristow explained that “

if any individual or group of persons had been allowed to hold land separately from the rest of the tribe, it would have meant the destruction of the tribal system ... For these reasons I feel strongly that the conclusion must be that, under pure native law and custom ... individual ownership was unknown, and the ownership was a common ownership by the whole tribe.”

In other cases on state-held 'communal land', as opposed to purchased land, people went to court to challenge the power of chiefs to dispossess them of land rights to specific homesteads and fields. Their evidence about past practice and intricate levels of consultation and decision-making got short shrift from the Courts. In the 1954 case of *Mosii v Motseoakhumo* for example, in which a headman insisted that a chief had no right to order his removal from his homestead, the Court found that

'It is common cause that tribal land belongs to the Crown and that no member of the tribe can ever acquire ownership of any land allotted to him.'

Current contestation concerning the scope of chiefly power
'according to customary law'

Notwithstanding the overtly political judicial reasoning used to justify findings of unilateral chiefly power and 'tribal ownership' in contexts where these were vehemently disputed by African litigants and witnesses, these constructs continue to reverberate in current disputes and litigation. In defending the Communal Land Rights Act during the *Tongoane* litigation, lawyers for the Department of Provincial and Local Government supported traditional leaders in deposing to affidavits that re-iterated the old colonial premise that homesteads are not inherited over generations but revert to the chief for re-allocation on the death of the holder.

In that case, one of the litigants challenging the CLRA was the Kalkfontein community, the successors to a multi-ethnic syndicate of land buyers in 1923. In 1979 a Tribal Authority was imposed over the farm in terms of the Bantu Authorities Act of 1951, as part of the process of creating a land base for the new KwaNdebele homeland. Acting Chief Christopher Mahlangu disputed the claim of the Kalkfontein community, saying that 'the notion of freehold ownership is unknown in customary law'.

More recently the chair of Ingonyama Trust Board has refused requests for information about mining deals on 'tribal' land on the basis that ordinary beneficiaries have no legal status to request such information. He states that

'For me to even look at this further, nothing short of appropriate resolutions by each one of these Traditional Councils duly signed by each Inkosi and the authorised signatories to that TC, will do.'

Similarly, there has been a string of judgments in NW High Court granting interdicts sought by traditional leaders against groups seeking to obtain financial information about mining deals, or planning to meet in opposition to the opaque nature of such deals. The basis for granting the interdicts builds on the precedents created by the cases discussed above. They reiterate that the only people with the *locus standi* to call meetings, or represent the interests of those living in 'tribal areas', are officially recognized traditional leaders.

This interpretation of customary law was challenged and overturned in the 2013 Constitutional Court case of *Pilane v Pilane*. In the 2003 *Alexkor* judgment, the Court stressed the need to assess past laws against their overarching political objectives – including their pivotal role in racial discrimination. The Court has repeatedly warned about the dangers of viewing customary systems through the distorting

prism of western legal constructs, particularly that of exclusive ownership.

Recent policy developments

Remarkably, flawed colonial constructs of customary law have continued to be supported by the post-1994 government through litigation, policy development and the enactment of law. Perhaps most astounding is that recent law and policy re-entrenches the colonial stereotype that customary systems of land rights do not constitute property rights for their members, and that land rights inimical to tribal control do not exist, and insofar as they do, must be done away with. This has far-reaching consequences for three categories of rural people: those who managed to buy land historically despite the Land Act; those who acquired title to land through land reform after 1994; and the other 17 million rural South Africans whose land rights are subjected to ascribed tribal identities and unilateral chiefly control.

This turn of events is not restricted to South Africa. Okoth-Ogendo points out that other post-colonial African countries have retained the distortions of colonial constructs of ownership and autocratic chiefly power. These continue to play a pivotal role in justifying continuing state ownership of 'communal land' and the 'tribal' governance of rural African communities. This enables the state to use land as a source of patronage on an on-going basis, and for securing power sharing deals with specific elites in society.

Okoth-Ogendo has drawn attention to the resilience of indigenous norms and values in practice, despite the overlay of state legal systems that ignore, distort, or seek to replace them. In his view indigenous law gives real and substantive rights over land to individuals and communities. These arise from a web of reciprocal rights and obligations that bind together and vest power in community members. He differentiates between rights of access and control, explaining that access rights to land are a function of membership in the family, lineage or community maintained through active participation in processes of production and social organisation.

In his view the exercise of control over land is not monolithic but segmented, vertically and horizontally, with different functions being carried out at different levels of social organisation. He criticised the CLRA for defaulting to the ownership paradigm, thereby overriding the mutual obligations and multi-layered structures that are intrinsic to the dynamics of customary systems.

Structural problems and opportunities

One of the structural problems confronting the recognition of customary land rights is the nature of the deeds registration systems inherited from apartheid. It is designed to map exclusive ownership rights vesting in specified owners onto discrete and clearly defined parcels of land. Customary systems are more nuanced: they provide for relative rights that prioritise claims based on belonging, participation and need, over those of absent individuals. A less exact survey system, with a register of family names entitled to use and occupy the land would enable flexibility at the same time as providing much needed individual security. It would also be less expensive, and so provide a viable alternative in other contexts, such as informal settlements where the prohibitive costs associated with titling mean that no land rights whatsoever are recorded.

Van der Walt and others have shown that exclusive ownership is, in any event, an ideological construct out of touch with the social nature of property rights, which have always been regulated by the wider society to a greater or lesser extent. He describes planning regulations, servitudes, forms of social housing, sectional title and share-block schemes that contradict the ideology of exclusive ownership throughout the world. The adaptations I mention would be relevant in both urban and rural contexts, and assist in deracialising opposing constructs of ownership by providing cheaper and more flexible forms of tenure security across a range of situations.

The laws and policies introduced since 2003, by contrast, default to the rigid divide between urban and rural, modern and customary, reifying exclusive ownership for the rich, and condemning the poor to a separate and opaque 'customary law' legal universe.

Conclusion – political will

Control over land creates power over people. It also enables the monopolisation of key resources such as the valuable minerals in the former homelands, and prime tourism and development ventures. The recent Mala Mala settlement in which the Department of Rural Development and Land Reform paid a billion rand compensation to a wealthy white company to settle one restitution claim, has fuelled concerns that the land reform budget is being diverted to broker such elite alliances, under circumstances where significant kick-backs to the ANC are alleged.

Tenure reform is complicated and difficult. To succeed it needs to acknowledge and accommodate the underlying dynamics of deeply embedded constructs of family, relative rights and fairness. Customary systems of land rights have a lot to offer the rest of South African property law. They prioritise claims of need and

enable nuanced accommodations between concurrent interests in the same land. But they are inherently vulnerable because of the legal and ideological strength of common law assumptions about the dominance of western ownership models, and the plethora of statute laws that have denied and overridden them for generations. They need to be recognized and protected on their own terms. But that does not mean that they exist in a separate universe from day-to-day urban life and other law. Recent processes of rural women claiming and getting residential sites draw on and combine a range of repertoires and values, including birth right, need, community membership and equality. Living law is the local amalgamation that people create by drawing on the various legal influences and values they are surrounded by.

The South African government has, however, given up on the difficult task of trying to infuse South African property law with indigenous African values. It has rejected the post-94 rights-based approach to land reform in favour of outsourcing power and control over 17 million South Africans to traditional leaders in a context where power relations are notoriously unequal and the content of customary law deeply disputed.

Aninka Claassens

Rural Women's Action Research Programme, Centre for Law and Society, University of Cape Town.

July 2014