



CONFERENCE
Strategies to Overcome Poverty & Inequality
"Towards Carnegie III"
University of Cape Town, 3 - 7 September 2012



This paper was presented at "Towards Carnegie III", a conference held at the University of Cape Town from 3 to 7 September 2012.

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Draft conference paper
“Strategies to overcome poverty and inequality: Towards Carnegie III” (UCT, 3 - 7 September
2012)

Communal tenure reform and the politics of ‘tradition’

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INTRODUCTION

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).

Progress has been slow in all three components (Greenberg 2010), but glacial in relation to communal tenure reform. More than 18 years after the end of apartheid, government still lacks a law aimed at securing the land rights of black South Africans who live in so-called ‘communal areas’. Yet the Bill of Rights in the Constitution requires that such a law must be passed by parliament. Section 25 (6) 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 Section 25 (6)”¹. The Communal Land Rights Act (CLRA) of 2004 was government’s attempt to do fulfil its constitutional duty in relation to residents of communal areas – but the Act was never implemented, and was then struck down by the Constitutional Court in 2010. Issues of the roles and powers of traditional leaders in relation to land were central to controversies over the Act, and lay at the heart of the legal challenge too. Over the past two years further contestation over the powers of traditional leaders has occurred, this time in relation to the Traditional Courts Bill, with government and traditional leadership lobbying

¹ In relation to labour tenants and farm dwellers and workers living on privately owned land, two laws passed in the mid-1990s sought to secure their tenure: the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997.

groups on side, and a broad-based, civil society grouping, the Alliance for Rural Democracy, on the other.

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 limited capacity. In addition to the challenge of complexity, however, tenure reform is always politically contentious – partly because property rights are deeply intertwined with systems of authority, and authority involves power relations and dynamics. As Christian Lund argues, ‘struggles over property are as much about the scope and constitution of authority as about access to resources’ (Lund 2002: 11). The powers and functions of ‘customary authorities’ in relation to land are controversial in many parts of Africa, and particularly contentious is the demarcation of the jurisdictional boundaries of ‘customary authorities’ (Cousins 2007).

CHALLENGES AND DILEMMAS

Historical legacies and challenges

The key rationale for tenure reform is the need to secure black South Africans’ rights to land which were rendered insecure by past policies and practices under colonial rule and in the apartheid era. The most influential characterization of the legacies of the past which tenure reform policy has to confront are usefully summarized in the White Paper (DLA, 1997: 57–66).² 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.

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

² Sources which contain similar analyses include Adams *et al* (2000), Cross (1992) and Delius *et al* (1997).

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.

Particular problems are experienced by groups of people who purchased farms in the late 19th and early 20th centuries as a way of securing their land rights, but were not allowed ownership rights because of racial restrictions. Many of these farms were identified by the apartheid regime as 'black spots' in the 'white' countryside. Many of their owners were dispossessed through forced removals; in other cases the farms are still occupied by their purchasers but 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 allocating the purchased land to outsiders in return for payment.

Another key problem is the partial breakdown of 'group systems' of land rights. A lack of legal recognition and administrative support for such systems has sometimes led to corruption and abuse of authority by traditional leaders, sometimes challenged by civic organisations, which can lead to a vacuum in legitimate authority. One result is that 'many black tenure systems are characterized by endemic violence' (DLA, 1997: 32). The White Paper also 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. 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 unclear, and registers of rights-holders are not kept up to date. 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.

Policy dilemmas

How did the first post-apartheid government respond to these problems and challenges? The White Paper (DLA, 1997: 57–8) lists key principles to 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 ss 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 expressed a demand for title deeds demonstrating ‘full ownership’ of land rather than the conditional permits of the past. These people included 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)³ or community trusts, are also a possibility. However, demands for a ‘title deed’ by rural people often express a desire for greater security 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. Titling is no longer assumed to be the only option for tenure reform in the developing world (Wily 2011).

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 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 (Bennett 2008)?

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 involve a mix of individual

³ CPAs and community trusts are the most common form in which the beneficiaries of land restitution and land redistribution hold land.

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.

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 (Kepe 2004). 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 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.

Forced removals and evictions from farms to the former reserves' often led to situations in which rights to land are overlapping and contested. The policy dilemma is *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 must include the provision of additional land, 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.

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 practice 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’. The exercise of choice by rights-holders requires strategic interventions to create political space for free and open discussion of alternative options.

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 requires expertise on the part of implementing agencies as well as dedicated time and resources. These are often in short supply in the public service. *How can land rights be effectively secured in the short to medium term, given great complexity and limited government capacity?*

LEGISLATION: A SITE OF STRUGGLE

The Land Rights Bill of 1999

Government’s initial approach to the question of how to give full legal recognition to the rights of people in ‘communal’ areas was based on a paradigm of transferring ownership from the state to groups or individuals. A number of test cases in 1997 and 1998 revealed inherent difficulties, however (Claassens 2000: 253-54). One was how to define the ‘unit of ownership’: should land be transferred to ‘tribes’, often consisting of hundreds of thousands of people, or to a population under a chief and a designated Tribal Authority, or to smaller units such as wards or villages? Vesting land ownership in a larger group could make it difficult for smaller groups to make meaningful decisions about land within their own localities; on the other hand, vesting rights in members at the local level might deny some rights inherent in the larger group of which they form a part, such as access to shared common property resources. Test cases also showed that the prospect of the transfer of private ownership raised the stakes in tenure disputes and triggered major tensions and conflicts between competing interest groups.

As a result of these difficulties, policy thinking moved towards the creation of ‘statutory’ rights which would secure in law but would not entail the transfer of title. A Land Rights Bill (LRB) drafted in 1998/99⁴ created a category of protected rights for which the majority of those occupying land in the former ‘homelands’ would qualify (Claassens 2000: 255). Most ‘communal’ land is registered as the property of the state. The LRB envisaged clear statutory limitations on the state’s rights in respect of this land. It proposed the vesting of occupation, use, benefit and decision-making rights in a class of ‘protected’ rights holders. Critically, the bill provided that the holders of protected rights could not be deprived of land without their consent, except by expropriation, for example when land is required for public purposes, and with compensation. The Minister of Land Affairs would continue to be the nominal owner of the land, but with strictly delimited powers. Protected rights would vest in the individuals who use, occupy or have access to land, but in group systems protected rights would be relative to

⁴ I was a member of the team that drafted the Land Rights Bill. This has no doubt influenced my assessment of the Communal Land Rights Act.

those shared with other members; individual rights would thus be relative to 'group rules', as decided upon by the majority of members.

This in turn would require the definition of the boundaries of the group – a key difficulty, as pointed out above, for the original 'transfer of ownership' paradigm. The solution proposed in the LRB was as follows:

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

Statutory protected rights would secure occupation and use without having to first resolve disputes over the precise nature and extent of these rights. The minimum content of protected rights was set out in the LRB: it included access, occupation, use and benefit. The rights could be bequeathed and, potentially, transacted and mortgaged. Beyond its basic minimum content, the LRB enabled a process of group decision making with regard to augmenting the content of protected rights, in particular in respect of the ability to transact and develop land. This might result, for example, in a decision allowing internal sales of the right to homestead plots to 'community' members in a particular area, but limitations on transactions with outsiders.

The LRB proposed that people had the right to choose which local institution would manage and administer land rights on their behalf. Agreed group rules would have to provide 'bottom line' protections for members, consistent with constitutional principles of democracy, equality and due process, and rights holders and local institutions would be supported by a Land Rights Officer based in each district. Where rights are overlapping and contested due to forced removals and evictions in the past, confirmation of rights would only take place after a rights enquiry, with government providing incentives to stakeholders to negotiate acceptable solutions, mainly in the form of additional land to relieve overcrowding.

The draft LRB never saw the light of day. In June 1999 a new Minister of Agriculture and Land Affairs took office⁵, and the LRB was set aside. In her view the approach adopted was too complex and would be too costly to implement. She was in favour of a law that transferred title of state land to 'tribes' (or 'traditional communities'), allowed traditional leaders to administer land, and did not require high levels of institutional support to rights holders. Following several false starts, a Communal Lands Rights Bill was drafted between 2001 and 2003 and eventually enacted in early 2004.

⁵ Ms Thoko Didiza.

The Communal Land Rights Act of 2004

The CLRA applied to state land in the former Bantustans, as well as land acquired by and for a community through processes of land reform and currently registered in the name of a Communal Property Association or Trust. The Minister of Land Affairs could transfer title of all such land from the state to “communities”, who would own the land as juristic personalities. They would have been governed by community rules that had to be registered with the Department of Land Affairs before the juristic personality of the “community” could be recognized. Communities had to establish land administration committees, which would allocate land rights, maintain registers and records of rights and transactions, assist in dispute resolution, liaise with local government bodies in relation to planning and development, and other land administration functions. Where they existed, traditional councils established under the TLGFA would have exercised the powers and functions of such committees⁶.

“Community” was defined in the CLRA as “a group of people whose rights to land are derived from shared rules determining access to land held in common by such group”. Senior government officials stated that they viewed the population of areas under the jurisdiction of Tribal Authorities as such “communities”⁷, and this interpretation is consistent with the provision that traditional councils established under the TLGFA would have become land administration committees.

Before a transfer of land to a “community” could take place, the Minister had to institute a land rights enquiry. An official or consultant would have been appointed to investigate the nature and extent of existing rights and interests in land (including competing and conflicting rights), options for securing such rights, measures to ensure gender equality, spatial planning and land use, and related matters. After receiving a report, the Minister would have determined the location and extent of the land to be transferred.

The Minister also had to make a determination on whether or not “old order rights” (i.e. communal land rights derived from past laws and practices, including “customary law and usage”) should be confirmed and converted into “new order rights”, and determine the nature and extent of such rights. New order rights were capable of being registered in the name of a “community” or a person, but where transfer of title to a ‘community’ as owner took place, the individual new order rights were not equivalent to title. Their content was not defined in the Act. The Minister could confer a new order right on a woman, even if old order rights such

⁶ Section 21 (2) of the CLRA stated that “If a community has a recognized traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council”. However, the word “may” appears to have been permissive, enabling a traditional council to exercise the powers of a land administration committee, rather than creating any real choice for rights holders. No other provision of the Act allowed for such a choice or set out the procedures to be followed.

⁷ Dr Siphoswe Sibanda of the Department of Land Affairs, Portfolio Committee on Agriculture and Land Affairs, 26th January 2004.

as Permission to Occupy certificates (PTOs) were vested only in men. New order rights were deemed to be held jointly by all spouses in a marriage, and had to be registered in all their names.

Community rules had to be drawn up by the “community” taking transfer of land, and these would have to regulate the administration and use of communal land. Although not made explicit, it could be inferred that these rules would define the nature and content of new order rights. If consistent with the Constitution, and after considering the report of the relevant Land Rights Board, these rules had to be registered by the Director-General of the Department of Land Affairs. Prescribed, standard rules could be deemed by the Minister to be the rules of a “community” should it fail to adopt and register its own community rules. The CLRA did not specify the process whereby such rules were to be drawn up and agreed to, nor its timing (e.g. whether or not the drawing up of such rules should precede the establishment of a land administration committee).

The Traditional Leadership and Governance Framework Act of 2003

The CLRA and the TLGFA were closely inter-related. The CLRA recognized a traditional council (as established under the TLGFA) as a land administration committee. Both laws, individually and taken together, had major implications for the administration of customary law, and the links between them were a key focus in the legal challenge to the constitutionality of the CLRA.

The TLGFA aims to provide for the establishment and recognition of “traditional communities”, traditional councils, houses of traditional leaders and the Commission on Traditional Leadership Disputes and Claims. This involves identifying the roles and functions of traditional leaders and councils, and specifying their relationship with elected municipalities. Its premise, as set out in the preamble of the Act, is that the Constitution recognises customary law and the institution of traditional leadership. As a consequence, the state must “respect, protect and promote” the institution of traditional leadership, but the institution must also be “transformed to be in harmony with the Bill of Rights”, so that democratic values and governance and gender equality may be promoted and advanced⁸. It must also promote the principles of co-operative governance and fair system for the administration of justice. The Act creates a framework for provincial legislation in the seven provinces where traditional leadership is present.

A community is recognized as a “traditional community” if it observes a system of customary law and this system includes a system of traditional leadership. Such a community is required to “transform and adapt customary law and customs” so that it prevents unfair discrimination, promotes equality and progressively advances gender representation in succession to tradition a leadership⁹. Once recognised, a “traditional community” must establish a traditional council of at most 30 members, of which at least one third must be women. A minimum of 40% of

⁸ Preamble to Act 41 of 2003

⁹ Section 2 (3)

members must be elected for a term of five years, and the remaining 60% must be selected by the senior traditional leader concerned “in terms of that community’s customs”¹⁰.

Most of the functions of traditional councils listed in the Act involve assisting municipalities in the planning and delivery of integrated and sustainable development and in the provision of services, and do not involve the exercise of significant independent statutory powers in relation to local government. Traditional councils may enter a service delivery agreement with a municipality. National government and provincial governments may pass laws to provide a role for traditional leaders and councils in relation to a range of functions, including land administration¹¹, agriculture, the administration of justice, and the management of natural resources¹². In this case, government must ensure that the allocation of a role or function is “accompanied by resources and that appropriate measures for accounting for such resources” are in place¹³.

One of the functions of traditional councils is “administering the affairs of the traditional community in accordance with customs and traditions”, as well as performing functions “conferred by customary law, customs and statutory law”¹⁴. The Act does not specify such functions, however, and neither do the various provincial acts which the national framework act has given rise to.

Transitional arrangements are provided for in the Act¹⁵. Traditional leaders who are recognised as such immediately prior to commencement of the Act are accorded recognition under the Act. Similar provisions are provided for “tribes”, which are deemed to be traditional communities, and for tribal authorities, which are deemed to be traditional councils. In the case of the latter, however, one year is allowed for tribal authorities to be restructured and transformed so that one third of its members are female and 40% are elected. The Act provided they must meet the requirements within a year. However very few managed to meet this deadline, which was extended by the provincial laws (many of which were enacted in 2005) providing an additional year.

Controversies generated by the CLRA and the TLGFA

Government held that the CLRA gave practical effect to section 25 (6) of the constitution and was able to “legally recognise and formalise the African traditional system of communally held land within the framework provided by the Constitution” (DLA 2003: 19). Critics from civil society and research organizations asserted, in contrast, that the Act would “entrench the autocratic version of ‘traditional’ customary law that dominated the colonial and apartheid era” (Love 2008: xii). At the core of the debate on the Act were competing views on the content of customary rights to land in rural South Africa and on in whom powers of decision-

¹⁰ Section 3 (2)

¹¹ A key role in the administration of land rights was provided for in the Communal Land Rights Act of 2004.

¹² Section 20 (1)

¹³ Section 20 (2)

¹⁴ Section 4 (1)

¹⁵ Section 28

making over land should vest. Linked to these were contrasting views on how best to secure land rights in communal areas

The CLRA attempted to combine both land titling and recognition of customary land tenure, but critics suggested that it did so in an incoherent manner that rendered land rights less rather than more secure (Cousins 2008: 15). Individual community members would hold only a secondary and poorly defined right to land, and ownership would vest in a large group, or “community” (the population living under the jurisdiction of a traditional council) represented by a structure (a land administration committee) that would exercise ownership on behalf of the group. Where that committee was coterminous with a traditional council, its legitimacy would supposedly be drawn from custom, but adequate mechanisms to ensure a council’s accountability to community members were absent - either indigenous accountability mechanisms, or those of a more democratic character (Claassens 2008: 290).

Key controversies arose in relation to the nature and content of communal land tenure systems, with critics suggesting that the CLRA was based on a distorting and overly rule-bound interpretation. In particular, they argued, it did not adequately acknowledge the layered or nested character of land administration and focused instead on only one level of socio-political organisation, the chieftaincy. This would therefore reinforce the centralised powers over land conferred on chiefs by both colonial powers and the apartheid state, generate conflicts over boundaries and resource use, and undermine the downward accountability of land administrators (Okoth-Ogendo 2008: 106-07; Delius 2008: 234-35; Cousins 2008: 131).

Parliamentary debates led to a number of amendments to the CLRA before it was approved, and some provided for joint vesting of land rights in all spouses, as a means to achieving gender equality in land holding. According to Claassens & Ngubane (2008: 165), however, the rights of single women and female members of households who are not spouses were not addressed. The CLRA failed to engage with family-based systems of land rights and the result was to formalise rights deriving from unequal power relations, discriminatory laws and distorted versions of custom. An alternative approach to that taken in the CLRA would involve defining and securing use rights exercised by women within family and kinship networks, and strengthening the position of women within social relationships and community structures (*ibid*: 179).

Perhaps the single most controversial issue raised by the Communal Land Rights Act was the role of traditional leaders in relation to land. Together with the issue of women’s land rights, 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 focused on this issue. Delius (2008: 232) and Ntsebeza (2008: 257) argue that under the apartheid government, measures such as the Bantu Authorities Act 1951 swung the balance of power away from popular support for chiefs and towards bureaucratic control. This allowed 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 occupied by those resisting tribal authorities. Chiefs began to assert greater control over land, the powers of lower levels of political authority were diminished, and security of tenure was weakened.

Claassens (2008a: 289-90) argues that the CLRA, taken together with the TLGFA, centralised power at the level of traditional councils and made no provision for decision-making and control over land at the level of the family, the user group, the village or neighbourhood, and the clan. The laws entrenched apartheid-era distortions and undercut the mediation of power between multi-layered levels of authority, and through ongoing contestations over boundaries. This problem was compounded by the CLRA's provision that disputed tribal authority boundaries would become default community boundaries, and by the false assumption that these boundaries enclose discrete, homogenous "tribes".

Recent Constitutional Court judgments have emphasized 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, which tend to distort the underlying values that inform the "living law", which constantly adapts to changing social practice (Bennet 2008: 144). Claassens (2008b: 368) argues that there is a danger that distorted, rule-bound versions of customary law such as that found in the CLRA will close down processes of transformative social change that attempt to integrate traditional and democratic values. Process-oriented approaches, however, are potentially a way of avoiding this danger, by allowing "living customary law" to reflect the multiple voices engaged in making and contesting the content of custom.

The court challenge to the CLRA

In 2005 representatives of four rural communities launched a challenge to the constitutionality of the CLRA. These were Kalkfontein and Dixie (both in Mpumalanga province), Makuleke (Limpopo) and Makgobistad (North West). The applicants argued that far from securing their rights in the land, the CLRA made them less, rather than more secure, mainly because, together with the new Traditional Leadership and Governance Framework Act (TLGFA), it imposed apartheid-era boundaries and authority structures on them.

There were four main legal grounds for challenging the CLRA. Firstly, the applicants argued that their land tenure rights were undermined rather than secured by the Act. An intrinsic feature of systems of property rights is the ability to make decisions about the property. Under customary systems of property rights, decisions are taken at different levels of social organisation, including at the level of the family. By transferring ownership only at the level of the "community", the CLRA would undermine decision making power and control at other levels. This is particularly serious when disputed tribal authority boundaries are imposed as the "default" boundaries of communities. The end result would be that the CLRA would undermine security of tenure, in breach of section 25(6) of the Constitution.

In addition, there are many cases in which groups of people with strong property rights to the land they occupy are located within the boundaries of existing tribal authorities. Members of these groups would be deprived of their property rights if ownership of their land was vested in imposed traditional council structures, or other structures created by the CLRA.

Secondly, the applicants argued that the CLRA conflicted with the equality clause in the Constitution in relation both to gender and race. It did not provide substantive equality for rural women because it entrenched the patriarchal power relations that render women

vulnerable. The 33% quota for women in traditional councils was not sufficient to off-set this problem because such women could be selected by the senior traditional leader. Moreover, 33% was too low a quota, given that women make up almost 60% of the rural population. In addition, while the Act sought to secure the tenure rights of married women, it undermined the tenure rights of single women, who are a particularly vulnerable category of people.

The CLRA also treated black owners of land differently from white owners of land, who were not subject to the regulatory regime imposed by the CLRA. Moreover, section 28(1)-(4) of the TLGFA entrenches the power of controversial apartheid-era institutions that were imposed only on Black South Africans.

A third argument was made in relation to a fourth tier of government. The Constitution provides for only three levels of government, national, provincial and local. It was argued that the powers given to land administration committees, including traditional councils acting as land administration committees, effectively made them a fourth tier of government, in conflict with the Constitution.

Finally, the applicants argued that the CLRA was unconstitutional on procedural grounds. Since the Act had a major impact on customary law and the powers of traditional leaders, both of which, in terms of the Constitution, are functions of provincial government. Thus it should have followed the section 76 parliamentary procedure that enables discussion by and consultation within the provinces. The Constitution provides that laws that deal with provincial functions should follow the section 76 procedure and those that deal with national functions should follow the section 75 procedures. Instead it was rushed through parliament using the section 75 procedure. Because the wrong parliamentary procedure was followed, the Act was therefore invalid.

Court judgements in 2009 and 2010

Two court judgements resulted from the legal challenge. In the first, on the 30th October 2009, Judge AP Ledwaba handed down judgment in the North Gauteng High Court, Pretoria¹⁶. The judgment declared invalid and unconstitutional the key provisions of the Act providing for the transfer and registration of communal land, the determination of rights by the Minister and the establishment and composition of land administration committees. The judgment did not find the parliamentary process to have been procedurally flawed, and did not strike down the Act as a whole.

The judgment focused on the problems likely to be created should traditional councils be imposed on communities as land administration committees. It referred to key arguments made by the applicant communities in relation to the layered nature of land rights in customary systems, including those existing at family, clan, village and group levels, and the problems that are likely to arise when these rights are subjected to the control of traditional councils. According to the court, the definition of community used in the Act failed to protect the land rights of smaller or independent communities living within the boundaries of large

¹⁶ *Tongoane and others v The Minister of Land Affairs and others* (TPD 11678/2006)

traditional councils. The court focused on the example of communities, such as the Makuleke, which have won title to their land through land restitution, only to find a nearby traditional leader claiming powers of land administration over them. It found that the tenure security of such groups is rendered vulnerable by the provisions of the Act that place them in a structural minority within a larger unit.

Government appealed the High Court judgement, and the matter then went to the Constitutional Court, which struck down the CLRA in its entirety in May 2010. The court accepted the applicants' arguments on the procedural issues, and therefore did not consider any of the substantive arguments made by the applicants or contained in the findings of the High Court. Prior to the hearing, the Minister of Rural Development and Land Reform, Gugile Nkwinti, declared that government would not defend the CLRA in court since it was no longer considered to be consistent with government policy. How government now intends to approach communal tenure reform remains unclear. In handing down its judgement, the Court once again emphasized that "living customary law" must be respected and supported. It said that "the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated".

CONCEPTUALIZING 'CUSTOMARY' LAND TENURE

Underlying the fierce debates over the CLRA and the Traditional Leadership and Governance Framework Act are competing views of the relationship between custom and democracy. Some emphasize tensions between the values, practices and political identities associated with 'customary systems' and liberal democracy (Comaroff and Comaroff 2006), but others see them as potentially reconcilable (Nhlapo 1995). Government has defended the approach adopted in the CLRA as consistent with both the nature of customary land tenure and democratic rights (Sibanda 2004). Some critics have seen the CLRA and the TLGFA as a complete betrayal of democracy, and argue that attempts to reconcile custom and democratic rights are inherently contradictory (Ntsebeza 2004).

South African debates echo those in the wider African context. On one hand, recent years have seen a marked emphasis in both advocacy and state policy on recognition of 'customary' law and institutions, together with the idea of devolving responsibility for land management to local institutions. This is in large part a reaction to the evident failures of individual land titling in countries such as Kenya. On the other hand, this policy stance has been criticized for 'positing a panacea' (Daley and Hopley 2005: 34) that fails to adequately acknowledge socio-economic differentiation and the realities of local politics and power relations, within which 'the democratic substance of village governments ... is often unclear' (Daley 2005b). Disquiet over the manipulation of ideas about the 'customary' by powerful men informs Whitehead and Tsikata's view (2003: 103) that there are 'too many hostages to fortune in the language of the customary at a national level for it to spearhead democratic reforms and resistance to centralized and elite-serving state power'.

These controversies demonstrate how complex attempts to recognize 'customary' land rights can be. In a context such as South Africa, where private property dominates and security of tenure is equated with exclusive ownership, but chiefs continue to be a significant political interest group, transferring private ownership to 'traditional communities' ruled by traditional

councils, and without effective mechanisms for downward accountability, appears to threaten rather than to secure land rights. One reason, as Aninka Claassens and I have argued (Cousins and Claassens 2004), is that this approach entrenches a version of 'custom' that emerged during the colonial era, and continues to lead to abuses of power. A-historical and simplistic notions of 'customary' land tenure are clearly problematic. Are there approaches which might be more useful?

'Western-legal' regimes of private property are historically specific and the concepts and terms associated with them must be used with caution. Administrators and anthropologists in the early colonial period recognized that legal concepts and language derived from European systems of law would not be appropriate in African (and other) contexts, but did not always agree on which concepts to use in their place (Bohannan 1963; Gluckman 1965). According to Biebuyck (1963: 52) 'common general formulae like... ultimate or sovereign rights, rights of allocation or of control, or rigid oppositions between ownership, possession, use and usufruct... have often obscured understanding of the scope and nature of rights and claims relating to the land'.

Okoth-Ogendo (1989) does not rely on European legal doctrine in his persuasive analysis of the nature of property rights in Africa. In his view a 'right' signifies a power that society allocates to its members to execute a range of functions in respect of any given subject matter. Where that power amounts to exclusive control one can talk of 'ownership' of 'private property', but it is not essential that power and exclusivity of control coincide in this manner. Access to this power (ie. a 'right') and its *control* are distinct, and there are diverse social and cultural rules and vocabularies for defining access and control.

In Africa, according to Okoth-Ogendo, land rights tend to be attached to membership of some unit of production; are specific to a resource management or production function; and are maintained through active participation in the processes of production and reproduction at particular levels of social organization. Control of such access is attached to 'sovereignty' (in its non-proprietary sense) and vested in political authority over different levels of social organization and units of production. Control occurs primarily for the purposes of guaranteeing access to land for production purposes. In these land tenure regimes there is no coincidence of access and control, and property does not involve the vesting of the full complement of power over land that is possible (ie. private property). Variations in power (ie. rights) derive from social relations, not the market. Control is exercised through members of the units of production; control is not simply the product of 'political superordination' (*ibid*: 11).

I make use of Okoth-Ogendo's conceptual framework in tracing patterns of continuity and change in land tenure regimes in South Africa from the pre-colonial era through to the present. I concur broadly with his view that 'indigenous norms and structures' in relation to property have demonstrated great resilience in the face of colonial and post-colonial policies of 'subversion, expropriation and suppression' (Okoth-Ogendo 2002: 10). Building on this insight, I argue that some key underlying principles and characteristics can often be observed in land tenure regimes over time:

1. Land and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character (eg. individual rights within households, households within kinship networks, kinship networks within wider 'communities').
2. Rights are derived primarily from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including gifts, loans, and purchases).
3. Land and resource rights include both strong individual and family rights to residential and arable land and access to a range of common property resources such as grazing, forests, and water. They are thus both 'communal' and 'individual' in character.
4. Access to land (through defined rights) is distinct from control of land (through systems of authority and administration). Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access, and resolving disputes over claims to land. It is often located within a hierarchy of nested systems of authority, with many functions located at local or 'lower' levels.
5. Social, political and resource boundaries, while often relatively stable, are also flexible and negotiable to an important extent; this flows in part from the nested character of social identities, rights and authority structures.

I am aware of the dangers of 'abstracting institutions from ... specific historical circumstances...' (Kuper 1997: 74) and of Moore's (1998: 39) critique of Etienne le Roy's attempt to define and model African land relations, which she suggests is essentialist and reductionist and 'at quite a distance from the multiple, shifting, permutating, recombining practices of rural Africa'. Nevertheless, my review of the literature suggests that the general principles listed above can often be discerned, embodied within a range of contextually specific land tenure regimes, both in the past and today. The extent to which, and ways in which, these principles are found in 'actually-existing' land tenure regimes are variable, given complex histories of state interventions and diverse, adaptive responses to these interventions. In specific cases some of these characteristics may be absent altogether. Where these characteristics *are* present, however, property regimes remain distinct from 'Western-legal' forms of private property, which is why they present such a challenge to tenure reform policy.

ALTERNATIVE POLICY STANCES

These underlying principles informing African tenure regimes have proved remarkably resilient in the South African context, informing context-specific practices that evolve over time. Is there a way, then, to secure these distinctive forms of land rights without replicating problematic versions of 'custom', and in a manner that promotes democratic decision-making? Can policy both secure rights on the ground, and also allow rights-holders to adapt or alter their tenure system through deliberate choices over time in response to changing circumstances? Relevant here are the tenure reform principles set out in the South African White Paper on Land Policy (DLA 1997). These require that the law be brought in line with *de facto* realities, but that these realities also be transformed to bring them in line with

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

The way beyond the 'customs versus rights' polarity, as Aninka Claassens (2008) and I have argued, is to vest land rights in individuals rather than in groups or institutions, and to make socially legitimate existing occupation and use, or *de facto* 'rights', the primary basis for legal recognition (Cousins 2007). These claims may or may not be justified by reference to 'custom'. Rights holders would be entitled to define collectively the precise content of their rights, and choose, by majority vote, the representatives who will administer their land rights (eg. by keeping records, enforcing rules and mediating disputes). Accountability of these representatives would be downwards to group members, not upwards to the state. Gender equality would be a requirement before legal recognition of rights could occur.

A key question is the nature of those individual rights. I am *not* suggesting a form of individual titling, which has been so problematic in Africa, but rather a form of statutory right that is legally secure but also qualified by the rights of others within a range of nested social units, from the family through user groups to villages and other larger 'communities' with shared rights to a range of common property resources. Women's rights within the family as well as other units need to be explicitly recognized.

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

This approach does not require attempts at codification of what are likely to be dynamic and changing practices, but does allow the key features of property regimes that are distinct from 'Western-legal' regimes to be secured in law. Moore's (1998) and Berry's (1990) suggestions that policy must aim to strengthen institutional spaces for the mediation of competing claims to land are critically important, but so are the views of Lavigne Delville (1999), Peters (2004) and Woodhouse (2003), who emphasize that unequal power relations within local institutional contexts have to be addressed. What is 'socially legitimate' is always subject to contestation. This means that the political embeddedness of land rights must be explicitly acknowledged. Democratizing land administration will require providing support to rights-holders within local institutional processes, and a degree of central government oversight (Woodhouse (2003). In addition to clarifying the nature of the rights at stake, this approach could provide 'a framework for their further evolution' (Sawadogo and Stamm, 2000, cited by Daley and Holey, 2005: 35).

CONCLUSION

Land tenure reform remains a key policy issue across Africa, given the large proportion of the population that relies on land and natural resources for their livelihoods. It is not enough to recognise the socially and politically embedded character of land rights, or the unequal outcomes of contemporary forms of 'enclosure'. Privatization and complete individualization of land are uneven and contested, and in many places the nature and content of land rights remain quite distinct from 'Western-legal' forms of property. In these situations, individual titling is not a feasible solution. If one adopts a 'rights without illusions' perspective (Hunt 1991), legal recognition of these distinctive forms of land rights can form part of a broader strategy to secure rights through political struggle, and must involve external support for rights holders within local institutional and political processes.

The alternative to individual titling is not a simple ratification of current systems of 'customary' land rights, which often privilege both traditional and non-traditional 'big men' (and men in general) – but vesting rights in individuals who share rights with others within a variety of nested social units, the territorial boundaries of which vary with the resource or decision at issue, and are thus flexible. The alternative approach also requires that decisions concerning these shared and relative rights are subject to the democratic principle of downward accountability to a majority of rights-holders. In turn this implies a key role for the central state in overseeing local governance. This takes us beyond the 'custom vs rights' polarity, in a manner that accords with the perspectives of many of those affected, like the rural groupings who successfully challenged the constitutionality of South Africa's Communal Land Rights Act.

REFERENCES

To be added