

## **8. TENURE REFORM: THE FORMER HOMELANDS**

### ***Introduction***

This chapter addresses the first (and more contentious part) of the South African Tenure Reform Programme – in other words, tenure reform in the former “homelands”. Sections one, two and three of this chapter provide a history of the development, and account of the current, multiple systems of tenure in South Africa. These sections (particularly section two) also attempt to draw appropriate lessons (for the development of tenure reform policies in South Africa) from international tenure reform programmes.

Section one, therefore, gives a brief account of the impact of colonial and apartheid policies on the development of South Africa’s current varied and overlapping systems of land tenure, land rights, and land management. Section two evaluates whether converting to freehold tenure is an appropriate policy option for South Africa, given the varied nature of tenure systems discussed in section one. The argument in section two is based on empirical and anecdotal evidence collected from a range of countries including, Kenya, Mexico, Egypt, Botswana, Mozambique, Eritrea, Nigeria and Lesotho. Section three evaluates whether communal tenure is an appropriate policy option for South Africa. The discussion in section three includes a brief discussion on the role of traditional authorities in land policy development and implementation, as well as their current relatively “powerful” positions in rural areas, especially in terms of land allocation. The section also discusses rural South Africans’ attitude to traditional authorities.

Section four is a discussion on South African tenure reform policies and legislation (applicable to the former homelands) with emphasis on the Interim Protection of Informal Rights Act 31 of 1996, the Land Rights Bill of 1999, and the Communal Land Rights Bill of 2001. Problems relating to all three pieces of legislation, as well as to South African tenure reform in general (i.e. traditional authorities) are discussed in section four, but are highlighted throughout the chapter.

### ***1. History and current status of tenure in South Africa***

Colonial and apartheid land policies that emphasised freehold rights for some and communal and user rights for others, interacted with indigenous common property systems and resulted in varied and often overlapping tenure and land management systems. Tenure systems in post-apartheid South Africa continue to be influenced by race (i.e. former white, coloured, Indian or African areas), tradition and political struggle (traditional authorities vs. civic associations) and location (urban, rural, or former bantustan). In the former bantustans (both in the self-governing territories and on South African Development Trust land), for example, a variety of tenure systems exist, which include trust, quitrent, freehold, communal and tenancy arrangements. A minority of bantustan residents have freehold rights to land – i.e. those who were able to obtain title deeds in scheduled areas prior to 1913. Effectively, however, much of this land is used and administered as communal land.

Trust land (the greater proportion of the bantustans) originated with the 1936 Land and Trust Act, which legislated that the land be held in “trust” for Africans by the South African Bantu Trust (later the South African Development Trust). The Black Administration Act 38 of 1927 provided for the following forms of land control/tenure in the SADT areas; ownership and deeds of grant, leasehold, Permission to Occupy Certificates, building permits and trading permits.<sup>1</sup> Communal land allocation was administered on the basis of R188 regulations initiated by the apartheid government in 1969.

In the self-governing territories<sup>2</sup>, the Constitution of Self-Governing Territories Act 21 of 1971, established authorities with legislative powers regarding land registration and survey systems and provided for the transfer of control over land matters to these authorities by the South African government. The Black Administration Act 38 of 1927 provided for the registration of land titles (section 6), the substitution of title deeds (section 7), the determination of rights to land (section 8), the power to issue proclamation (section 25) and the establishment of towns (section 30) in the self-governing territories. The Act allowed two forms of tenure in the non-urban areas, quitrent (surveyed land) and Permission to Occupy (land not surveyed). The forms of tenure in the urban areas of the self-governing territories included deeds of grant, leasehold, lodgers’ permits, building permits and trading permits. Until the end of 1986, the exclusive control as well as the power to develop towns and to confer rights on individuals was exercised by the Department of Development Aid (formerly the department of Native Affairs, Bantu Administration, Plural Relations and Co-operation and Development).<sup>3</sup>

The principle mechanism of land administration and tenure, in both the self-governing territories and on SADT land, was the Permission to Occupy Certificates (PTO) system. It was a system of lesser rights to land, where land is rented for life and rent is paid to the government via homeland authorities (e.g. magistrates). Typically, the chief, the local magistrate and the Department of Agriculture all played a role in land administration. With the scrapping of racist land legislation in the early 1990s, a vacuum was created in the processes of communal land administration and allocation.<sup>4</sup> Therefore, although no longer legal, PTOs (in many cases) remain the basic system of land allocation and magistrates in some areas (Northern Province) have continued to issue PTO certificates.<sup>5</sup>

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<sup>1</sup> Olivier N & Du Plessis W, “An overview of current forms of black land tenure”, Paper presented at a conference of the Newick Park Initiative, Land Reform and Agricultural Development, UK, October 1990, Jubilee Centre Publications

<sup>2</sup> Lebowa, Kangwane, Gazankulu, QwaQwa, KwaZulu and KwaNdebele

<sup>3</sup> Olivier N & Du Plessis W, “An overview of current forms of black land tenure”, Paper presented at a conference of the Newick Park Initiative, Land Reform and Agricultural Development, UK, October 1990, Jubilee Centre Publications

<sup>4</sup> With regard to South Africa’s urban areas, the Free Settlement Areas Act 102 of 1988 lifted racial restrictions in a number of Group Areas. The Separate Amenities Act 9 of 1953 was repealed on October 30, 1990. The Group Areas Act was repealed in 1991.

<sup>5</sup> For evidence from Bophuthatswana and the former Transkei see Greenberg S, “Chaos in communal land allocation”, *Land and Rural Digest*, July/August 1999 & for details on Northern Province see Lahiff E,

Quitrent land could be granted for arable, residential, farming or trading sites by the Director General of the Department of Agriculture/ Development Aid subject to the authority of the relevant minister. The quitrent system provided holders with the right to possess land in perpetuity, but did not grant the right to alienate that land. The holder could not mortgage or sell the land, and could let land only with permission from the Chief Commissioner in the area.<sup>6</sup>

Just to give an indication of the legislative confusion that exists, in 1997, for example, approximately 32% of South Africa's population lived in the former homeland areas. Of these, 63.6% had Permission To Occupy Certificates for the land on which they lived, 26.8% lacked PTOs and a remaining 9.6% were uncertain as to whether they had PTOs or not. Approximately 56% of households had access to grazing land and 71% had access to land for agricultural purposes. Of these, approximately 78% received their land from a tribal authority and 1.8% received their land from the state.<sup>7</sup>

The legislative confusion outlined in this section of the chapter is exacerbated by overlapping claims<sup>8</sup> to land as a result of the forced removal and eviction policies of the apartheid era, which resulted in overcrowding and conflict, and which has the potential to generate more conflict and even violence. Adams et al point out that apartheid policies have generated not only overlapping "claims" but overlapping rights (i.e. original occupants with strong rights were forced to accommodate refugees who have subsequently obtained tenant rights) and that this creates an "acute dilemma" for tenure reform. The authors caution that tenure reform policies should not strengthen the rights of original occupants in a manner that leads to the eviction of later arrivals – as has been threatened in places like Phokeng, Driefontein and Mgwali in the Eastern Cape.<sup>9</sup>

Conflicting land claims, overcrowding, insecure tenure arrangements and confusing property rights hamper development and lead to tension and disputes. It is therefore imperative that a land tenure reform policy is developed that provides all South Africans with secure rights to land and which establishes an efficient and just system of land administration and allocation. Policy options include conversion to communal tenure, other systems of informal (and secure) land rights, freehold tenure or any combination of the above.

## ***2. Conversion to Freehold tenure***

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"Land Tenure in South Africa's Communal Areas: A Case Study of the Arabie-Olifants Scheme", *African Studies*, 59, 1, 2000

<sup>6</sup> Jaichand V, *Restitution of Land Rights: A Workbook*, Lex Patia, PTA, 1997, p. 13 & 14

<sup>7</sup> NLC, "Tenure Reform Media Fact Sheet", not dated

<sup>8</sup> Also see Makopi S, "Awards to provide security of tenure and comparable redress", in Cousins B (ed.), *At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century*, PLAAS, UWC, 2000

<sup>9</sup> Adams M, Cousins B and Manono S, "Land tenure and economic development in rural South Africa: Constraints and Opportunities", in Cousins B (ed.), *At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century*, PLAAS, UWC, 2000

Historically and internationally, the dominant argument appears to be that of the superiority of freehold tenure. This argument is/was made by academics, colonial authorities, African elites, the World Bank (which continues to provide funding for land titling projects in sub-Saharan and North Africa), USAID (e.g. Egypt in 2000) and other foreign aid donors. Freehold tenure is presented as a necessary condition for increased agricultural productivity, access to credit, social cohesion, political stability and environmental sustainability. It is argued that conversion to individual freehold tenure will have a positive effect on agricultural productivity because individualisation increases tenure security, which in turn provides farmers with the incentives to invest in agricultural production. On the other hand, it is argued that communal/indigenous tenure systems, developed to support subsistence agriculture, present an obstacle to agricultural development and increased productivity. Freehold tenure arguably provides individuals with surety to raise loan finance and, credit institutions will expand agricultural lending as the supply price of credit decreases because the cost of lending is reduced by improved credit worthiness and higher collateral values.<sup>10</sup> It is argued that individualisation and freehold rights lead to the development of an efficient land market, which ensures that land is passed to the most able farmers and that tribal exclusiveness is broken down.<sup>11</sup>

It is also argued that freehold tenure ensures sound and environmentally sustainable land use, while communal/traditional tenure systems are environmentally destructive. Other perceived advantages of individualised freehold tenure include, the promotion of political stability as land disputes and related litigation decrease<sup>12</sup>, the creation of a stable African middle class, viable farm sizes and decreased land fragmentation<sup>13</sup>. Finally, registration arguably provides a record of land use and ownership that enables the government to control land transactions and, for example, introduce a land tax.<sup>14</sup>

As the following discussion will show, the argument for the superiority of freehold tenure is flawed. The flaw lies in the equation of freehold tenure with secure tenure. While secure tenure may be a crucial condition for (or contributing factor to) development, investment, environmental sustainability and efficient land allocation, freehold tenure is not.

Firstly, scholars have argued that the political and/or social context has a far greater impact on productivity than formal tenure arrangements and have questioned the alleged positive correlation between freehold tenure and productivity. Basset argues that *“the notion that tenure reform is the panacea to Africa’s agrarian ills is an old idea that ignores critical social dynamics that strongly influence how productive resources are*

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<sup>10</sup> Barrows R & Roth M, "Land Tenure and Investment in African Agriculture: Theory and Evidence", Journal of Modern African Studies, Vol. 28, No.2, 1990

<sup>11</sup> The tribal exclusiveness argument was made by the post independence government in Kenya

<sup>12</sup> Peterson S, "Neglecting the Poor: State Policy Toward the Smallholder in Kenya", in Commins S.K, Lofchie M.F & Payne R (Eds.), African Agrarian Crisis, Lynne Rienner Publishers, Colorado, 1986

<sup>13</sup> This argument was made by colonial administrators in Kenya and can be found in Barrows R & Roth M, "Land Tenure and Investment in African Agriculture: Theory and Evidence", Journal of Modern African Studies, Vol. 28, No.2, 1990

<sup>14</sup> Peterson S, "Neglecting the Poor: State Policy Toward the Smallholder in Kenya", in Commins S.K, Lofchie M.F & Payne R (Eds.), African Agrarian Crisis, Lynne Rienner Publishers, Colorado, 1986

*acquired, contested and mobilised*".<sup>15</sup> The argument is that all land holding or tenure systems are embedded in social, political and economic structures that vary over time and influence the nature of agricultural production and change in any given society. This is acknowledged in the 1997 White Paper on South African Land Reform Policy, which admits that access to markets, credit and good quality land often has a more profound impact on agricultural productivity than the formal tenure system.

Secondly, communal/traditional tenure systems cannot, by definition, always present an obstacle to development. The term "traditional" is misleading since it refers neither to static arrangements nor to uniform systems of land management, use and allocation. Any tenure or land management system continually develops and adapts to changing social, political and economic environments. Furthermore, the term "communal" may refer to anything ranging from systems of group production to small-scale individual farming on land to which the farmer has user rights (which are often lifelong rights and hence imply substantial tenure security). Communal land can be owned by a community and managed by an elected committee or communal land may be held in trust for a community by a traditional/government authority.

With regard to increased agricultural production, evidence from Malawi, Kenya<sup>16</sup>, Rwanda, Mexico and Ghana<sup>17</sup> indicates that titling per se (as opposed to tenure security) had very little effect on productivity. Land reform in Mexico established four basic tenure systems. The first tenure type was parcelled ejidos where households, as part of a community, were allocated their own tracts of land - the income from which accrued to the individual households. The others were collective ejidos, small freehold farms and large private holdings. Studies comparing the productivity between parcelled ejidos and small freehold farms in Mexico, before the 1970s, reveal no significant productive difference between the two sectors.<sup>18</sup> Small-scale farmers in South Africa (Transkei), producing within the communal system were able (in some cases) to outperform (comparatively) a heavily subsidised commercial agricultural sector.<sup>19</sup> Cross & Haines<sup>20</sup> point out that other rural tenure systems open to black South Africans have not performed better in terms of agricultural production than communal land tenure systems. These include imposed tenure such as quitrent, restricted freehold tenure, trust tenure, the different kinds of mission tenure as well as freehold tenure.

With regard to the arguably positive correlation between freehold tenure and investment, research among the Embu in Kenya indicates that titling had no significant effect on agricultural investment, as funds were most often channelled into off-farm investments

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<sup>15</sup> Basset T. J., "The Land Question in Agricultural Transformation in Sub-Saharan Africa", Land in African Agrarian Systems, Basset T.J & Crummey D.E (Eds.), University of Wisconsin Press, Wisconsin, 1993

<sup>16</sup> Okoho T, "After Zimbabwe land grabbing looms in Kenya", Pan African News Agency, May 9, 2 000

<sup>17</sup> Migot-Adholla S, Hazell P, Blarel B & Place F, "Indigenous Land Rights Systems in Sub-Saharan Africa: A constraint on Productivity?", The World Bank Review, 5, 1, 1991

<sup>18</sup> Heath J.R, "Evaluating the Impact of Mexico's Land Reform on Agricultural Productivity", World Development, Vol.20, No.5, 1992

<sup>19</sup> Letsoalo E. M, Land Reform in South Africa: A black perspective, Skotaville publishers, JHB, 1987

<sup>20</sup> Cross C. R & Haines R J, Towards Freehold? Options for Land and Development in South Africa's Black Rural Areas, Juta & Co, Cape Town, 1988

such as children's' education.<sup>21</sup> Barrows and Roth's research project in Kenya found no correlation between freehold title and long-term investments. They found that farmers were just as willing to plant permanent crops before title registration as after, in an attempt to meet subsistence and cash needs.<sup>22</sup> Evidence from Mexico also illustrates that freehold tenure is not a prerequisite for investment in agriculture. The only prerequisite is that the profits from farming accrue to the farmer (as was the case in Mexico's parcelled ejidos).<sup>23</sup>

The discussion in chapter 4, drawing largely on research conducted in Kenya, indicates that conversion to freehold tenure is not a sufficient condition for improved access to credit.<sup>24</sup> Freehold tenure is one of a host of factors that enable farmers to obtain credit from commercial institutions. It appears that commercial banks in South Africa generally will not lend to farmers who do not have title deeds as collateral. The state-owned Land Bank has also been slow to lend to small-scale and emergent farmers without access to title deeds. However, even in cases where farmers have access to title deeds, commercial/formal credit institutions have been reluctant to lend to small-scale/emergent farmers because of administrative difficulties, location, lack of financial history and regular income among poor farmers and the costs to the lender in making a large number of small loans. Therefore, the failure to access credit is not so much a result of the tenure system, but rather results from the unwillingness/inability of formal and commercial credit institutions to respect, and give recognition to, alternative systems of tenure. In cases where communities express a preference for communal or any other tenure system, it is particularly important that access to credit is achieved within the system currently acceptable to that community. As discussed in chapter 4, the majority of small-scale or resource poor rural farmers and entrepreneurs access credit from informal credit sources such as family and friends or through personal savings. Establishing rural bank branches and high interest rates may therefore have a bigger impact on access to resources than conversion to freehold tenure.

The introduction of freehold tenure does facilitate the emergence of efficient land markets. Empirical evidence, however, points to questions regarding the necessity, desirability and implications of an efficient "free" market in land. Evidence from Lesotho<sup>25</sup> suggests that indigenous tenure systems are flexible and that borrowing, leasing and sharecropping arrangements meet the needs of both landless and commercial farmers. The emergence of an efficient land market, on the other hand, can lead to dispossession and further impoverishment. In fact, conversion to freehold tenure can increase social differentiation and class formation with particularly detrimental

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<sup>21</sup> Haugerud A, "Land Tenure and Agrarian Change in Kenya", *Africa*, 59, 1, 1989

<sup>22</sup> Barrows R & Roth M, "Land Tenure and Investment in African Agriculture: Theory and Evidence", *Journal of Modern African Studies*, Vol. 28, No.2, 1990

<sup>23</sup> Heath J.R, "Evaluating the Impact of Mexico's Land Reform on Agricultural Productivity", *World Development*, Vol.20, No.5, 1992

<sup>24</sup> See chapter 4 on credit for detailed account of the relationship between freehold tenure and access to credit.

<sup>25</sup> Lawry S.N, "Transactions in cropland held under customary tenure in Lesotho" in *Land in African Agrarian Systems*, Basset T.J & Crummey D.E (Eds.), University of Wisconsin Press, Wisconsin, 1993

consequences for female-headed households (see chapter ten for more on this issue).<sup>26</sup> Land activists in South Africa fear that freehold tenure could lead to widespread dispossession as those with capital purchase the land that becomes newly available on the market while impoverished Africans lose all access to land.<sup>27</sup>

Examples can be found of cases where conversion to freehold tenure and the emergence of efficient land markets resulted in dispossession. Until the introduction of Law 86 of 1992, for example, Egyptian tenants enjoyed rights to land in perpetuity. The introduction of a land market resulted in dispossession and land reverting back to the former land-owning class.<sup>28</sup> In Mexico, the land reform laws of 1856 and 1857 introduced freehold tenure and turned land into a marketable commodity. As a result, practically all formerly communal owned land went into the hands of wealthy land owners or land companies as indigenous Indian communities sold their land or mortgaged it to repay debts.<sup>29</sup>

Conversion to freehold tenure in Kenya had mixed results and, in some areas, aggravated landlessness. By 1967, Africans owned nearly 400 000 hectares of farmland<sup>30</sup> yet Europeans retained almost half of their land.<sup>31</sup> Landlessness increased partly because it resulted in land acquisition for investment or speculation purposes by the wealthy. Such acquisition took place because no restrictions were placed on the amount of land that could be held under freehold tenure. Nor was there any legislation limiting land purchase for the purposes of investment or speculation. Poverty increased partly because there were no policies or strategies in place to provide employment in urban or rural areas for former tenants and others that lost their land to wealthier investors and farmers. Policies to convert to freehold tenure also excluded certain groups who would have had access to land under customary tenure. These include former tenants, landholders who were absent when land adjudication was in progress, women and the poor.<sup>32</sup>

In Botswana, the Tribal Grazing Policy led to displacement of large groups of people because the land that was appropriated for commercial purposes was already inhabited in many cases and, because a land grab was set in motion by rich cattle owners.<sup>33</sup> In Algeria, the introduction of freehold tenure and a land market by the French colonial

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<sup>26</sup> Research from Kenya illustrates how conversion to freehold tenure did not lead to increased tenure security for women. See Chapter on Women, Patriarchy and Land Reform for more information on the impact of freehold tenure on women's ability to access land.

<sup>27</sup> Cross C. R & Haines R J, Towards Freehold? Options for Land and Development in South Africa's Black Rural Areas, Juta & Co, Cape Town, 1988

<sup>28</sup> Bush R & Szeftel M, "The struggle for land", Review of African Political Economy, 84, 2000

<sup>29</sup> Wolf E, Peasant Wars of the 20<sup>th</sup> Century, Faber & Faber, London, 1969, p. 15 & 16

<sup>30</sup> Christodoulou D, "Examples of rural movements and circumstances", The Unpromised Land, Zed Books, London, 1990

<sup>31</sup> Cloete F, "Comparative lessons for land reform in South Africa", Africa Insight, Vol.22, No.4, 1992

<sup>32</sup> Barrows R & Roth M, "Land Tenure and Investment in African Agriculture: Theory and Evidence", Journal of Modern African Studies, Vol. 28, No.2, 1990

<sup>33</sup> Roe E.M, "Public Service, Rural Development and Careers in Public Management: A Case Study of Expatriate Advising in African Land Reform", World Development, Vol.21, No.3, 1993

government in 1863 resulted in inequality, dispossession of Muslim cultivators and land acquisition by colonists.<sup>34</sup>

Tenure reform programmes that emphasise freehold tenure and land markets have also been particularly pernicious to nomadic cattle farmers. Conversion to freehold tenure systems (i.e. settlement) tends to undermine the traditional migratory patterns of nomadic groups and encroach on grazing land and water resources. Examples include Kenya<sup>35</sup> and Eritrea.<sup>36</sup> Finally, tenure reform programmes are not land redistribution programmes. As Francis and Williams argue with regard to Kenya in 1952, tenure reform was an attempt to achieve a more racially equitable distribution of land ownership “without actually redistributing white owned land”.<sup>37</sup>

Freehold tenure and the emergence of land markets are also not sufficient conditions for optimal land allocation and do not ensure that land passes into the hands of the most able farmers. Miriam Goheen<sup>38</sup> found that the emerging elite in Cameroon was able to accumulate land as a result of their influential positions in local institutions. Botswana and Kenya provide classic examples of the negative socio-economic consequences of the imposition of freehold tenure programmes that tend to serve the interests of wealthy farmers or the emerging elite. South African restitution cases have shown that private ownership of land by groups convey significant advantages to powerful and/or wealthy members of the group.<sup>39</sup> Freehold tenure also does not necessarily result in less fragmentation and more viable farm sizes. In Kenya, for example, inherited land continued to be subdivided into very small plots that are not formally registered.<sup>40</sup>

The discussion in chapters two and three (as well as the short section in chapter seven) indicates that access to sufficient amounts of land and resources (including appropriate technology) are more important factors in promoting environmental sustainability than the tenure system. Furthermore, evidence from the United States (e.g. the American Dust Bowl<sup>41</sup>), Botswana, Lesotho and Kenya (e.g. degradation of privatised rangeland<sup>42</sup>) challenges the argument that freehold tenure ensures environmentally sustainable land use. With regard to communal, traditional and/or nomadic cattle farmers, arguments that shifting cultivation is environmentally destructive can be inverted. Shifting cultivation can also be viewed as a rational and environmentally sound response to abundant land

<sup>34</sup> Wolf E, Peasant Wars of the 20<sup>th</sup> Century, Faber & Faber, London, 1969, p. 213

<sup>35</sup> Anderson M, "Kenya: Kitui District and Semi-arid lands project", Gender Roles in Development, Overholt C, Anderson M.K, Cloud K & Austin J.E (Eds.), Kumarian Press, Connecticut, 1985

<sup>36</sup> See chapter 7 on Redistribution.

<sup>37</sup> Francis E & Williams G, "The Land Question", Canadian Journal of Modern African Studies, Vol.27, No.3, 1993

<sup>38</sup> cited in Basset T. J, "The Land Question in Agricultural Transformation in Sub-Saharan Africa", Land in African Agrarian Systems, Basset T.J & Crummey D.E (Eds.), University of Wisconsin Press, Wisconsin, 1993

<sup>39</sup> See section on CPAs in chapter 6 on restitution for examples.

<sup>40</sup> Okoho T, "After Zimbabwe land grabbing looms in Kenya", Pan African News Agency, May 9, 2 000

<sup>41</sup> Bruce J.W, "Do Indigenous Tenure Systems Constrain Agricultural Development", Land in African Agrarian Systems, Bassett T & Crummey D.E. (Eds.), University of Wisconsin Press, Wisconsin, 1993

<sup>42</sup> Timberlake L, Africa in Crisis, New Society Publishers, Philadelphia, 1986

resources and, the fact that, prolonged cultivation exhausts soil in the absence of relevant technology.<sup>43</sup>

Conversion to freehold title and land consolidation also does not necessarily lead to greater political stability. In Kenya, the system of land consolidation, based on recommendations from the 1954 Swynnerton plan, was open to abuse and corruption, the consequences of which continue to plague Kenyan society today. Many Kenyans perceived the process of land registration as unfair<sup>44</sup> and disputes over land ownership and access continue. These disputes escalated into violent clashes between two “ethnic” groups in 1992.<sup>45</sup> Disputes and litigation procedures based on the way land had been allocated and registered since independence continued even in 1997 – illustrated by the conflict that broke out in the Rift Valley at the time. Ben Cousins argues that the introduction of freehold (western-style) property rights may in fact result in conflict because the titling model is inappropriate and ineffective in Africa. Cousins<sup>46</sup> argues that titling models assume that property rights are absolute or exclusive, with clear boundaries and a central registry of title deeds that provide certainty in cases of dispute. Whereas in African tenure systems land rights are shared, relative and embedded in social relationships (i.e. seek a balance between individual land rights and individual obligations to the group). The result of titling (and examples are plentiful among South Africa’s redistribution and restitution cases) is “thus to create massive boundary disputes between adjacent groups”.<sup>47</sup>

The argument that conversion to freehold tenure results in an improved and simplified system of land management and administration is also questionable. In Uganda, for example, land titling was extremely costly and the principal beneficiaries appear to have been the surveyors, accountants and lawyers involved.<sup>48</sup> Moreover, attempts to convert customary tenure systems into freehold tenure systems often complicate land management and administration. In Zimbabwe, for example, after more than 10 years of land reform and titling, Zimbabwe had individual titles in the large-scale farming sector, leases in the small-scale farming sector, communal tenure in communal areas and permits in resettlement areas.<sup>49</sup> In another example, in 1850, the Brazilian Empire defined land ownership by means of Law 601 that stipulated that land not officially registered would be considered state-owned land. Land titles were manufactured and forgeries were common, resulting in extensive confusion regarding tenure and ownership rights that

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<sup>43</sup> For more information on tenure systems and environmental sustainability see chapter 2, section on environment.

<sup>44</sup> Those with education and knowledge of the procedures required for the registration process took the opportunity to establish claims to uncultivated land.

<sup>45</sup> Francis E & Williams G, "The Land Question", *Canadian Journal of Modern African Studies*, Vol.27, No.3, 1993

<sup>46</sup> *Mail & Guardian*, “Draft land bill should be rejected”, September 20 – 26, 2002

<sup>47</sup> *Mail & Guardian*, “Draft land bill should be rejected”, September 20 – 26, 2002. Also see Claassens A, “Land Rights and Local Decision Making Processes: Proposals for Tenure Reform”, in Cousins B (ed.), *At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century*, PLAAS, UWC, 2000.

<sup>48</sup> Interview with Helena Dolny (Former Director of Land Bank), June 22, 2001

<sup>49</sup> Masoka N, “Land reform policy and strategy” in *Zimbabwe’s Agricultural Revolution*, Rukuni M & Eicher C.K (Eds.) University of Zimbabwe Publications, 1994

continue to plague Brazil today.<sup>50</sup> The Italian colonial administration encouraged various tenure systems in Eritrea until 1941 when a British colonial force took over. The British advocated individual freehold tenure further confusing tenure arrangements in Eritrea. This confusion continued under United Nations administration in the 50s and 60s and after the 1974 revolution. With independence in 1993, it was decided that a system of long-term individual user rights would be most appropriate. This tenure reform programme was still not completed in 1996 and confusion continued in many instances.<sup>51</sup>

Finally, during the period of Portuguese colonisation (1891 – 1975) and the introduction of western concepts of property rights, many Mozambicans were dispossessed and/or relocated to less fertile areas. At independence in 1975, all land was nationalised. According to the Constitution then, all land was vested in the state and could not be “sold, mortgaged or otherwise alienated”.<sup>52</sup> Yet, the Mozambican government made land concessions (agricultural, mineral, hunting, grazing, forestry and tourism) to private sector interests. The concession policy contributed to the impoverishment of the rural population and by 1994 an estimated 40 million hectares of land (half of Mozambique’s total land area) had been granted in concessions or sold to private commercial enterprises.<sup>53</sup> Furthermore, many of these concessions were poorly recorded and in many cases land became subject to conflicting land claims from local communities and new investors. Conflicts and confusion in land rights increased when the approximately 6.5 million displaced refugees of the civil war and drought returned to claim their land after 1992 (much of which had been granted to private sector interests).<sup>54</sup>

With the first democratic elections in October 1994, and the introduction of the free-market system that encouraged foreign investment, land alienation increased for poor Mozambicans as foreign investors acquired more land.<sup>55</sup> In cases where land disputes reached the judicial system (which operated according to western concepts of property rights) private interests almost always took precedence over local land rights that were based on traditional tenure systems, such as rights of occupancy.<sup>56</sup> By the early 1990s,

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<sup>50</sup> Kilerann J, "Land Reform: The Struggle Continues", Newsletter of the Inter-congregational Justice and Peace Group, Sao Paulo, May 1996

<sup>51</sup> Fullerton Joireman S, "The Minefield of Land Reform: Comments on the Eritrean Land Proclamation", African Affairs, Vol.95, 1996

<sup>52</sup> United Nations, "Ensuring small farmers access to land", Africa Recovery, 14, October 2000

<sup>53</sup> Meyers G.W, "Competitive Rights, Competitive Claims: Land Access in post-war Mozambique", Journal of Southern African Studies, Vol. 20, No.4, December 1994

<sup>54</sup> Tanner C, "The Land Question in Mozambique: Elements for Discussion", Land Tenure Service, FAO Rural Development Division, December 18, 1996

<sup>55</sup> According to Hanlon, however, land is not a scarce resource in Mozambique and “there is almost no landlessness”. According to Hanlon, claims that millions of hectares of land have been allocated to foreign companies is a “wilful misrepresentation of Mozambican law” by the “United States and the World Bank” aimed at “sowing confusion” in order to apply pressure on Mozambique to “change its Constitution to allow a switch from leasehold to a freehold system”. See Hanlon J, “Mozambique: Will growing economic divisions provoke violence in Mozambique: A case study for conflict potential”, paper presented at a workshop entitled *Conflict dynamics in Southern Africa – Early Warning in Practice*, Berne, Switzerland, Swiss Peace Foundation, Institute for Conflict Resolution ([www.swisspeace.chSDC](http://www.swisspeace.chSDC)), May 2000

<sup>56</sup> Meyers G.W, "Competitive Rights, Competitive Claims: Land Access in post-war Mozambique", Journal of Southern African Studies, Vol. 20, No.4, December 1994

over 60% of Mozambicans lived in absolute poverty.<sup>57</sup> Landlessness is a major contributing factor to widespread poverty and food insecurity in Mozambique. There have been peaceful and violent confrontations between small-scale farmers and landowners, as well as incidences of direct action (i.e. property destruction, squatting and illegal land invasions). As a result, a new land policy was adopted in September 1995, which aimed to “*create a modern legal and administrative system that can secure the diverse rights of the Mozambican people over land and other national resources*”.<sup>58</sup> In other words, a tenure reform policy that provides secure tenure, without imposing freehold or communal tenure, was adopted (similar to the tenure reform policies proposed in South Africa and discussed in section four of this chapter).

In accordance with the 1995 land policy, the 1997 Mozambican Land Law, which acknowledged customary tenure systems and which accepted verbal endorsement for land rights certification, was introduced. The 1997 Mozambican Land Law aims to protect the land rights and usage of small-scale farmers who (according to the United Nations<sup>59</sup>) constitute 99 percent of the agricultural economy in Mozambique<sup>60</sup>. In terms of the 1997 Law, the state still owns the land, but in cases of dispute verbal evidence (as opposed to previous demands for written records) is sufficient for dispute settlement. This development is important in a context where many rural families do not have access to written records, are illiterate<sup>61</sup>, or where courts and legal advice are scarce or inaccessible. The shift to verbal endorsement is also an attempt to limit (or bring an end to) the concessions made to large-scale/ commercial landowners. Furthermore, the 1997 Law recognises the rights to land of people who have occupied a particular piece of land for over 10 years, and continues the prohibition of land mortgages in an attempt to prevent land alienation.

In terms of the 1997 law, occupancy-rights are equal to formal freehold title<sup>62</sup>, which, upon enactment, improved tenure security for thousands of rural Mozambicans. In other words, the Act defines land tenure not in terms of ownership rights, but rather in terms of user rights. (Whether or not people are aware of their rights will partly determine how effective the law is. Subsequently, attempts were made to disseminate information

<sup>57</sup> Tanner C, "The Land Question in Mozambique: Elements for Discussion", Land Tenure Service, FAO Rural Development Division, December 18, 1996

<sup>58</sup> Tanner C, "The Land Question in Mozambique: Elements for Discussion", Land Tenure Service, FAO Rural Development Division, December 18, 1996

<sup>59</sup> United Nations, "Ensuring small farmers access to land", *Africa Recovery*, 14, October 2000

<sup>60</sup> Approximately 71% of Mozambicans lived in rural areas in 2000 according to Hanlon J, "Mozambique: Will growing economic divisions provoke violence in Mozambique: A case study for conflict potential", paper presented at a workshop entitled *Conflict dynamics in Southern Africa – Early Warning in Practice*, Berne, Switzerland, Swiss Peace Foundation, Institute for Conflict Resolution ([www.swisspeace.chSDC](http://www.swisspeace.chSDC)), May 2000

<sup>61</sup> Approximately 60% of people over 15, in Mozambique, are illiterate according to Hanlon J, "Mozambique: Will growing economic divisions provoke violence in Mozambique: A case study for conflict potential", paper presented at a workshop entitled *Conflict dynamics in Southern Africa – Early Warning in Practice*, Berne, Switzerland, Swiss Peace Foundation, Institute for Conflict Resolution ([www.swisspeace.chSDC](http://www.swisspeace.chSDC)), May 2000

<sup>62</sup> Also see Strasberg P J & Kloock-Jensen S, "Challenging Conventional Wisdom: Smallholder Perceptions and Experience of Land Access and Tenure Security in the Cotton Belt of Northern Mozambique", Working Paper, no. 48, Mozambique Series, University of Wisconsin, Madison, April 2002

pertaining to the law and according to Hanlon<sup>63</sup>, the 1997 Law was drafted in an “extremely open and participative way” that included two years of widespread consultation. Hanlon explains that several drafts of the law were circulated in urban and rural areas and that large public hearings were convened at which opinions were expressed that led to amendments to the law)

In terms of the Act, Mozambican individuals or communities (from differing social, economic and cultural environments<sup>64</sup>) have to register their rights, upon which certificates are issued. Communities have to establish management structures, sometimes referred to as a Land Committee. Communities can access, “own” and manage land completely independent of traditional leaders, and yet, in the Zambezia area, Norfolk at al found that land registration has occurred around “traditional groupings”.<sup>65</sup> Although the law went into effect on January 1<sup>st</sup>, 1998, the Mozambican government does not (yet) have the capacity to effectively implement or enforce these regulations.

As suggested by these examples (Uganda, Zimbabwe, Eritrea and Mozambique), conversion to freehold tenure systems do not necessarily result in more efficient or simplified systems of land management or administration. In addition, tenure policies are sometimes more like official “wish-lists” and have little relevance to, or impact on, day to day land use and management. It appears that, in a number of cases, the imposition of western (freehold) property rights has failed and that community-based systems of land management and allocation have persisted. In Kenya, after a lengthy process of land consolidation and registration (the largest titling scheme in Africa), customary laws of inheritance and succession continued to determine land control and land use. The result is a very confusing dual system of land administration.<sup>66</sup> In many areas where land was registered, day to day operations continued to take place based on principles of customary tenure and accordingly, a gap developed between what was reflected in the land register and what was recognised by communities.<sup>67</sup>

Land tenure in Nigeria (as a further example) takes three basic forms; communal, individual and public. In 1978, with the introduction of the Land Use Decree the Nigerian government tried to impose and encourage conversion to freehold title as well as increase agricultural productivity. The impact of the Decree has been minimal as a result of cultural, economic, religious and institutional factors, and communal tenure

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<sup>63</sup> Hanlon J, “Mozambique: Will growing economic divisions provoke violence in Mozambique: A case study for conflict potential”, paper presented at a workshop entitled *Conflict dynamics in Southern Africa – Early Warning in Practice*, Berne, Switzerland, Swiss Peace Foundation, Institute for Conflict Resolution ([www.swisspeace.chSDC](http://www.swisspeace.chSDC)), May 2000

<sup>64</sup> Norfolk S, Nhantumbo I, Pereira J, Matsimbe Z, “The New Communities: Land Tenure Reform and the Advent of New Institutions in Zambezia Province, Mozambique”, Sustainable Livelihoods in South Africa, Research Paper, no. 12, IDS, University of Sussex, March 2003

<sup>65</sup> Norfolk S, Nhantumbo I, Pereira J, Matsimbe Z, “The New Communities: Land Tenure Reform and the Advent of New Institutions in Zambezia Province, Mozambique”, Sustainable Livelihoods in South Africa, Research Paper, no. 12, IDS, University of Sussex, March 2003

<sup>66</sup> Dewees P.A, “Trees and Boundaries: Farm forestry, land tenure and reform in Kenya”, *Africa*, Vol.65, No.4, 1994

<sup>67</sup> Barrows R & Roth M, "Land Tenure and Investment in African Agriculture: Theory and Evidence", *Journal of Modern African Studies*, Vol. 28, No.2, 1990

practices remained almost unaffected in 1997.<sup>68</sup> In 1990, in the Oyo state, for example, only 100 formal land transactions were recorded. Clearly this is only a fraction of the total number of land sales that took place in the state.<sup>69</sup> Implementation of the Decree has also placed enormous administrative burdens on the Nigerian government resulting in bottlenecks, corruption and large-scale fraud.<sup>70</sup> In Mozambique in 1994, despite the various tenure programmes discussed above, traditional leaders continued to be the de facto managers of rural land.<sup>71</sup> In Tanzania, until the 1975 Ujamaa Village Act was passed and land rights were transferred to the government, Tanzanians had freehold land rights (as stipulated in the 1962 and 1963 Land Ordinances). Despite the land reform programme and associated legislation (including the creation of ujamaa villages) the rural and social organisation of Tanzania had not changed fundamentally by the late 1970s.

Introducing freehold tenure is extremely expensive, administratively difficult and time consuming. In South Africa, the cost of surveying and registering all land in the former bantustans would be exorbitant and it is unlikely that the South African government, given financial and capacity constraints, will be able either to afford, or implement, such a programme at a sufficiently rapid pace. Individuals could shoulder the costs but this would not be viable for the poor majority. In fact, tenure test cases embarked on by the DLA, in 1996 and 1997, indicated that replication on a large-scale would “overwhelm” the department.<sup>72</sup> Furthermore, one of the reasons for the shelving on the 1999 Draft Land Rights Bill (discussed in the following sections) was the fact that the Bill was very “complicated” and posed major administrative and budgetary challenges to a department that was already crippled by a lack of resources.

Moreover, communities and individuals often perceive customary tenure systems as the most effective systems in meeting their needs and providing them with secure access to land. Accordingly, communities often resist imposed changes to customary tenure systems. In the late 1970s, for example, the World Bank and USAID embarked on a programme to convert customary tenure systems in Lesotho to freehold systems. The Basotho leadership resisted these changes, arguing that other factors, such as low product prices, were more important in determining agricultural productivity and, that the poor would not be able to access land through a land market.<sup>73</sup> Similar evidence emerges from attempts to implement the 1978 Land Use Decree in Nigeria, where 56% of survey respondents were opposed to the Decree.<sup>74</sup>

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<sup>68</sup> Arua E.O & Okorji E.C, "Multidimensional analysis of land tenure systems in eastern Nigeria", Land Reform Bulletin, 1997

<sup>69</sup> Williams D.C, "Measuring the impact of land reform policy in Nigeria", Journal of Modern African Studies, Vol.30, No.4, 1992

<sup>70</sup> For a detailed account see Williams D.C, "Measuring the impact of land reform policy in Nigeria", Journal of Modern African Studies, Vol.30, No.4, 1992

<sup>71</sup> Tanner C, "The Land Question in Mozambique: Elements for Discussion", Land Tenure Service, FAO Rural Development Division, December 18, 1996

<sup>72</sup> Interview with Ben Cousins, (Director PLAAS), July 2, 2001. Also see section four of this chapter.

<sup>73</sup> Lawry S.N, "Transactions in cropland held under customary tenure in Lesotho" in Land in African Agrarian Systems, Basset T.J & Crummey D.E (Eds.), University of Wisconsin Press, Wisconsin, 1993

<sup>74</sup> Williams D.C, "Measuring the impact of land reform policy in Nigeria", Journal of Modern African Studies, Vol.30, No.4, 1992

No tenure reform programme can be successful unless the people that the programme is likely to affect support it. Furthermore, the South African Constitution and the Bill of Rights guarantees the right of individuals and communities to choose the tenure system they perceive as most appropriate. These rights must be recognised and protected, even in cases where communities support the continued role of traditional authorities in land allocation and management. Conversion to freehold tenure is not a prerequisite for economic development, equitable access to land or environmental sustainability. The crucial condition is secure tenure (and where the benefits of investment accrue to the land user) irrespective of the tenure system opted for.

### ***3. Informal land rights, Communal Tenure and Traditional Authorities***

*“I think that we have not even begun to sort out the policies between chiefs and land; that nightmare is still going to hit us. There is power in owning land and power and politics play a huge role in land relationships”.*<sup>75</sup>

In designing an appropriate tenure policy that promotes development and protects human rights (including gender rights and protection against abuse of power by the rural elite) a number of questions need to be answered. First, what is communal tenure? Second, what is the nature of communal tenure in South Africa? A third issue relates to the role and political power of traditional authorities in South Africa. Including the relationships between traditional authorities and land administration, traditional authorities and local government and traditional authorities and development. One relationship that is not discussed in any detail in this chapter, is the relationship between (or the impact of) traditional authorities and (on) women, in terms of access to and control of land. (This discussion takes place in chapter ten). Fourth, what are peoples’ divergent attitudes to communal tenure and traditional authorities? Finally, what are the benefits of communal tenure? Answers need to be framed within the context of the right of potential beneficiaries to choose the tenure system under which they prefer to live and produce and, the legal recognition of communal tenure.

Although “traditional” and/or communal tenure systems in Africa and South Africa are very diverse,<sup>76</sup> traditional authorities came to play a central role in the South African bantustans - particularly with regard to land administration and allocation. In communal tenure systems, land ownership is defined in terms of user and not exclusive ownership rights. Generally, ownership is vested in the chief/traditional authority who acts as a “trustee” of the community’s land and has the responsibility to distribute it. The chief generally distributes land parcels to headmen who, in turn, distribute the land to household heads. The household head has the responsibility to distribute the land among household dependants. In principle, all members of the community could claim rights to land. A chief or his representative allocates land to an individual on a semi-permanent rights basis (the only real limitation is that the land cannot be sold). Generally land is allocated to individuals for agricultural and residential purposes, while land for grazing

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<sup>75</sup> Interview with Durkje Gilfillan (Former Land Claims Commissioner), June 1, 2001

<sup>76</sup> Some traditional authorities were, and are, openly autocratic while others were more consultative (at least as far as men are concerned).

and hunting remains a communal resource.<sup>77</sup> In other words, communal tenure does not necessarily imply communal or collective production, nor does it imply that decisions regarding land use are made communally.

Although the communal land tenure system in South Africa was greatly altered by colonialism and apartheid, the system is still prevalent in various forms. A South African example of the communal land tenure system can be found among the Bafurutse ba Braklaagte who have lived on a farm in the Western Transvaal since 1909. The land is registered in the name of a chief who holds the land in trust for the community. The process of land allocation at Braklaagte follows the same complex procedure. There is a hereditary chief who governs with the assistance of a council of elders (kgotla). There are also extended family groups (kgoros) through which the kgotla communicates. A large portion of land is put aside for each of the kgoros and the allocation to families is the responsibility of the kgotla representing that particular group of families. Each family has access to residential and agricultural land. Grazing land remains a communal resource. Inheritance is along male lines, usually from the father to the oldest son.<sup>78</sup> In essence, the individual's entitlement to land in communal tenure systems is related to his/her membership of a social and political community.

In early 1990, at an ANC Agricultural Training Workshop in Lusaka, Pallo Jordan said: *"A complicating factor in the solution of the land question is the role Pretoria has assigned to the chiefs and bantustan authorities. Land, its availability and the manner of its distribution are central concerns of the African population in the Bantustans. The conflictual relationship the bantustan system has interposed between chiefs and their subjects undermines all efforts to forge unity among the disparate social and political forces opposed to Apartheid. Are the collaborationist chiefs deserving of the allegiance of their subjects? Should this institution itself be retained in post-apartheid South Africa"*.<sup>79</sup> Despite legislation and legal guarantees provided in the 1996 constitution, this issue remains unresolved in practice.

About 40% (17 million) of the people of South Africa and 17% of its territory are effectively ruled by traditional leaders.<sup>80</sup> In KwaZulu-Natal, traditional leaders control 50% of the land.<sup>81</sup> Systems of traditional authority have a complex history that influences the role of traditional authorities in a democratic South Africa. Under colonial governments many African chiefs and authorities were co-opted and used to maintain control over Africa's indigenous people. In South Africa, this was taken a step further when the Apartheid government proceeded to manipulate the institutions of traditional authority to fit, and in many cases sustain, the racial separatist ideology of Apartheid. The Apartheid regime co-opted and perverted indigenous systems of chiefly governance for its own ends, ruling the bantustans through chiefs who were willing to collaborate. *"In turn, many chiefs perverted indigenous concepts of their role in land management*

<sup>77</sup> Letsoalo E. M, *Land Reform in South Africa: A black perspective*, Skotaville publishers, JHB, 1987

<sup>78</sup> TRAC, *Botho Sechabeng: A Feeling of Community*, Marshalltown, 1992

<sup>79</sup> Dolny H, *Banking on Change*, Penguin Books, South Africa, 2001, p. 36 - 39

<sup>80</sup> Bekker J.C, "Tribal government at the crossroads", *Africa Insight*, vol. 21, 2, 1991

<sup>81</sup> *Mail & Guardian*, "Rural land restitution goes for broke", June 14 – 20, 2002

*with their own conflation of ownership and governance. They claimed, and some continue to claim, that the land they administered was their personal property, to be allocated to their subjects at their personal discretion.*<sup>82</sup>

By the 1980s, it was widely assumed (including within the ANC) that the institution of traditional authority would not survive in a post-apartheid South Africa. It was also in the 80s and 90s that mass rural mobilisation emerged with traditional authorities as a target. The UDF and civic organisations played a major role in this mobilisation. The reintegration of the bantustans into the new South Africa was also expected to reduce the role and influence of traditional authorities in terms of land allocation, local government and dispute settlement. There is evidence (in the Eastern Cape for example) indicating that traditional authorities are losing power and are increasingly marginalised (e.g. their access to government has been reduced and traditional leaders are forced to accept decisions made by women in relatively powerful positions as gender equality increases).<sup>83</sup> Others<sup>84</sup> argue that apartheid policies such as forced removals, which led to overcrowding in the former homelands, undermined the power of traditional authorities (especially with regard to land allocation) as disputes and settlement rates increased. In some cases land allocation has been taken over by alternative structures such as warlords in the Durban and Pietermaritzburg peripheries, or civic associations in the former Ciskei, parts of the Transkei and ThabaNchu.<sup>85</sup>

A study of Rakgwadi in the Northern Province, where the National Party transferred land title to the Matlala “tribe” shortly before the 1994 elections, also indicates the decreasing influence of traditional leaders between 1986 and 1994. Claassens<sup>86</sup> found that the “tribal” system of land administration changed significantly in the period following the 1986 uprisings against traditional authorities. She argues that some of the changes to traditional practices (particularly excessive levies, free labour and gender discrimination) were won by direct confrontation. Other liberalising changes were the result of a changing society. In Rakgwadi, chief Matlala lost power with the change of government because he lost access to state power, privileged access to key resources as well as political influence. As Claassens explains, *“once repressive laws and police and military back-up are no longer available to enforce unpopular measures, the only way that a system structured around participation and levies can survive is if it is sufficiently legitimate. Systems, which do not enjoy sufficient legitimacy, are unable to collect levies. Without levies, the system as a whole cannot operate effectively because the government salaries provided to chiefs and tribal secretaries are insufficient to sustain institutions*

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<sup>82</sup> Turner S & Ibsen H, “Land and agrarian reform in South Africa: A Status Report”, Occasional Paper Series, PLAAS, UWC, November, 2000, p. 20

<sup>83</sup> Peires J. B, “Traditional Leaders in Purgatory: Local government in Tsolo, Qumbu and Port St. Johns, 1990 – 2000”, *African Studies*, 59, 1, 2000

<sup>84</sup> Independent Project Trusts, *Traditional Leaders: A KwaZulu-Natal Study 1999 – 2001*, Durban, 2002, p. 101 & Vaughan A & McIntosh A, The role of traditional leaders in land development, paper prepared for the National Development and Planning Commission, October 9, 1998

<sup>85</sup> Vaughan A & McIntosh A, The role of traditional leaders in land development, paper prepared for the National Development and Planning Commission, October 9, 1998

<sup>86</sup> Claassens A, “It is not easy to challenge a chief: Lessons from Rakgwadi”, Research Report no.9, PLAAS, October 2001, p. 38

*such as the court, nor can they maintain the network of headmen that are the eyes and ears of the chief at the village level. It is this village level network, particularly with regard to land allocation that is critical to the survival of the tribal system”.*<sup>87</sup> In other words, without repressive support, chiefs have no option other than to increase the legitimacy of their governance by being more responsive to the views and needs of their communities/ subjects. (What is particularly interesting about the Rakgwadi case, as discussed later in this chapter, is the fact that the transfer of title to the tribe – understood by beneficiaries as transfer of title to chief Matlala – has once again increased the chief’s control over the community. Transfer of title has allowed him to “revert to his previously autocratic style of operating”.<sup>88</sup>)

In any event, the system of traditional authority survived and traditional authorities continue to play an important role in land allocation. In many cases, developers and local government officials still cannot access land without permission from chiefs.<sup>89</sup> Kessel and Oomen<sup>90</sup> argue that this survival is the result of an institution that was able to adapt to changing circumstances by shifting alliances. By the late 1980s, for example, chiefs were re-orientating themselves towards the ANC. The Congress of Traditional Leaders in South Africa (Contralesa) established in 1987, by a group of traditional authorities from KwaNdebele who were opposed to the declaration of bantustan independence, played a critical role in giving legitimacy to traditional authorities. When transformation seemed inevitable in the late 1980s and early 1990s, large numbers of formerly discredited traditional authorities also joined Contralesa and eventually came to dominate the organisation.<sup>91</sup> The ANC accepted this shift in an attempt to form a broad alliance, in order to isolate the IFP<sup>92</sup> and, because of the support that traditional leaders and their followers could provide during South Africa’s first democratic elections. This acceptance also reflects a certain ambiguity in ANC policy,<sup>93</sup> as well as, the emphasis that the IFP placed on a continued role for traditional leaders during the negotiations.

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<sup>87</sup> Claassens A, “It is not easy to challenge a chief: Lessons from Rakgwadi”, Research Report no.9, PLAAS, October 2001, p. 39

<sup>88</sup> Claassens A, “It is not easy to challenge a chief: Lessons from Rakgwadi”, Research Report no.9, PLAAS, October 2001, p. 43

<sup>89</sup> Oomen B, “We must not go back to our history: Retraditionalisation in the Northern Province”, African Studies, 59, 1, 2000

<sup>90</sup> Kessel I & Oomen B, “One chief, one vote: The revival of traditional authorities in post-Apartheid South Africa”, African Affairs, 96, 1997

<sup>91</sup> Ntsebeza L, Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa, PLAAS, 1999

<sup>92</sup> Oomen B, “We must not go back to our history: Retraditionalisation in the Northern Province”, African Studies, 59, 1, 2000

<sup>93</sup> Some leaders in the ANC see traditional leaders as a legitimate and authentic institution, while others at central and branch levels have clashed with chiefs – for details see Levin R & Weiner D (Eds.), Community perspectives on land and agrarian reform in South Africa, MacArthur Foundation, Illinois, 1994. Also see Claassens A, “It is not easy to challenge a chief: Lessons from Rakgwadi”, Research Report no.9, PLAAS, October 2001, p. 91. There are also provinces where the provincial legislatures and MECs have taken a strong anti-chief position in the past. In the North West and the Eastern Cape, for example, legislation was introduced that significantly curtail the powers of chiefs. These are both provinces that are controlled by the ANC. This ambiguity is also highlighted by the official reaction to former Transkei Prime Minister and President, Chief Kaiser Matanzima’s death and the furore about a State

Traditional authorities also successfully used constitutional and other legal guarantees to ensure their political future. Traditional authorities were excluded from the first round of CODESA negotiations in 1991 but were included in the 1992 round. They were invited because the ANC wanted to encourage the IFP to participate in the negotiations and also did not want to alienate influential traditional leaders before the elections. Traditional authorities retained significant power and were sufficiently organised to influence negotiations and subsequent policies. Apart from Contralesa, the National Council of Traditional Leaders and the Provincial Houses of Traditional Leaders played a role. For example, traditional leaders were able to prevent the publication of the White Paper on Local Government until an extensive section on the importance of the institution of traditional authority was included.<sup>94</sup> Opposition from traditional authorities also contributed to the shelving of the 1999 Draft Land Rights Bill. As a consequence, the Interim and 1996 Constitutions recognised the institution of traditional authority without clearly setting out their role and powers in post-apartheid society. The constitution does however limit the power of traditional authorities to “*customs and traditions in communities observing a system of customary law*”, where all powers must be performed subject to the Constitution.<sup>95</sup>

Much of the confusion in the tenure reform programme is caused, and increased, by the lack of clear government policy with regard to traditional authorities. The ANC government remains ambiguous and traditional authorities a powerful lobby group. In the meantime, traditional authorities are receiving salaries and benefits (worth R32 million in 1999).<sup>96</sup> Another reason is that in many areas, given the absence or weak nature of alternative structures of government and land allocation, traditional authorities remain, for most people, the only access point to land, pensions, dispute resolution and other services. Newly elected local rural councils as well as rural magistrates were unable to perform their functions effectively, partly due to capacity constraints and partly because of a lack of skills. However difficult it may be to obtain land through traditional authorities, the process is probably less complicated and expensive than acquiring land through the formal process.<sup>97</sup>

In addition, according to Adams et al, there are long-standing disputes between provincial and local governments and traditional authorities, about who owns (and controls) land. The authors maintain that traditional authorities see local government (developmental) initiatives as “undermining pre-existing rights”, while local governments view traditional authorities as obstacles to development. Neither local government, nor traditional

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burial. See SABCnews, “No state funeral for Matanzima”, June 19, 2003 & SABCnews, “Matanzima reaches his final burial place”, June 22, 2003

<sup>94</sup> Oomen B, “We must not go back to our history: Retraditionalisation in the Northern Province”, *African Studies*, 59, 1, 2000

<sup>95</sup> Ntsebeza L, Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa, PLAAS, 1999

<sup>96</sup> Ntsebeza L, Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa, PLAAS, 1999

<sup>97</sup> Independent Project Trusts, Traditional Leaders: A KwaZulu-Natal Study 1999 – 2001, Durban, 2002, p.

authorities, however, consider the occupants of the land in question as “decision-makers”.<sup>98</sup>

The principle function and source of power of traditional leaders in rural areas is the administration and allocation of land. Traditional authorities stand to lose a great deal of power and political influence should they lose control over land administration and allocation. As Vaughan and McIntosh<sup>99</sup> argue, traditional authorities see attempts to wrest land allocation functions from their control as “institutional suicide”. The fact, that control of access to land is also a source of income<sup>100</sup> for traditional leaders, is likely to harden their attitude against conversion to individualised freehold tenure. In response, therefore, to the DLA’s Tenure Reform Policy, the KwaZulu-Natal House of Traditional Leaders was unequivocal that land belongs to traditional authorities and that title deeds should be registered in their names. Similar (though less forceful) views were expressed in the Eastern Cape.<sup>101</sup> Others, like Nkosi Khayelihle Mathaba in KwaZulu, “*would rather die than give up his birthright*”.<sup>102</sup> His “birthright” consists of 6 000 hectares of land and a population of approximately 120 000. There are exceptions, however, such as Chief Zibuse Mlaba, of the KwaXimba community in KwaZulu, who argues for the introduction of individual freehold tenure.<sup>103</sup>

The continued role that traditional authorities play in land allocation is the result of the fact that some of the apartheid era legislation outlined in section one of this chapter, notably Proclamation R188 of 1969, are still in place. And, further, because the systems of administration and record keeping are not only different and/or administered by different authorities in each of the former homelands, but is also in the process of breaking-down, which according to Adams et al, indicates the possibility of a “general collapse in rural governance”.<sup>104</sup> Adams et al argues that current systems of land management are so “dysfunctional that *“people are often confused about what institutions and laws affect them”*”.<sup>105</sup> Such confusion in land administration is obviously a source of tenure insecurity and tenure insecurity (as discussed in section two of this chapter) is detrimental to economic development. Neither government, nor private business interests, nor rural inhabitants are likely to invest if they do not expect to see a return on their investments.

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<sup>98</sup> Adams M, Cousins B and Manono S, “Land tenure and economic development in rural South Africa: Constraints and Opportunities”, in Cousins B (ed.), At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century, PLAAS, UWC, 2000

<sup>99</sup> Vaughan A & McIntosh A, The role of traditional leaders in land development, paper prepared for the National Development and Planning Commission, October 9, 1998

<sup>100</sup> New applicants have to pay or provide gifts of a varied nature or cost in order to obtain access to land.

<sup>101</sup> Ntsebeza L, Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa, PLAAS, 1999

<sup>102</sup> Payne H, “Sons of the soil stake a claim”, Financial Mail, March 13, 1998

<sup>103</sup> Payne H, “Sons of the soil stake a claim”, Financial Mail, March 13, 1998

<sup>104</sup> Adams M, Cousins B and Manono S, “Land tenure and economic development in rural South Africa: Constraints and Opportunities”, in Cousins B (ed.), At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century, PLAAS, UWC, 2000

<sup>105</sup> Adams M, Cousins B and Manono S, “Land tenure and economic development in rural South Africa: Constraints and Opportunities”, in Cousins B (ed.), At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century, PLAAS, UWC, 2000

Apart from tenure insecurity, traditional authorities have a direct negative effect on development. As noted in this chapter, although the state is the legal owner of land in the rural areas of the former homelands, there are many cases where developers and local governments still cannot access land without permission from traditional authorities (chiefs). Adams et al point out that the lack of legal clarity on the role of traditional authorities in land management in rural areas has, for example, caused serious delays with respect to provincial government procedures, particularly housing developments and that this has caused the “return of unspent funds to the treasury”. The authors point to similar delays in Spatial Development Initiatives and other private sector investment projects. Another argument, made by critics of the traditional land tenure system, is that traditional authorities act as a drag on development by appropriating resources. Traditional leaders extract income from their subjects and this diminishes the resources available for investment in agriculture and/or capital accumulation.<sup>106</sup>

Empirical evidence and fieldwork in certain provinces (notably the former Transvaal and the Eastern Cape) suggest that there is wide-scale rejection of the role that traditional authorities play in land allocation. The Land Reform Research Programme’s National Report found that among people needing land, 21.1% felt that traditional authorities were best placed to allocate land, 41% felt that they should not allocate land and the rest thought that they could be involved in allocating land but should not be the sole agency.<sup>107</sup> Workshops conducted in the central Lowveld had similar results. At workshops, held in Marite in January 1993 and Manzini in March 1993, participants stated that they wanted an elected committee to administer land and not a chief. Furthermore CPLAR surveys found that over 85% of all respondents in the Northern and Eastern Transvaal central Lowveld rejected the idea that land allocation be the sole preserve of chiefs.<sup>108</sup> According to Aninka Claassens, communities on state-owned land are “demanding” that the Minister of Land Affairs transfer the land to them in “direct ownership”, and that entrepreneurial farmers in communal areas “demand title to [the] areas that they cultivate”.<sup>109</sup>

In 1982, the Buthelezi Commission conducted opinion surveys (largely in KwaZulu-Natal) and found that 66% of respondents opted for freehold land rights while only 18% thought that chiefs should allocate land.<sup>110</sup> Respondents’ criticisms relate to corruption in land allocation practices, tenure insecurity and the perceived illegitimacy of traditional authorities. There are many allegations that chiefs allocate land in a manner that serves their own interests. In KwaZulu-Natal, for instance, chiefs were warned in 1975 not to

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<sup>106</sup> For details on this argument see Levin R & Weiner D (Eds.), Community perspectives on land and agrarian reform in South Africa, MacArthur Foundation, Illinois, 1994

<sup>107</sup> Marcus T, "Traditional Authorities", Down to Earth, Marcus T, Eales K & Wildschut A (Eds.), Land and Agricultural Policy Centre, Indicator Press, Natal, March 1996, p. 87 & 88

<sup>108</sup> For Lowveld surveys see Levin R & Weiner D (Eds.), Community perspectives on land and agrarian reform in South Africa, MacArthur Foundation, Illinois, 1994

<sup>109</sup> Claassens A, “Land Rights and Local Decision Making Processes: Proposals for Tenure Reform”, in Cousins B (ed.), At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century, PLAAS, UWC, 2000

<sup>110</sup> Lodge T, “Perceptions of agrarian issues in black politics”, Development Southern Africa, 7, 1990

continue with the unlawful practice of receiving money, or kind, for the allocation of a site.<sup>111</sup> Other areas in which traditional authorities are accused of abusing their power include state pensions, tribal courts and applications for migrant labour.<sup>112</sup> Cases of patronage, corruption and the selling of land that is supposed to be held in trust for communities in order to obtain personal profit are frequent.<sup>113</sup> The loss of legitimacy (and support for traditional authorities) is also a consequence of apartheid and the Bantu Administration Act in particular. The Act and its 1952 amendment turned all appointed traditional authorities into salaried officials of the National Party government and gave the government the power to appoint or depose traditional leaders. Generally, chiefs who co-operated with the National Party were appointed, while those who opposed the government and its policies were deposed.

With regard to land administration in post-apartheid South Africa, chiefs don't appear to have a great record either. Chief M. Matlala, for example, acquired ownership of the Matlala tribe's land in a deal with the National Party and the Lebowa homeland administration in early 1994.<sup>114</sup> Chief Matlala proceeded to charge entry fees and other levies for land, threaten residents who challenged him with eviction, thwart a land restitution claim, cripple business projects, seize land promised to an adjacent community and to delay, by 2 years, a housing development planned by the local municipality.<sup>115</sup> In KwaZulu-Natal, traditional leaders are accessing land through the land reform programme. In some cases, traditional authorities use their capacity to underwrite applications for land in return for political allegiance and/or control over the acquired land.<sup>116</sup>

It should be noted that there is a great deal of diversity between traditional leaders and their supporters/opponents, as well as fluidity in the institution of traditional authority itself. In some cases there is a high tolerance for traditional authorities<sup>117</sup>, notably in the

<sup>111</sup> Bekker J.C, "Tribal government at the crossroads", *Africa Insight*, vol. 21, 2, 1991

<sup>112</sup> Ntsebeza L, *Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa*, PLAAS, 1999

<sup>113</sup> Marcus T, "Traditional Authorities", *Down to Earth*, Marcus T, Eales K & Wildschut A (Eds.), Land and Agricultural Policy Centre, Indicator Press, Natal, March 1996, p. 82. In another example, Jabulani Mdalose, purporting to be chief of the Othaka Tribal Authority, was arrested in May 2003 for illegally selling plots of privately owned farmland in Vryheid, KwaZulu-Natal to his "subjects". See *Mail & Guardian*, "Fake chief arrested for illegal land sales", May 30, 2003

<sup>114</sup> *Mail & Guardian*, "Conflicts triggered by land transfer to chiefs", November 23 to 29, 2001

<sup>115</sup> For more details see study by Aninka Claassens as reported in *Mail & Guardian*, "Conflicts triggered by land transfer to chiefs", November 23 to 19, 2001. Also see Claassens A, "It is not easy to challenge a chief: Lessons from Rakgwadi", Research Report no.9, PLAAS, October 2001, p. 91 & 28

<sup>116</sup> Marcus T, "Traditional Authorities", *Down to Earth*, Marcus T, Eales K & Wildschut A (eds.), Land and Agricultural Policy Centre, Indicator Press, Natal, March 1996, p. 83 & 84

<sup>117</sup> In Mozambique, for example, "traditional leaders" had also been appointed by the colonial government, and consequently the Frelimo-led government of the 1970s assumed that traditional authorities would be unpopular. However, there was a similar ambiguity as is the case in South Africa. Some traditional authorities were unpopular, but others were respected and continued to play important roles in land allocation. See Hanlon J, "Mozambique: Will growing economic divisions provoke violence in Mozambique: A case study for conflict potential", paper presented at a workshop entitled *Conflict dynamics in Southern Africa – Early Warning in Practice*, Berne, Switzerland, Swiss Peace Foundation, Institute for Conflict Resolution ([www.swisspeace.ch](http://www.swisspeace.ch)SDC), May 2000

Northern, North West, Mpumalanga and Free State provinces.<sup>118</sup> In the Mamane traditional authority (Northern Province), for example, 73% of respondents said that they supported the chief.<sup>119</sup> There is also a fine line between criticism of particular chiefs and the institution of chieftancy. In many cases it is individuals who are challenged, while the institution is still deeply respected.<sup>120</sup>

Lahiff<sup>121</sup> conducted a very interesting study on the Arabie-Olifants irrigation scheme in the Northern Province that highlights these complexities. Residents in the area felt that they had secure tenure within a system of chiefly land allocation. Those with PTO certificates also expressed confidence in the system. Most respondents indicated satisfaction with the system of land acquisition and management. Respondents who advocated freehold tenure, on further investigation, actually supported a continuation of the communal system because they did not believe that people should have to pay for land or have the right to sell it. Lahiff argues that what respondents expressed was a need for a tenure system through which they could access credit from commercial financial institutions. In other words, members of the scheme wanted secure and permanent tenure as well as access to credit and other services. The majority did not support (or had not really contemplated) a transition to freehold tenure or a market-based property system. Furthermore, there are areas where traditional authorities continue to be the only recognised, functional and accessible form of government.

Communal/traditional tenure systems also have certain advantages. Authors like Ben Cousins have stressed the benefits of communal tenure with regard to social equity and environmental sustainability.<sup>122</sup> For the very poor, communal tenure provides free or very cheap access to land (e.g. South Africa). In theory, all members of a given community have a right to land (whether residential, productive or grazing land). Conversion to a free market in land could lead to dispossession and reduced land access for the very poor. For example, landlessness is less prevalent in the congested former bantustans than it is in the former white owned commercial areas.<sup>123</sup> The same sentiment is captured in the 1997 White Paper on Land Reform, which emphasises that communal tenure systems provide secure access to land for the poor because land under these systems cannot be sold or foreclosed for debt. In addition, communal land management systems are part of a broader social structure, which often provides an important safety net for the poor – particularly for female-headed households.

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<sup>118</sup> Marcus T, "Traditional Authorities", Down to Earth, Marcus T, Eales K & Wildschut A (Eds.), Land and Agricultural Policy Centre, Indicator Press, Natal, March 1996, p. 87

<sup>119</sup> Oomen B, "We must not go back to our history: Retraditionalisation in the Northern Province", African Studies, 59, 1, 2000

<sup>120</sup> Levin R.M, "Land Restitution, the Chieftancy and Territoriality: The case of the Mmaboi Land Claim in South Africa's Northern Province, Centre for African Studies, March 1996

<sup>121</sup> Lahiff E, "Land Tenure in South Africa's Communal Areas: A Case Study of the Arabie-Olifants Scheme", African Studies, 59, 1, 2000

<sup>122</sup> Interview with Ben Cousins, (Director PLAAS), July 2, 2001

<sup>123</sup> See paragraph on resistance to freehold tenure above & Marcus T, "Traditional Authorities", Down to Earth, Marcus T, Eales K & Wildschut A (Eds.), Land and Agricultural Policy Centre, Indicator Press, Natal, March 1996

It is therefore important to remember that communal land tenure systems have provided a stable base for the productive use of land for many decades throughout Africa. South African research indicates, for example, that households' use of resources such as firewood, wild fruit and other fodder in the communal areas can supplement household income to the value of more than \$1 000 per year. Therefore, researchers believe that land based livelihood on communal land may represent 2.5% of the GDP and a vital "safety net" for the poor.<sup>124</sup> As Claassens explains, "*one must recognise the value of institutions that provide a measure of stability, predictability and social order (even if flawed and uneven) in neglected and under-resourced rural areas. The police are often far away and courts inaccessible. Government services are scarce or not available at all. In many areas people have come to rely on traditional institutions as the only service that is consistently available to them*".<sup>125</sup>

Botswana's land reform programme is, in fact, a relatively successful example of transforming traditional systems of communal ownership into more democratic systems of communal ownership where land is owned by communities or families and managed by trusts, companies or partnerships. Land boards (falling under direct control of the national government) were elected to hold land in trust for communities instead of traditional authorities (who became members of these boards).

#### **4. South African Tenure Reform Policy**

The first attempt at tenure reform was introduced by the National Party government in the form of the Upgrading of Land Tenure Rights Act 112 of 1991. The Act aimed to end the state's role as nominal owner of communal land, to transfer land to "tribes" and to upgrade PTOs. In 1996, the Act was amended to ensure that the opinions of rural people are obtained before any major decisions are made about their land. Later amendments restricted the Act to residential or business sites in urban areas.<sup>126</sup>

The ANC's 1992 Land Policy called for security of tenure but also for the legalisation of various forms of tenure including communal tenure systems.<sup>127</sup> In 1994, the RDP called for secure tenure rights for all South Africans "*by adapting a tenure policy that recognises the diverse forms of tenure existing in South Africa*". The RDP also called for the development of "*new and innovative forms of tenure*" such as group based holding systems.<sup>128</sup>

This commitment to a variety of tenure systems and people's right to choose was laid down in the 1995 Framework Document on Land Policy, which contained the fundamental principles of tenure policy and legislation. According to the Document

<sup>124</sup> Shackleton S, Shackleton C & Cousins B, "Re-valuing the communal lands of southern Africa: New understandings of rural livelihoods", *Natural Resource Perspectives* 62, Overseas Development Institute, November 2000

<sup>125</sup> Claassens A, "It is not easy to challenge a chief: Lessons from Rakgwadi", Research Report no.9, PLAAS, October 2001, see preface/introduction

<sup>126</sup> NLC, "Tenure Reform Media Fact Sheet", not dated

<sup>127</sup> ANC, 1992 Land Policy Document, Education Section, April, 1992

<sup>128</sup> Section 2.4.10

individual freehold tenure should be seen as one of a variety of tenure forms. The Document warned against the arbitrary imposition of freehold tenure rights and the possibility that this could result in increased landlessness. The Document proposed the development (among other forms of tenure) of a secure system of communal tenure.<sup>129</sup> Similarly, the 1996 Green Paper on Land Reform Policy suggested a tenure reform programme that emphasised extending formal rights based on the principle that people had the right to a tenure system of their preference.

The Constitution states that “A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws and practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or comparable redress”.<sup>130</sup> It further provides in section 25(9) that “Parliament must enact the legislation referred to in subsection (6). The first tenure reform Act to be passed by the ANC government was the Interim Protection of Informal Land Rights Act (IPILRA) no.31 in 1996. The Act aimed to provide protection for the land rights of people living in the former bantustans. The Act also aims to formalise decision-making processes affecting people with “informal land rights”. Therefore the Act provides that people with informal rights to land cannot be deprived of those rights except with their consent or by expropriation. A detailed procedure for consultation and participation was set out in the Act. This included a document issued by the Minister of Land Affairs (as nominal owner of the land) in 1997. The document explained to provincial government and other national departments that the Minister could not sign-off transactions in relation to communal areas, which were not authorised by the majority of the occupants in the area.<sup>131</sup> Although designed as a temporary measure until permanent legislation was introduced, the Act was renewed again in 1998, 1999 and eventually extended through 2002.<sup>132</sup>

The second Act passed by parliament dealt with the issue of communal land ownership. The Communal Property Associations Act no.28 was developed and passed in 1996. The act was developed to enable people to “collectively acquire, hold and manage property in terms of a written constitution”. The Constitution of a Communal Property Association (CPA) has to set out the rules and regulations governing the CPA, as developed by members in accordance with their values and situation, and subject to the Constitution of South Africa. A two-thirds majority must agree to these rules and regulations. After investigation a CPA is officiated by a designated DLA official.<sup>133</sup>

The Department of Land Affairs also embarked on a number of tenure reform “test cases” in 1996 and 1997. The “thinking”, on which the test cases were based, was that where

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<sup>129</sup> Ntsebeza L, Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa, PLAAS, 1999

<sup>130</sup> Section 25 (6)

<sup>131</sup> Claassens A, “Land Rights and Local Decision Making Processes: Proposals for Tenure Reform”, in Cousins B (ed.), *At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century*, PLAAS, UWC, 2000

<sup>132</sup> *Land and Rural Digest*, “Extension of the Interim Protection of Informal Land Rights Act”, November/December, 2001

<sup>133</sup> Problems have emerged around the CPA structures, for more information see chapters 6 and 7.

individualised land rights existed, these rights would be legally transferred to the individuals concerned. This was an attempt to learn from experience but also to address the needs of communities whose land rights were immediately and gravely threatened. By December 1997, the Department of Land Affairs had completed 3 large-scale projects upgrading tenure rights. A fourth project was launched in Thaba Nchu on December 10, 1997, at an estimated cost of R25 million to provide 40 000 households with secure tenure.<sup>134</sup> According to academic, Ben Cousins, embarking on test cases “*was the right thing to do, because it led to the realisation that if we tried to replicate this on a large-scale we would be totally overwhelmed. But, the test cases themselves were constrained by a lack of skills and expertise among those involved and by a very weak Tenure Directorate*”.<sup>135</sup>

Other lessons that emerged from the test cases include a growing awareness that determining the unit of ownership to which land in communal/ traditional areas should be transferred would be more complex than anticipated. Individual land users formed part of smaller groups with user rights to land who, in turn, formed part of “tribes”/ nations who had user rights to land, all of which could overlap with other and/or similar structures. Furthermore, within these nations/ smaller groups and among individuals people had different demands. For example, some were satisfied with traditional authorities allocating land, whereas others opted for more democratic structures. As can be expected, there are all kinds of interests, conflicts and power relationships within communities that influence how tenure policies are developed and implemented. Tenure reform could cause new conflicts or re-ignite older conflicts. And consultation (to avoid conflict and account for the differences hinted at above) would be time consuming and enormously complex.<sup>136</sup> It also soon became apparent that the scope of a tenure reform programme would be much wider than anticipated and would, therefore, require a huge amount of resources.

Emerging from all the above was the White Paper on Land Reform Policy in 1997. The White Paper set out to address the need for tenure security for all and the need to record and register all rights in property. The White Paper (1997) acknowledged that communal tenure systems were “*based on pre-existing joint rights to land*” and that the government is “*under obligation to ensure that group based holding systems do not conflict with the basic human rights of members of such systems nor other residents of communal areas*”. The Paper was based on certain fundamental principles, which included a move away from second class to more secure land rights, to build a unitary non-racial system of land rights, to give people the right to choose the tenure system of their preference, to develop a tenure system that is consistent with the constitution and the reality of people’s lives and to develop sound adjudicatory principles. Further issues that the White Paper attempted to address included development in the former bantustans, developing methods to deal with overlapping land claims, making services available to communities and how

<sup>134</sup> Business Day, “Land Affairs starts tenure project”, December 11, 1997

<sup>135</sup> Interview with Ben Cousins, (Director PLAAS), July 2, 2001

<sup>136</sup> This discussion draws on Claassens A, “Land Rights and Local Decision Making Processes: Proposals for Tenure Reform”, in Cousins B (ed.), At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century, PLAAS, UWC, 2000. See this piece for greater detail on the lessons that emerged from the tenure test cases.

to strengthen the beneficial aspects of communal tenure systems while at the same time bringing about change. In essence, the White Paper stipulated that permits should be replaced by enforceable rights within a unitary non-racial land rights system and that ownership of communal land be transferred from the state to its current occupants (land users). The Paper was not clear on “how” such rights would be transferred or to “whom”. It did allow for communal ownership and, in principle, did allow land transfers to traditional authorities.

In 1996, a Tenure Reform Core Group<sup>137</sup> was established to strengthen the Tenure Directorate and to start work on a Land Rights Bill that had two major objectives. Firstly, to provide a blanket transfer of protective rights (similar to the IPILRA rights) to people living in the former bantustans and secondly, to develop a system of land administration structures based on community control/ ownership.<sup>138</sup> As discussed above, experience gained from test cases soon made it clear that such a complete transfer of ownership would be extremely complex, costly and contentious. It became apparent to members of the Directorate that land transfers would generate major disagreements, counter claims and boundary disputes. Claassens explains that counter claims were made by residents who objected on the basis that they wanted individual land rights, as well as by sub-groups within communities who argued that they had specific rights to particular areas. Conflicts and counter claims also emerged/re-emerged between traditional leaders.<sup>139</sup> Claassens also points out that the test cases exposed the relative nature of land rights. Where, for example, families would have strong rights to residential plots, but rights to fields and/or grazing areas would be relative to the larger group’s rights. It was also feared that title transfers would “*set in stone relations that existed at a particular point in time*” and, that if title went to the wrong individual or group “it would be difficult to undo”.<sup>140</sup>

This realisation led to the Draft Land Rights Bill and the proposal to register land rights for groups and/or individuals. It took approximately 4 years before the Draft Land Rights Bill was finally tabled. This lengthy process was partly a result of the complexity of the issue and, partly, a result of a very cautious Tenure Directorate who were “*afraid of creating big problems by moving too fast*”.<sup>141</sup> It could also be that problems in the former homelands appeared less defined and, that addressing these problems was not as politically expedient as, for example, the restitution programme.

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<sup>137</sup> Ben Cousins (an academic) and Aninka Claassens (an advisor to the Minister of Land Reform) acted in an advisory capacity to the Tenure Reform Group.

<sup>138</sup> Greenberg S, “Chaos in communal land allocation”, Land and Rural Digest, July/August 1999

<sup>139</sup> Conflicts between and within traditional authority areas continued and in some cases re-emerged. In March 2001, the Department of Traditional Affairs continued to be involved in resolving land disputes between traditional authorities and/or individuals, according to KwaZulu-Natal Minister of Traditional Affairs, Inkosi Nyanga Ngubane. Consequently the department embarked on a survey of traditional authority boundaries to enable any traditional authority to identify its exact area of jurisdiction in an effort to eliminate potential conflicts. From Independent Project Trusts, Traditional Leaders: A KwaZulu-Natal Study 1999 – 2001, Durban, 2002, p. 98

<sup>140</sup> Claassens A, “It is not easy to challenge a chief: Lessons from Rakgwadi”, Research Report no.9, PLAAS, October 2001, see preface/introduction

<sup>141</sup> Interview with Ben Cousins, (Director PLAAS), July 2, 2001

The Draft Land Rights Bill proposed a range of mechanisms to effect tenure reform. Firstly, state officials would be responsible for recognising informal land rights, as well as, to regulate the management of these rights within structures representing the actual rights holders. The Director General of the DLA could also appoint a Land Rights Officer who would have investigative powers, report any contravention of the proposed Act, play a mediating and advisory role and provide information to rights holders.<sup>142</sup> Secondly, land rights would be vested in the users (whether individuals, households or larger groups) and not in local institutions such as municipalities or tribal authorities. At the same time, recognition would be given to people's right to choose the most appropriate tenure system for a user group (subject to the conditions of the proposed Act and the Constitution), which could, therefore, include traditional authority systems for the purposes of land administration.

The Bill tried to find a balance between giving people real and secure land rights, while recognising that in some areas traditional government works quite effectively and that it would be counterproductive to destroy functional systems. The Bill stopped short of giving people ownership rights but rather gave them permanent rights. In other words, the Bill proposed that the de facto land rights in the former homelands be converted to registered property rights. In communal areas, people would receive individual rights but would still be subject to group consensus. As Claassens explains, the larger group could, for example, choose (based on majority decision-making) to impose restrictions on sales of land rights (such as limiting sales except to approved members of the group).<sup>143</sup> For these purposes, the Bill introduced several new concepts including commonhold and the formation of Land Rights Boards and Committees. Commonhold provides that land rights vest in the members of the community of co-owners as opposed to a legal entity. Decision-making takes places on a majority basis and the land is managed by an elected body.

The Land Rights Boards would be established by the Minister of Land Affairs in order to flesh out the details of protected rights under the proposed Act and, to facilitate consultation, mediation and negotiation. More specifically, the following functions for the Land Rights Boards are proposed in the Draft Land Rights Bill. These Boards should endeavour to safeguard the interests of protected rights holders, resolve disputes, determine appeals and advise the Minister of Land Affairs. Traditional leaders and elected rural councillors could also be Board members. Tenure awards could also be made under the auspices of the Land Rights Boards for additional land to those whose claims could not be accommodated in the areas where they were making them.<sup>144</sup> Importantly, it is proposed in the Draft Land Rights Bill that communities have an option to transfer land rights and establish a legal entity/ body to administer that land (subject to

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<sup>142</sup> Ntsebeza L, *Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa*, PLAAS, 1999

<sup>143</sup> Claassens A, "It is not easy to challenge a chief: Lessons from Rakgwadi", Research Report no.9, PLAAS, October 2001, see preface/introduction

<sup>144</sup> Cousins B, *Uncertainty and institutional design: proposals for tenure reform in South Africa*, Paper presented to the 8<sup>th</sup> biennial conference of the International Association for the Study of Common Property, Bloomington, Indiana, 2000 and Turner S & Ibsen H, "Land and agrarian reform in South Africa: A Status Report", Occasional Paper Series, PLAAS, UWC, November, 2000, p. 21 & 22

local, provincial and national government regulations). For protected rights holders (at a local level) the draft Land Rights Bill proposes the establishment of “accredited rights holder structures”, which can be applied for by “any land rights structures”. A Traditional Authority could also apply to be such a structure. Applications will be considered by the Land Rights Board, and will only be approved if set requirements are met.<sup>145</sup> In addition, as mentioned above, a Land Rights Officer may be appointed by the Director-General of Land Affairs “to monitor compliance with the proposed Act by rights holders and other persons and report any contravention; confirm decisions of rights holders and rights holder structures, inform persons of their rights in terms of the proposed act; endeavour to resolve disputes between protected rights holders regarding the exercise of their rights; and advice the Land Rights Board on the performance of its functions”.<sup>146</sup> The Land Rights Officer will have the required powers to conduct these tasks.

The Draft Land Rights Bill was tabled just before the 1999 elections, but was immediately shelved due to its controversial nature and the ANC’s fears of an electoral backlash from traditional leaders who arguably stood to lose significantly under the Bill. There was also strong lobbying against the Bill by the Congress of Traditional Leaders. Timing became an even bigger factor when the new Minister of Land Affairs was appointed and permanently withdrew the Bill in mid 1999. As an interviewee closely involved with the Tenure Directorate put it “*We should have tabled it earlier, if Hanekom was still there we might have had a chance*”.<sup>147</sup>

Further reasons for the withdrawal of the Bill included the fact that it was extremely complicated and, that it posed major administrative and budgetary challenges to a department, which was already crippled by a lack of resources. The Bill also did not clearly define the nature of “permanent” property rights nor did it specify how the groups that were to determine the rules and restrictions governing these rights would be constituted.<sup>148</sup> As a land rights activist put it “*it was this wonderful Bill with land boards, elected councillors here, traditional authorities there. But anyone who has ever worked in the former bantustans would just look at it and ask ‘where is this?’ Because out there, there is no form of government*”.<sup>149</sup>

Despite its shortcomings, the categorical shelving of the Draft Land Rights Bill effectively set aside approximately 5 years’ worth of experience and research. The exodus of personnel from the DLA in 1999 and 2000 resulted in a significant loss of experience. By the end of 1999, the DLA confirmed that land administration in the former bantustans was “chaotic”.<sup>150</sup>

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<sup>145</sup> Ntsebeza L, Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa, PLAAS, UWC, 1999, p. 49

<sup>146</sup> Ntsebeza L, Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa, PLAAS, UWC, 1999, p. 49

<sup>147</sup> Said in August 2001

<sup>148</sup> Claassens A, “It is not easy to challenge a chief: Lessons from Rakgwadi”, Research Report no.9, PLAAS, October 2001, see preface/introduction

<sup>149</sup> Said in June 2001

<sup>150</sup> Greenberg S, “Chaos in communal land allocation”, Land and Rural Digest, July/August 1999

The new Minister of Agriculture and Land Affairs indicated, when she withdrew the Draft Land Rights Bill in 1999 and again in her February 2000 policy statement, that land would be transferred to individuals, communities and “tribes”. The minister also committed the DLA to the finalisation of coherent state land disposal and tenure reform legislation by the third quarter of 2000 (at the time of writing in early 2003, however, tenure reform policy has not yet been finalised<sup>151</sup>). She also proposed the establishment of State Land Committees to oversee the process. This led, 18 months later, to the development of the Land Administration Bill. The Land Administration Bill “*was a complete abortion. It was rejected by the state and all the advisors were fired. Then the minister went back to her department and told them to start working on the original Draft Land Rights Bill again*”.<sup>152</sup>

The minister was also immediately criticised for the proposal to transfer land to “tribes”. Many critics feared that this would perpetuate corrupt and inefficient systems of land allocation and administration under traditional authorities. A report by Claassens certainly highlighted the potential dangers of land transfers to “tribes”. The report examines an area in the Northern Province (the 25 farms of Rakgwadi), which was transferred to the Matlala “tribe” in 1994 in a deal between the former Lebowa government and the National Party. The area falls under the jurisdiction of Kgosi M. Matlala. According to Claassens, the Matlala tribe was an apartheid construct – the farms were allocated to Chief Matlala’s father as a reward for his role in undermining the Sekhukhune uprising. Chief Matlala was a member of the Lebowa cabinet and took part in the decision to call the South African Defence Force to Lebowa to repress the 1986 uprisings. Matlala used his cabinet position to push through the land transfer and no consultation with the affected communities took place. When one of the communities affected by the transfer (the Mmotwaneng village) opposed the transfer, their leaders received death threats and the community was threatened with eviction. Although the land title was transferred to the “tribe”, the dominant belief in Rakgwadi is that the land title was transferred to chief Matlala (who has exploited this misunderstanding). This has enabled Chief Matlala to use authoritative and repressive measures to increase his control over the area – these measures include arson and threats to evict. The transfer has undermined the rights and economic status of poor people in the area and has left them more vulnerable than they were when the land was state-owned. The transfer also created high stakes, generated disputes and has given those with power and resources an opportunity to succeed at the expense of (or instead of) poorer or less organised groups or individuals.<sup>153</sup> Although care should be taken not to generalise, the report clearly points to the need for clearly defined policies and laws in any tenure reform programme.

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<sup>151</sup> As explained in Turner S, Land and Agrarian Reform in South Africa: A status report, 2002, Research Report no. 12, PLAAS, August 2002, p. 15 – 17, the implementation of the Transformation of Certain Rural Areas Act of 1998, in the former coloured reserves of the Northern Cape, is the only evidence of movement on tenure reform in recent years.

<sup>152</sup> Said by former member of the Tenure Directorate.

<sup>153</sup> Claassens A, “It is not easy to challenge a chief: Lessons from Rakgwadi”, Research Report no.9, PLAAS, October 2001, p. 1 & 9 & 17 – 18 & 43 & 52 & 86 - 89

According to a Mail and Guardian reporter, an Ulundi resident said, “*government underestimates the chiefs. If the Bill<sup>154</sup> is passed, it will be understood that any tribe member who applied to own land can be killed or have their house burnt down. Many people will be happy to strike the match*”. The resident also said that rural people could be coerced into handing the land over to the chiefs and that communities could be strong-armed into electing chiefs (or their families and friends) onto land administration boards.<sup>155</sup>

Nevertheless, the Communal Land Rights Bill, released at a national conference on tenure reform in Durban in November 2001, reiterated that land could be transferred to traditional authorities or “tribes”. The Communal Land Rights Bill allows “traditional communities” operating under “customary law” and authorised representatives [traditional authorities] to be recognised as “juristic persons” for the acquisition of ownership rights to state land. Overall, however, the Bill is still based on the principle that “persons have a democratic right to choose the appropriate tenure system” subject to the provisions of the Constitution. The Bill is not clear on how people currently under the authority of traditional leaders will be able to choose an alternative tenure system or elect a land management body.

The Bill drew a vast amount of criticism. Although Land Affairs Director, Siphosiso Sibanda, was disparaging about criticism saying that it emanated mainly from “progressive liberals”,<sup>156</sup> criticism came from a wide range of sources. These included SANCO leaders and ANC MP Lydia Ngwenya - member of a commission on the role of chiefs in land management.<sup>157</sup> Cosatu argued that the Bill in its current form could deepen poverty and inequality and proposed a “substantial redrafting”. Cosatu argued that the transfer of ownership could restrict the state’s ability to intervene on behalf of communities or to take the land back in the event of abuse or corruption. The union called for the retention of nominal state ownership while strengthening occupants’ rights.<sup>158</sup>

Some critics rejected the Bill as unconstitutional because they do not believe that the Bill provides residents in the former bantustans with the tenure security required by the Bill of Rights.<sup>159</sup>

Owen Green, chairman on the Ingonyama Trust, argued that the commitment in the Bill to individual title could lead to poverty and inequality as wealthy and powerful individuals acquire “*vast tracts [of land] at minimal expense*”.<sup>160</sup>

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<sup>154</sup> The resident is, in fact, referring to the Communal Land Rights Bill, which followed the Land Administration Bill.

<sup>155</sup> Mail & Guardian, “Tensions rise over land rights bill”, January 17 – 23, 2003

<sup>156</sup> Mail & Guardian, “Land Affairs officials push for African way of life”, Nov. 30 – Dec. 6, 2001

<sup>157</sup> Mail & Guardian, “Land Affairs officials push for African way of life”, Nov. 30 – Dec. 6, 2001

<sup>158</sup> Mail & Guardian, “Tensions rise over land rights bill”, January 17 – 23, 2003

<sup>159</sup> Turner S & Ibsen H, “Land and agrarian reform in South Africa: A Status Report”, Occasional Paper Series, PLAAS, UWC, November, 2000, p. 43

<sup>160</sup> Mail & Guardian, “Tensions rise over land rights bill”, January 17 – 23, 2003

Communities in the Limpopo province expressed concerns regarding the membership and operation of land boards, as well as dissatisfaction with the slow process of reform.<sup>161</sup>

The Programme for Land and Agrarian Studies at the University of the Western Cape referred to the Bill as “*deeply flawed and alarming*” and “*at best a poorly thought-through measure . . . that could lead to a massive wave of post-apartheid dispossession*”.<sup>162</sup> Ben Cousins described the Bill as “*an echo of apartheid policy and an ominous sign that she [Minister of Land Affairs] intended consolidating chiefs’ power in land*”.<sup>163</sup> These concerns were heightened when the government announced, in August 2002, that a third of KwaZulu-Natal’s land (falling under the Ingonyama Trust<sup>164</sup>) would be exempted from the Communal Land Rights Bill.<sup>165</sup>

A careful analysis of the 2002 version of the Communal Land Rights Bill suggests that criticisms such as those mentioned above overstate the role that the Bill proposes for traditional authorities. In the preamble, the Bill recognises that “*the institution of traditional leadership played an important role in channelling the resistance to colonial dispossession of land and upholding the dignity and cohesion of African people and in retaining access to parts of their land*”.<sup>166</sup> It also states that “*traditional leadership institutions and other community based institutions should continue to play a meaningful and key role in the administration of communal land subject to the provisions of this Act and any other applicable legislation*”.

Nevertheless, the broad goals of the Bill include the “*further democratisation*” of the institution of traditional leadership. It includes a commitment to the provision of “*an enabling legal environment*” for communities or individuals to obtain legally secure tenure within a tenure system of their choice, as well as, “*protection against arbitrary deprivation of land tenure rights*”. Furthermore, the goal to “*provide for the settlement of disputes by communities by way of alternative dispute resolution mechanisms, as well as, recourse to the magistrate’s courts and the Land Claims Court*”, if achieved, will undermine the role of traditional authorities in dispute resolution.

In Chapter two of the Bill it is stated that any conference of juristic personality or recognition of tenure rights must take place in accordance with the Bill of Rights. By implication, juristic personality cannot be conferred to institutions of traditional authority that violate basic human rights, including gender equity and the right to democratic participation by the members of a community in decision making processes affecting their tenure rights. (With regard to “juristic” persons, the Bill aims to confer juristic personality on communities with full legal capacity.)

<sup>161</sup> *Mail & Guardian*, “Tensions rise over land rights bill”, January 17 – 23, 2003

<sup>162</sup> *Mail & Guardian*, “Uproar over the land Bill”, November 23 to 29, 2001

<sup>163</sup> *Mail & Guardian*, “Uproar over the land Bill”, November 23 to 29, 2001

<sup>164</sup> See Box A at the end of this chapter.

<sup>165</sup> *Mail & Guardian*, “Row erupts over land law”, August 2 – 7, 2002

<sup>166</sup> DLA, Communal Land Rights Bill 2002 (in process), Preamble, *Government Gazette*, August 14, 2002

According to chapter seven, section seven, of the Bill, a customary/ communal system of land tenure may not discriminate unfairly against anyone, directly or indirectly, with regard to a community rules or decisions, which determine,

- (a) the ownership, allocation, occupation, use or alienation of communal land for any purpose,
- (b) participation in decision-making processes and forums concerned with the ownership, allocation, occupation, use or alienation of communal land or,
- (c) the membership of any structure involved in the management and allocation of right's in the community's communal land.

Furthermore, in order for a community to be established as a juristic person,<sup>167</sup> the community must,

- (a) comply with the provisions of the Act/ Bill,
- (b) have as its main objective the holding of property in common,
- (c) adopt rules that comply with the Bill of Rights and
- (d) & (e) have held meetings attended by, and where decisions were accepted by, the majority and,
- (f) subject to the approval of the Director-General of the DLA.

Communities with juristic personality must appoint a representative, and accountable, administrative structure. Section 33 states that “*legitimate traditional authorities may participate in an administrative structure in a ex-officio capacity; provided that the ex-officio membership in the administrative structure should not exceed 25% of the total composition of the structure; further provided that the ex-officio component of the administrative structure shall have no veto powers in the decision-making of the structure*”.<sup>168</sup>

What is reflected in the Bill, is thus not an attempt to increase the powers of traditional authorities. Rather, the Bill reflects the government's continued ambiguity towards traditional authorities and the continued power and influence of the institution of traditional authority in South African society. This influence is particularly strong in KwaZulu-Natal, where the institution enjoys support from the IFP.

The major shortcomings of the Bill result from the failure to learn from international experience and the experience gained through the redistribution and restitution programmes. The tenure reform programme (as proposed in the Bill) is again overly bureaucratic and excessively centralised. In each case (whether for comparable redress, title registration or land transfer), the permission of the Minister is required. One can therefore expect the same delays and slow pace of delivery encountered in the other two parts of the national land reform programme.

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<sup>167</sup> Chapter 7, section 12

<sup>168</sup> Administrative/Land Boards have become a flash point. As legal entities, these boards can issue title deeds to individuals in communal areas. Traditional authorities & the IFP are reportedly unhappy about the fact that traditional authorities may only have 25% representation on these boards.

As discussed, titling programmes in Africa (and elsewhere) have proved ineffective because they are costly, time-consuming and demand real capacity from government. The process of the registration of tenure rights proposed in the Bill is exceedingly complicated, “*involving about 30 administrative steps*” and at this rate “*it will take 200 years to transfer land to the estimated 20 000 rural communities in the former homelands*”.<sup>169</sup> The proposed procedure for transfer of title or comparable redress (for insecure tenure as a result of past racially discriminatory practices or legislation) starts with the submission of an application to the Minister of Agriculture and Land Affairs. The application should include the location and exact boundaries of the land in question, the full names of all the potential beneficiaries and a community resolution expressing support for the transfer. Assuming that the community/family/individual in question has access to adequate information and is literate, given the complexities in establishing clear boundaries alone, the completion of such an application may take several months. Where marginalised communities/individuals are concerned, one can assume that the completion of an application may take even longer.

After receiving the application the Minister appoints a land rights inquirer to investigate and report on the application. A copy of the application is also sent to the Land Rights Board<sup>170</sup> with jurisdiction in that area. According to chapter 5, section 18 of the Bill, the land rights inquirer shall “*try to complete the report in 4 months but, the period may be extended*”. If the minister is satisfied that the report meets the conditions of the Act, she/he may “*initiate the procedure for the possible transfer of land and appropriate registration in land*”. If not satisfied, the minister may refer the application back to the community/individuals for amendments or, reject the application. If the minister accepts the report and the application, she/he must give a public notice of the proposed transfer. A 60-day period is then provided for opponents of the transfer to lodge complaints. Generously, just to reach this stage will take 7 months. If there are complaints, the minister will again appoint a land rights inquirer to investigate. No time limit is provided for such an investigation.

If the application is approved, and after the community has registered its rules<sup>171</sup>, a deed of transfer will be prepared by a designated DLA official and lodged with the Registrar of Deeds. In some cases, the Minister may require the opening of a communal land register as a precondition for title registration or land transfer. This requires the election of an administrative structure by the community, which will give a land management plan to the Surveyor-General for approval (chapter five, section 22). If the Surveyor-General approves the plan the administrative structure can lodge the plan with the Registrar of Deeds and apply for the opening of a communal land register. Once registered, the beneficiary/beneficiaries have land tenure rights but not full ownership. Section 25 of the Bill outlines the procedure for conversion of tenure rights into ownership rights. In such a case, the individual/ administrative structure (subject to approval from the community

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<sup>169</sup> Mail & Guardian, “Draft land bill should be rejected”, September 20 – 26, 2002

<sup>170</sup> The members of Land Rights Boards are appointed by the Minister

<sup>171</sup> Before adopting community rules (in terms of chapter 7 of the Bill), the DG of the DLA must meet with the community in question, write a report on the meeting, investigate & play a role in mediating any conflict, register the rules & provide the relevant Land Rights Board with a copy of the community rules.

concerned) must prepare and lodge with the Registrar of Deeds, a Deed of Transfer, the existing Deed of Land Tenure Rights, the title deed of the community and a diagram of the relevant portion of the land. In other words, it may take several years for a community to obtain ownership rights through this process.

### ***5. Conclusion***

Section one of this chapter has shown how the current confusion in land management and land administration systems in South Africa (e.g. tenure arrangements) is the result of the interaction between colonial and apartheid policies and indigenous common property systems. Current tenure arrangements in the former homeland areas are, accordingly, characterised by overlapping claims and rights to land, contradictory and confusing land management systems, overcrowding, conflict and insecure tenure arrangements that hamper development and lead to further tension and disputes.

This chapter has evaluated the likely policy success of conversion to communal tenure, other systems of informal (secure) land rights, freehold tenure systems, as well as, systems that purport to be a combination of the positive aspects of all of the above (i.e. the Draft Land Rights Bill). The evaluation draws on a number of South African, as well as, international case studies, that include Mozambique, Kenya, Zimbabwe, Brazil and Nigeria.

Further, because a tenure reform policy pertaining to South Africa's former homelands had not yet been finalised (at the time of writing), this chapter differs from chapters six and seven in the sense that it is partly aimed at developing "policy recommendations" in addition to evaluating proposed legislation.

Section two evaluated, based on case study material from Kenya, Uganda, Zimbabwe, Brazil, Mexico, Ghana, Eritrea, Mozambique, Nigeria, Tanzania, Malawi, Rwanda and the former Transkei in South Africa, whether the dominant paradigm<sup>172</sup>, which represents conversion to freehold tenure as the panacea for peace and political and economic development, is accurate. It is argued (in the literature consulted) that conversion to freehold tenure is a crucial condition for increased agricultural production, access to credit, social cohesion, simplified administrative systems, political stability and environmental sustainability. Section two discussed these factors one by one and concluded (based on the case studies listed above) that freehold tenure is not the crucial condition or prerequisite for economic development, equitable access to land, environmental sustainability, increased agricultural production, or any of the factors listed above. Rather, the crucial condition or prerequisite for achieving the objectives listed is secure tenure. (With the exception of access to credit, which generally requires access to collateral such as freehold land rights – as discussed in chapter four).

Furthermore, section two highlights the possibility that conversion to freehold tenure systems (especially imposed conversion) could lead to dispossession, impoverishment, increased social differentiation, class formation and can have a particularly negative

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<sup>172</sup> There have recently, however, been some significant shifts in thinking.

effect on female-headed households and nomadic farmers. As Barrows and Roth argue *“Registration effectively provides a mechanism for transfer of wealth to those with better social or economic positions, thereby creating tenure insecurity for less influential rights holders”*<sup>173</sup>. Section two also emphasised that the intended beneficiaries of tenure conversion/registration projects are often opposed to (or do not fully understand) the process, and that forced conversion is not likely to succeed.

Section three of this chapter addressed a wide range of inter-linked issues in an attempt to assess the appropriateness and efficiency (or lack thereof) of communal/traditional tenure systems. An analysis of traditional/communal tenure arrangements in South Africa cannot avoid discussing the role of traditional authorities in land allocation and administration, nor, issues pertaining to the legitimacy of traditional authorities. What makes this issue problematic is that after nine years of policy development and democracy, the issue of traditional authorities and their position in local and national politics (including land allocation and management in the former homelands) remains largely unresolved (particularly in terms of policy implementation). Although significant variation exists, traditional/communal tenure is understood (in this thesis) as systems where individuals have user rights, rather than ownership rights of land, and their user rights are affected by their position in (and relationship with) the community.

Section three identified a number of advantages of traditional/communal tenure systems. For example, however corrupt or inefficient some traditional authorities may be, they are often the only effectively functioning institutions in some rural areas (and this has contributed to their post-apartheid survival). For many people (given that about 40% of the people of South Africa and 17% of its territory were ruled by traditional authorities in the early 1990s and given the absence or weak structures of local government) traditional authorities remain the only access point to land, pensions, dispute resolution and other services.

People in the rural areas of the former homelands often have ambivalent attitudes to traditional authorities. As pointed out in this chapter, where hostility exists, it is often directed at particular individuals and not at the institution itself. Related to this, those who demand freehold-tenure systems (in some cases) appear confused about what this entails (e.g. they do not want to pay for land). However, people in the rural areas of the former homelands are clear about their demands for secure tenure. Most importantly, the poorest sectors of rural society (and this includes women and the unemployed) are far more likely to obtain secure access to land in a communal/traditional tenure system (as it exists in South Africa) than under a freehold tenure system (that requires the financial resources not only to buy, but also to keep the land).

The serious disadvantages associated with traditional authorities in their land allocation roles (highlighted in this chapter) are, the constraints traditional authorities often place on economic development, as well as on greater social (particularly gender) equality.

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<sup>173</sup> Barrows R & Roth M, "Land Tenure and Investment in African Agriculture: Theory and Evidence", *Journal of Modern African Studies*, Vol. 28, No.2, 1990

Section four discussed the development and implementation of tenure policies in South Africa since the early 1990s. The process of tenure reform, which had been started by the National Party government in the early 1990s, was continued by the post-apartheid government, which throughout the policy formulation process committed itself to people's right to choose the tenure system according to which they wanted to live.

The first policy, the 1996 Interim Protection of Informal Rights Act, was introduced as a temporary measure, but was renewed in 1998, 1999 and eventually extended to 2002. The Act provides that people with informal rights to land cannot be deprived of those rights except with their consent or by expropriation. This was followed by the 1997 White Paper on South African Land Reform Policy, which called for enforceable rights within a unitary, non-racial, land rights system and the transfer of land ownership rights in communal areas to current occupants (on an individual/ communal basis).

The first significant policy statement following the policy directives set out in the White Paper, the Draft Land Rights Bill, which took four years to develop, was preceded by a number of tenure test cases that highlighted the complexity of tenure reform – i.e. overlapping claims and rights, boundary disputes and the relative nature of land rights. In essence, the Draft Land Rights Bill proposed a blanket transfer of land rights to groups or individuals, but not ownership rights. The “new” minister of Agriculture and Land Affairs shelved the Bill in late 1999, partly because it was “extremely complicated” and “not practical or implementable”.<sup>174</sup>

The first significant policy statement to emerge under the “new” leadership was the Communal Land Rights Bill. The Bill was criticised vehemently - mostly by individuals who in some way had been involved in the drafting of the shelved Land Rights Bill - for giving traditional authorities too much power in land administration in the rural areas of the former homelands. However, as the discussion in this chapter has tried to show, the Bill does acknowledge the right of individuals and communities to choose (although it also raised questions regarding the ability of individuals and communities to choose within current social systems) the tenure system(s) under which they want to live. The Communal Land Rights Bill also protects human rights by legislating that all tenure arrangements should be subject to the Bill of Rights. In other words, traditional authorities that administer land in ways that discriminate against women, for example, cannot legally qualify as landowners/managers.

The major shortcomings of the Communal Land Rights Bill (according to this thesis) is that the Bill does not explain how compliance to the Bill of Rights will be monitored or enforced, or how individuals and communities that are powerless against current traditional authority structures, or who hold minority opinions will be able to “choose” the tenure system(s) under which they want to live. Secondly, the policy errs in its overly bureaucratic and centralised approach to tenure reform, as well as, the failure to take cognisance of the current government's lack of capacity to implement such an extensive programme. Procedures must be simplified and responsibility for decision-making must be decentralised.

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<sup>174</sup> Interview with NDA employee.

A number of important themes emerge from the discussion in this chapter. These are development, socio-economic differentiation, overlapping claims/rights, and the expansive nature of tenure reform.

Tenure reform in the former homelands is a key issue for millions of very poor people. Current confusion, in tenure arrangements and land management systems (and consequent tenure insecurity), is detrimental to poverty alleviation and development projects. There are two aspects to this. Firstly, insecure tenure (and sometimes, traditional authorities) are factors that constrain development. Second (as Adams et al argue), tenure reform, by itself, will not lift people from poverty or result in significant development, unless “*the government takes complementary actions to stimulate the rural economy*” and only then will “*the full benefit of tenure reform be felt in increased [agricultural] production and investment*”.<sup>175</sup>

What emerges from the preceding discussion is that both freehold and communal/traditional tenure systems can be manipulated by those who have relative political and economic power. It is the failure of policy makers to take account of socio-economic differentiation that contributes to the “elite” capture of the benefits of tenure reform. Conversion to exclusive ownership rights, or title registration, for example, is sometimes a mechanism “for transfer of wealth for those with better social or economic positions”.<sup>176</sup> Furthermore, tenure reform is not likely to benefit landless individuals or communities, because tenure reform, by definition, applies to people who already have access to land. It has also been shown that tenure reform can result in dispossession, particularly of women, tenants and nomadic farmers – examples discussed in this chapter include Kenya, Egypt, Mexico, Botswana, Algeria and Eritrea. As a consequence of the above, tenure reform may also result in increased rural polarisation and even violent conflict – examples discussed in this chapter include Kenya and Botswana.

In South Africa, it is important that policy developers and implementers remember that because of the many socio-economic differences among and within communities, there is no such thing as a “community-perspective” according to which policy can be developed. Furthermore, as discussed, individuals are part of communities with particular social systems and power relations and, by implication, may not be able to “choose” – as the Ulundi resident quoted in this chapter explained with regard to the Communal and Rights Bill, “*government underestimates the chiefs. If the Bill is passed, it will be understood that any tribe member who applied to own land [individually/freehold] can be killed or have their house burnt down. Many people will be happy to strike the match*”.

With regard to overlapping land claims and land rights (and this relates to the discussion above) it will be necessary that the tenure reform programme includes making more land

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<sup>175</sup> Adams M, Cousins B and Manono S, “Land tenure and economic development in rural South Africa: Constraints and Opportunities”, in Cousins B (ed.), At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century, PLAAS, UWC, 2000.

<sup>176</sup> Barrows R & Roth M, “Land Tenure and Investment in African Agriculture: Theory and Evidence”, Journal of Modern African Studies, Vol. 28, No.2, 1990

available for settlement, as well as, government investment in rural economic development. This, of course, raises questions around the capacity of the South African government to implement tenure reform (i.e. the expansive nature of tenure reform).

What the international and South African case studies (discussed in this chapter) indicate, is that tenure reform programmes are highly complex, almost never successful, and generally beyond the immediate capacity of the government. Tenure reform programmes are incredibly expensive, administratively difficult and very time consuming – tenure reform in South Africa, for example, in terms of current policy directions, could take 100 years. Imagine the cost and complications of surveying, identifying the new legitimate owners and registering land rights in South Africa’s former homeland areas. Given the budget constraints on restitution and redistribution, discussed in the previous two chapters, and given the requirement for government investment in and support of the rural economy discussed in this chapter and chapter three, it is unlikely that the South African government will be able to afford or implement a comprehensive tenure reform programme at a sufficiently fast pace. This is also why, for example, tenure reform programmes are often abandoned, or why it has taken nine years for South African policy makers to present a vehemently criticised Draft Bill. Furthermore, the international case studies indicate that despite literally centuries of attempts at tenure reform (mainly to freehold) in African and Latin America, “*customary tenure not only persists, but is still by far the majority form of tenure*”.<sup>177</sup>

Authors like Ben Cousins have argued that the “case by case” approach to tenure reform (and by implication the slow pace of tenure reform) could be overcome by developing tenure reform programmes similar to those employed in Mozambique in the late 1990s.<sup>178</sup> The Mozambican programme recognises and protects existing occupation and use of land, and gives residents the status of property owners without requiring their conversion to private ownership.

It is unclear, how this will address problems such as lack of access to credit (see chapter four). Furthermore, the problems that have emerged during the “case by case” approach are just as likely to emerge in the “blanket” approach – e.g. overlapping claims, boundary disputes and the relative nature of land rights. In the Mozambican case, for example, problems (similar to those in the CPA structures in South Africa) soon emerged around Land Committees. These include; the status of women did not improve, third parties soon encroached on communal land/rights, group relationships and power struggles became problematic, and traditional authorities have largely maintained their positions of influence and legitimacy.<sup>179</sup>

Does this mean we should abandon tenure reform? Does this mean that there should be nominal state ownership of land in the rural parts of the former homeland areas and that

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<sup>177</sup> Alden Wily L, “Land Tenure Reform and the Balance of Power in Eastern and Southern Africa”, *Natural Resource Perspectives*, Overseas Development Institute, no. 58, June 2000

<sup>178</sup> See section two of this chapter.

<sup>179</sup> Norfolk S, Nhantumbo I, Perira J, Matsimbe Z, “The New Communities: Land Tenure Reform and the Advent of New Institutions in Zambezia Province, Mozambique”, *Sustainable Livelihoods in South Africa*, Research Paper, no. 12, IDS, University of Sussex, March 2003

people's rights to land should be strengthened through measures such as the Interim Protection of Informal Land Rights Act? Where, as Cosatu recommends, the state should have the ability to intervene (in land allocation and management) on behalf of communities and expropriate land in cases of abuse and/or corruption, or where those who control access to land do not comply with the Bill of Rights?

**Box A**

The Ingonyama Trust controls approximately 3 million hectares or about 40% of KwaZulu-Natal. This body was created by the KwaZulu government in 1994, as a result of a deal between the then leader of the former KwaZulu homeland, IFP President Mangosuthu Buthelezi and then State President, F.W. de Klerk (24 hours before the 1994 general election). The KwaZulu-Natal Ingonyama Trust Act 3 of 1994 created the Trust. The Act instructed the Registrar of Deeds to transfer land that was vested in the KwaZulu government to the Trust and provided that the Zulu king would be the sole trustee of the land. The main flaw in the Act was that the Zulu king did not have the capacity or the infrastructure to carry out the functions required by the Act. After a number of court challenges the Act was repealed in 1996 and new legislation passed in 1998. The latter provided for the formation of an 8-member board responsible for the administration of the affairs of the Trust. The Zulu-king was appointed as head of the board. Deputy Director General of the Department of Agriculture, Glen Thomas, is the vice-chairperson of the Trust's board. A further 4 members are appointed by the Minister of Agriculture and Land Affairs in consultation with the premier of Natal and the Chairperson of the House of Traditional Leaders. (Independent Project Trusts, Traditional Leaders: A KwaZulu-Natal Study 1999 – 2001, Durban, 2002, p. 103 & 104)