

Working Paper Number 22

**DEFINING THE PROPERTY RIGHTS OF OTHERS:
POLITICAL POWER, INDIGENOUS TENURE
AND THE CONSTRUCTION OF CUSTOMARY LAW**

by

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Constitutional recognition of indigenous law and the role of traditional authorities at last dignifies African legal culture in South Africa with the official equality it has so long been denied. But this new status will stimulate the debate over the content and construction of customary law as presently recognized by the courts as well as over the relationship between this body of law and the new bill of rights.¹

One of the first issues to be confronted is the question of how land tenure is linked to the administrative powers of traditional authorities. Within weeks of President Nelson Mandela's inauguration, this issue had already threatened the stability of the new government of national unity; former State President de Klerk's last-minute assent to the KwaZulu Ingonyama Trust Act meant that approximately three million hectares were to be administered by Zulu King Goodwill Zwelithini as the sole trustee, with the administrative expenses to be borne by the new KwaZulu/Natal provincial government.² Although a Cabinet committee managed to resolve the initial crisis, the King's precise powers over the allocation of resources were left to be settled

¹ See TW Bennett 'The Equality Clause and Customary Law' (1994) 10 *SAJHR* 112 and TW Bennett and JW Roos 'The 1991 Land reform Acts and the Future of African Customary Law' (1992) 109 *SALJ* 447.

² E Randall & F Chothia 'Land deal: The king's ransom' *Weekly Mail* May 20-26, 1994 at page 2 col 2.

by future legislation.³

As the Ingonyama Trust debate shows, constitutional recognition of indigenous law will require the new government to disentangle indigenous land rights from a colonial legacy under which political sovereignty and land ownership were intertwined as part of the system of indirect rule. Moreover, the property rights of individuals, family groups and communities -- within indigenous land tenure systems -- are entrapped within the administrative model of customary law⁴ which imposed a system of patronage and political dependency while simultaneously undermining community governance and the role of traditional authorities in the political process. Finally, a revitalization of indigenous land law will require the new state to ensure that those communities and individuals who wish to continue to relate to and use land within the framework of an indigenous land ethic are able to reinfuse indigenous tenure with community norms and practices, rather than remaining dependant on administrative fiat.

This process may also serve to free 'customary' legal concepts and rules from their colonial moorings and to bring legal understandings into line with more recent academic investigations. Of particular importance are the deeply textured understandings flowing from new historical studies and legal anthropology,⁵ which emphasize

³ See TW Bennett *Trusteeship and Land Tenure* (unpublished draft, 1994) and H Ngubane *The Role of Monarchy and of Traditional Authorities Generally in Indigenous Land Tenure in South Africa* (unpublished submission, May 31, 1994) for different accounts of the nature of relationship between traditional authority and land tenure.

⁴ See M Chanock 'Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure' in K Mann and R Roberts (eds) *Law in Colonial Africa* (1991) at 76.

⁵ See, K Maddock 'From Terra Nullius to Mabo' paper to be included in volume in honour of Professor P K Bhowmick, Dept of Anthropology, University of Calcutta (1994), for an example of how these developments have impacted on

the extent to which the legal framing of 'customary tenure' is shaped by its construction in a context dominated by particular, culturally-specific, legal notions of property and ownership, and the way colonial imperatives shaped the particular content given to customary tenure and the subsequent political consequences of this process.⁶

Through a close examination of *Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale*⁷ I hope to contribute to this growing body of literature, and to demonstrate how a particular, possibly erroneous, construction of indigenous law became geographically extended and imposed as legal authority for a universalized notion of 'customary tenure.' In conclusion I will argue that recognizing the constructed nature of existing legal notions of customary tenure allows us to reopen the question of land held under communal tenure and may facilitate a greater recognition of the land rights of individuals and families under indigenous law. Discrediting the basis of current legal notions of customary tenure provides an incentive for future legislative and judicial explication of the constitutional recognition of indigenous law and traditional authorities to liberate indigenous tenure from the domination of administrative processes. This could be accomplished by a 'reinvigorating process' through which communities committed to the recognition and practice of an indigenous land ethic are able to directly contribute their shared understandings and accepted intra-community practices as sources for the construction of a legitimate system of indigenous tenure.

HERMANSBERG MISSION SOCIETY AND THE CREATION OF

legal developments towards the recognition of Aboriginal land rights in Australia.

⁶ See generally, Sara Berry *No Condition is Permanent* (1993) and K Mann and R Roberts (eds) *Law in Colonial Africa* (1991).

⁷ *Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale* 1906 TS 135.

LEGAL AUTHORITY

Representing a pivotal moment in the construction and recognition of property rights in 'colonial' society *Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale* hinges on an African chief's refusal to recognize an alleged land-sale contract concluded between his father and the plaintiff missionary society. The Chief argued that a chief may not alienate tribal land without the direct consent of the community. Rejecting his argument the court held that an African chief, as trustee of the community's land, may alienate land with the consent of the chief's council and without the direct participation of the community. While a seemingly subtle distinction, the shifting of chiefly accountability for the control and distribution of community resources from the pitso -- a body made up of all married males, the recognized political participants in the community -- to the chief's council had profound consequences for the future recognition of community and ultimately individual property rights in African polities.

This case reveals a story of colonial interaction which spans a period during which this particular African community was transformed from an autonomous political entity into a subject group whose territory was not only incorporated into the colonial state but its land rights were formally transferred 'in trust' into the hands of the colonial administration. The community's relationship with the Hermansberg Mission Society followed a similar trajectory. Initially the missionary was invited to join and serve the community and settled on land granted by the Chief as a participant in the community. However, thirty years later the missionary asserted an exclusive right to the land as a way to resist the parcel's inclusion in the lands demarcated by the colonial authorities in the creation of a 'native reserve' for the community. Based on a financial transaction -- which may on the facts have been a sale, mortgage, secured or unsecured loan depending on the vantage point of the witness -- the missionary's claim and the consequences for the community reveal all the ambiguities of meaning, understanding and changing circumstances which bedeviled these colonial interactions.

The choice of any particular case must however be guided not only by concern for the specific story which the case reveals but also

by the impact the case may have had on the formation of legal precedent. Both the context within which the *Hermansberg Mission Society* litigation arose and the impact the case had on the development of legal authority makes it a case of pivotal significance. Furthermore, the case centered on the issue of the transfer of land from an African community to a colonial entity and invoked the question of alienability which is one of the two elements identified by Martin Chanock as determinate in the construction of customary tenure.⁸

The legal significance of the *Hermansberg Mission Society* case lies in the historic role it plays in colonial jurisprudence. The reported opinion of Chief Justice Innes is the source for subsequent legal arguments which incorporated the relationship between political authority and land rights, providing a legal anchor for the line of cases which culminated in the declaration of the privy council in *Sobhuza II v Miller and Others* that 'the true character of the native title to land throughout the empire, including South and West Africa ... is a uniform one ... [which] takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign'.⁹ This feudal notion of individual or even family and group rightlessness with respect to political authority is thus extended, with profound consequences, as the colonial or official understanding of indigenous tenure throughout the empire.¹⁰

Although colonial authorities had postulated the rightlessness of indigenous tenure relations from the time consideration was given to the recognition of indigenous law¹¹ the 'legalization' of this view point finds its inception in the *Hermansberg Mission Society* case.

⁸ See, Chanock op cit note 4.

⁹ *Sobhuza II v Miller and Others* 1926 AC 518 (JC) at 525.

¹⁰ See Chanock op cit note 4 at 64-6.

¹¹ See CJ Rayner *Report on Land tenure in West Africa* (1898) quoted in *Amodu Tijani v Secretary, Southern Nigeria* (1921) AC 399 (JC) at 404.

From mere dicta in the opinion of Chief Justice Innes the proposition that 'ownership in land ... was foreign to their ideas', is transformed through its citation by the Privy Council as legal authority in *In re Southern Rhodesia* and then by reference to *In re Southern Rhodesia* in *Sobhuza II* into legal precedent of vast consequence.

The assertion of legal authority

Denying the land rights of Lobengula's Ndebele people Lord Sumner, reporting for the Privy Council, cited as sole authority the statement that when the African peoples of South Africa 'were governed by their own customs and laws the notion of separate ownership in land or of the alienation of land by a chief or any one else was foreign to their ideas'.¹² Revealing their evolutionary assumptions the Privy Council contrasts this 'original' situation with that of the 'Basutos ... who had made considerable progress both in the idea of transferable property in tribal land and in usages for ensuring the assent of the tribe to alienation of it'.¹³ Although willing to countenance evolutionary development, especially as a result of 'contact with white men and ... residence under their rule',¹⁴ the most enduring impact on legal development has been the assertion that aboriginal peoples had no comparable notion of ownership over land. Thus the Privy Council could argue that although Her Majesty Queen Victoria was pleased to recognise the sovereignty of an indigenous monarch it would only be fanciful to try to span the great gulf in all the juridical conceptions of their respective subjects.¹⁵

This distinction between sovereignty and the juridical conceptions of the subjects of either the colonial power or colonized societies allowed the colonial courts to simultaneously 'legalize' the

¹² *In re Southern Rhodesia* 1919 AC 211 at 215.

¹³ *Ibid.*

¹⁴ *Ibid* at 215.

¹⁵ *Ibid* at 216.

process of colonization within the context of established colonial law while denying any preexisting rights to land among the indigenous population by reconstructing indigenous property relations so as to exclude the possibility of their recognition under the common law. Given the consequences of this distinction for the land rights of indigenous people -- individually and collectively -- its source and status as legal authority is pivotal to future interpretations of 'customary law'.

CONSTRUCTING THE PROPERTY RIGHTS OF OTHERS

Authoritative texts on customary law continue to argue that indigenous law 'cannot be adapted to ownership in immovable property for there is no such customary law',¹⁶ while simultaneously conceding that with regard to other forms of property indigenous law 'knew ownership and possession of movables, and occupation and use, but not ownership, of land'.¹⁷ This distinction in customary law, which denies ownership in land but concedes notions of ownership in such valuable resources such as cattle, seems with historical hindsight to be more a product of nineteenth Century European notions of ownership and colonial ordering than a genuine reflection of land rights in indigenous law.

While modern notions of land tenure portray property rights in land as a bundle of rights which may differ from one jurisdiction to another and even over time,¹⁸ official customary law continues to be dominated by the assumption that 'true' ownership is in all circumstances equivalent to freehold title. This assumption precludes any notion of land ownership in indigenous law on the grounds that where a property holder does not have the right to alienate freely they

¹⁶ JC Bekker *Seymour's Customary Law in Southern Africa* 5 ed (1989) at 50.

¹⁷ Ibid.

¹⁸ See C Lewis 'The Modern Concept of Ownership of Land' 1985 *Acta Juridica* 241.

do not have an ownership right. This notion of ownership is however based on a combination of two nineteenth century jurisprudential traditions. First, the absolutist concept of ownership, which was advocated by pandectist philosophers, but which has been challenged as being an ahistorical assertion of the nature of ownership under Roman-Dutch law,¹⁹ and second, the feudal notions of property relations which underpin English land law. Despite this pedigree and the long formal recognition of the concept of ownership, the exact content of 'ownership' remains contested in both the European civil law and Anglo-American common law traditions, and is subject to continuing debate in South African law. Freed of the assumption of a single definition of ownership it is possible to examine in general terms how the process of colonial ordering and the 'legalization' of indigenous law reconstructed the 'legal' relationship between indigenous communities and their land.

Colonization and the construction of customary tenure

An overview of the fate of indigenous land rights at the hands of colonial regimes reveals different outcomes dependent in broad terms on the relative strengths of the colonized and colonizing groups. Three general patterns may be discerned ranging from the complete denial of land rights to the recognition of 'customary tenure'.

The first pattern is typified by situations in which the colonizers simply negated indigenous land rights, asserting that the land at issue was *terra nullius*.²⁰ For less powerful or more marginalised

¹⁹ See DP Visser 'The "Absoluteness" of Ownership: the South African Common Law in Perspective' 1985 *Acta Juridica* 39.

²⁰ But cf: *Concerning Certain Questions relating to Western Sahara (Rio de Ore and Sakiet El Hamra)*, 1975 ICJ 12 (Advisory Opinion of 16 October 1975). The Western Sahara Opinion stands as the first major legal refutation of the notion that unsettled lands were *terra nullius* before the arrival of European colonizers.

communities this denial of any property rights in the territory they occupied continues -- as is the case of the San communities in Botswana²¹ -- or has only recently been overcome, as in the case of Aboriginal communities in Australia.²² However, even when the property rights of these communities have been recognized in the form of common law aboriginal title, it is recognized subject not only to the state's normal powers of expropriation but also to any 'use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of ... [the] people under native title'.²³

The second pattern occurred in situations where the colonizers initially recognized the territorial rights of the indigenous sovereign but where -- often as a consequence of the military defeat of the colonized -- the existence of cognizable property relations among the defeated peoples were subsequently denied. Thus the Privy Council denied the property rights of Lobengula's people following his defeat and the extension of British sovereignty over Southern Rhodesia.²⁴ Although the case originated in a conflict between the British South Africa Company and the Crown over rights to unallocated lands, the Aboriginies Protection Society intervened on behalf of the Africans of Southern Rhodesia 'claiming that Africans had rights which had not been ceded'.²⁵ Their argument was based on contemporary international law which held that if the property rights of colonized or defeated communities were of a similar nature to those recognized in

²¹ EN Wilmsen 'Introduction' in EN Wilmsen (ed) *We Are Here: Politics of Aboriginal Land Tenure* (1989) at 1.

²² See Maddock op cit note 5.

²³ Per Brennan J *Mabo v The State of Queensland* (1992) 175 Commonwealth Law Reports 1 at 76.

²⁴ See generally *In re Southern Rhodesia* 1919 AC 215 (PC).

²⁵ Chanock op cit note 4 at 65.

English law, they would not be affected by a change in sovereignty.²⁶ In order to overcome this well established precedent the court 'approached the question in terms of social evolution',²⁷ arguing that '[s]ome tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society'.²⁸

Significantly this denial of individual land rights among Africans was further justified on the basis of colonial imperative. Rejecting the position of the Aboriginies Protection Society the court stated that according to their argument 'the natives before 1893 were owners of the whole of these vast regions in such a sense, that without their permission or that of their King and trustee, no traveller, still less a settler, could so much as enter without committing a trespass. If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the Company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council.'²⁹ This statement of the reality of de facto colonial power is then asserted as a fact making 'further inquiry into the nature of the native rights unnecessary'.³⁰

The third pattern or response to indigenous property rights was to acknowledge the existence of certain 'lesser' rights. Where the colonial power was able to assert sovereign authority but where it lacked the power to completely dominate colonized society the recognition of 'property rights' involved the 'creation' of customary law in a process of 'dialogue between the colonial state and its African

²⁶ See K McNeil *Common Law Aboriginal Title* (1989).

²⁷ Chanock op cit note 4 at 65.

²⁸ *In re Southern Rhodesia* supra note 12 at 233.

²⁹ Ibid at 234.

³⁰ Ibid.

subjects'.³¹ However, rather than recognizing these rights as equal to ownership, which could withstand a change of sovereignty in the form of colonization, these rights were defined as lesser rights -- to occupation and use -- confirming their vulnerability to simple extinguishment by any act of the new sovereign inconsistent with the continued existence of the particular rights.³²

This response contained two elements. First, it defined the rights of the colonized as limited to occupation and use which characterized feudal land law in England. Land rights in this feudal model were seen as deriving from 'political authority, rather than residing in the peasantry'.³³ This construction of African land rights had the virtue of according with prevailing colonial notions of state and society and enabled colonial authorities to make a connection between British and African land law. Second, in accordance with this characterization, rights to land were seen as inextricably bound up with issues of sovereignty and governance. This allowed the Crown to assert a control over colonized lands which it had long been required to relinquish under English law while simultaneously rearticulating the role of African chieftainships in accordance with the policy of 'indirect rule' which mediated between African resistance and a limited colonial state.

³¹ Chanock op cit note 4 at 62.

³² Significantly, as Martin Chanock has noted, the 'early colonial discussions over African rights to property, particularly land, were over the extent to which property was communal, and the extent to which individuals had use rights . . . [and that] the expropriation of communal lands was far more easily politically and legally accomplished and justified than the expropriation of individual rights.' M Chanock 'A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa' (1991) 32 *Journal of African History* 65 at 70.

³³ Chanock op cit note 4 at 64.

Customary tenure as a product of universal history

The intellectual framework upon which this edifice was built reflects the universalizing narratives of social evolution which dominated the nineteenth century and which were summed up with respect to land tenure by Lord Lugard the architect of the policy of indirect rule:

'In the earliest stage the land and its produce is shared by the community as a whole; later the produce is the property of the family or individuals by whose toil it is won, and the control of the land is vested in the head of the family. When the tribal stage is reached, the control passes to the chief, who allots unoccupied lands at will, but is not justified in dispossessing any family or person who is using the land. Later still, especially when the pressure of population has given to the land an exchange value, the conception of proprietary rights in it emerges, and sale, mortgage and lease of the land, apart from its user, is recognized These processes of natural evolution, leading up to individual ownership, may, I believe, be traced to every civilization known to history.'³⁴

Rather than understanding customary law as the product of anthropological and administrative observations of custom and practice in African communities, its formulation must be considered within the context of a dominant colonial power. This colonial construction of customary land tenure must not however be understood as something merely thrust upon unresponsive African societies but rather as the outcome of an interaction in which the colonized constantly sought opportunities to shape and redefine the process so as to either protect what remained of their lands or to further the interests of particular sections of African society. This process witnessed colonial administrators on the one side seeking 'information on traditional social structures and identities in order to know how to apply customary rules in governing colonial peoples',

³⁴ Lugard *The Dual Mandate in British Tropical Africa* (1922) 280-1, quoted in Chanock op cit note 32 at 69.

while on the other 'African colonial subjects renegotiated rules and social identities in order to cope with or take advantage of colonial rule and commercialization'.³⁵ Africans have thus actively participated in the development of customary law,³⁶ and in the construction and perpetuation of particular notions of communal tenure in particular.³⁷

CONTEXTUALIZING THE *HERMANSBERG MISSION SOCIETY* CASE

Although the importance of context in the creation of customary law and even the role of respective participants and interests is now widely accepted, it remains essential to investigate how this context framed the emergence of specific legal authority.³⁸ The issue of context in the *Hermansberg Mission Society* case is relevant at two separate points in time, first, at the time when the transaction took place, and second, for the period thirty years later when the litigation occurred. The transaction, which occurred in 1876, took place in a period in which the necessity of clarifying property relations had come to the attention of the mission societies. On the one hand, mission stations in the Cape had been made aware of their tenuous property relations when in 1854 Sir George Cathcart announced the establishment of

³⁵ Berry op cit note 6 at 34.

³⁶ See, Chanock op cit note 32.

³⁷ See Chanock op cit note 4 at 66 and see generally, AP Cheater 'Fighting Over Property: The Articulation of Dominant and Subordinate Legal Systems Governing the Inheritance of Immovable Property Among Blacks in Zimbabwe' (1987) 57 (2) *Africa* 173.

³⁸ As Martin Chanock argues: '[w]hile "law in action" derives its meaning from local situations and conflicts, we must not lose sight of the general overarching legal framework as a major ingredient of each situation.' Chanock op cit note 4 at 66.

trust tenure on mission stations arguing that it was not clear 'whether these mission lands were the property of the missionary or of the mission community congregated within it'.³⁹ On the other hand, the denial of sovereignty and continued colonial expansion brought into question the long term stability of the chiefly land grants upon which the mission stations were initially founded. For example, the denial of Tlhaping sovereignty over lands in what became the British Crown Colony of Griqualand West by the Keate Award in 1871 threw into question chiefly land grants and left the mission stations in that area subject to the vagaries of colonial administrative policy.⁴⁰ Aggravating these uncertainties was the general shortage of land for rural settlement, for both black and white, from the 1870s onwards.⁴¹

The context in which the litigation arose was in comparison shaped by the consequences of these earlier processes requiring the Mission Society to distinguish its land holdings from that of the tribe whose land was in the process of being placed in trust as part of the colonial creation of African reserves. Significantly, in terms of the missionaries' understanding of their property rights the process of placing land in trust was initiated after the first British annexation of the Transvaal by Sir Theophilus Shepstone in 1877. In fact the very land transfer -- of the farm Kafferskraal No 597 -- for which Chief Frederick Mogale needed the sixty pounds obtained from the missionary Jordt

³⁹ 'Further Papers Relative to the State of the Kafir Tribes, July 1855, No. 12. Sir G. Cathcart to the Duke of Newcastle, 14 Mar. 1854' in TRH Davenport and KS Hunt (eds) *The Right to the Land* (1974) at 35.

⁴⁰ See, K Shillington *The Colonisation of the Southern Tswana 1870-1900* (1985) at 35-89.

⁴¹ TRH Davenport *South Africa: A Modern History* (1977) at 118.

was registered in the name of Shepstone's son HC Shepstone⁴² 'in his capacity as Secretary for Native Affairs⁴³ and in trust for Chief Magalie and his people'.⁴⁴ Despite this forewarning however it seems that until faced with the threat of direct state intervention the Mission Society saw no reason to assert rights in the land inconsistent with those granted by the community. Another important factor defining the context within which the litigation took place was the aftermath of the Anglo-Boer War during which the Rustenburg district among others had witnessed a tenants revolt in which African communities took over Boer farms and asserted rights to the land.⁴⁵ Resistance to the return of Boer landlords⁴⁶ and the new British administration's reconstruction policies which reasserted landlord/tenant relationships

⁴² HC Shepstone was the son of Sir T Shepstone and the brother of the T Shepstone, commonly known as Offie, who gave expert evidence at trial in this case. See, W Beinart 'Production and the material basis of chieftainship: Pondoland c 1830-80' in S Marks and A Atmore (eds) *Economy and Society in Pre-Industrial South Africa* (1980) at 139.

⁴³ HC Shepstone was Secretary for Native Affairs in the first British administration of the Transvaal. See, P Delius *The Land Belongs To Us* (1983) at 222.

⁴⁴ Registrar of Deeds, Particulars of the three farms Boschfontein No 381, Kafferskraal No 597 and Kareepoort No 623, district Rustenburg (21st March 1906), Illiquid Cases 99/06 at 502 [ztpd 5/615] (State Archives, Pretoria).

⁴⁵ P Warwick *Black People and the South African War 1899-1902* (1983) at 51.

⁴⁶ Ibid at 165-6.

and disarmed African communities⁴⁷ as well as the 'great fear' of a general uprising which swept the Northern Transvaal in 1904⁴⁸ all set the stage upon which the litigation unfolded.

While Chief Justice Innes -- the author of the decision in the *Hermansberg Mission Society* case -- is recognized as having been one of South Africa's few great liberal judges, a contextualized analysis of his decision will reveal that it may have been precisely his embedded nineteenth Century liberal notions of social evolutionism which lie at the source of his understanding of the case. A close examination of the evidence and legal argument in the case furthermore demonstrates that these notions of social evolutionism and the resulting distinction between ownership and rightlessness -- which denies the existence of individual or even family-based group rights vis-a-vis the sovereign in customary law -- is as suspect as earlier constructions of indigenous peoples property rights.

A contested transaction

Giving evidence before Chief Justice Innes of the Transvaal Supreme Court⁴⁹ Mr JP Jordt, missionary of the Hermansberg Mission Society told the court that in his discussions with Chief Frederick Mogale the Chief 'couldn't understand why I wanted to buy because the erf had

⁴⁷ See J Krikler *Revolution from Above, Rebellion from Below* (1993).

⁴⁸ Which interestingly is blamed in part on the agitation of the irresponsible Offie Shepstone, a landowner angling for a post in the Department of Native Affairs, whose extravagant ideas concerning peasant revolt were to be brought to the attention of the authorities again a few years later' *ibid* at 230.

⁴⁹ Later Chief Justice of the Union of South Africa 1914-1927.

already been given to me'.⁵⁰ Although made thirty years after the event this statement, reflecting on the relationship between the missionary and the Chief, provides an essential prism through which to contextualise the transaction. Distilled in this reported interaction are all the issues of sovereignty and property, church and sovereign, advisor and intermediary which bedeviled relationships between chiefs and missionaries.

The relationship between Mr Jordt, Chief Frederick Mogale and the BaPo community was initiated by Chief Frederick Mogale's application to the Hermansberg Mission Society for a missionary to be appointed to the community.⁵¹ The choice of this particular mission society was not based on religious preference but rather on the fact that in response to an 1853 request by the Kwenia Chief Setshele to President Pretorius the Boer 'government had invited the Hermannsburg Lutheran Mission to establish itself in the area'.⁵² The arrival of missionary Jordt in 1874 was therefore part of a wider development which saw the establishment of twelve 'fully-fledged Hermannsburg Lutheran Mission stations in the [Rustenburg] district' by 1885.⁵³

Explaining the establishment of Christian missions by 'chiefly invitation' as in part a 'creative response to the undermining effects of colonisation on both the ideological and material basis of chiefly

⁵⁰ JP Jordt, evidence given on the 21st March 1906, *Hermansberg Mission Society v Commissioner for Native Affairs and Darius Mogale* y, 99/06, 1906 Illiquid Cases from 84-99, ztpd 5/615, State Archives, Pretoria at 512-3 [hereinafter Evidence].

⁵¹ Ibid.

⁵² GN Simpson *Peasants and Politics in the Western Transvaal, 1920-1940* (unpublished MA thesis, University of the Witwatersrand 1986) 87.

⁵³ Ibid.

authority',⁵⁴ Simpson contextualises chief/community/missionary relationships in the district in terms of the twin processes of colonization and African resistance or response. The role of missionaries in mediating this confrontation was, on the one hand, welcomed by African communities -- where 'chiefs wanted evangelists because they had seen how "Mateebe's missionaries" were "a shield to his back" ' -- and, on the other hand, it restructured the lifeworld of African communities in ways which neither chiefs nor missionaries -- who came 'from a world that had conjured up a hard-edged distinction between politics and religion, secular power and sacred authority' and who 'failed to see that sovereignty in Tswana communities simply could not be apportioned in such terms' -- could have comprehended.⁵⁵

Intertwined in the complexities of this relationship is the fact that during the nineteenth century the 'most significant aspect of the co-operative relationship between the chiefs and the Lutheran mission [in the Rustenburg district] ... was the extent to which this facilitated the purchase of land on behalf of the various tribes'.⁵⁶ The significance of these land purchases lay in the history of the district in which many African communities had at one time or another been displaced and where land purchase was an important part of reconstituting the community. Even the chief of the BaPo community 'who had fought alongside the boers against the Ndebele' came into conflict with the Boers when the community resisted claims on their land and labour,⁵⁷ and was forced to flee south to Basutoland in

⁵⁴ Ibid at 370.

⁵⁵ J Comaroff and J Comaroff *Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa* (1991) 256-7.

⁵⁶ Simpson op cit note 52 at 364.

⁵⁷ Ibid at 85.

about 1847.⁵⁸ Chief Mogale Mogale (Frederick's father) only returned to the district in 1862 after purchasing the farm Boschfontein, 'because the kraals of his ancestors were situated there'.⁵⁹ Furthermore, the 'purchase of land on behalf of these chiefdoms contributed greatly to the maintenance of chiefly authority by maintaining the material basis of the chief's ability to distribute land amongst members of the chiefdoms'.⁶⁰

The interdependence of chiefs and missionaries was not however unproblematic and although the missionaries felt that 'great things could be achieved' as long as the 'chief remained under the influence of the missionary', the 'Lutheran missionaries complained that the second generation of chiefs after the establishment of the missions ... wanted to be "masters of the church"'.⁶¹ The determination of the missionaries to maintain the autonomy of the church in the face of chiefly presumptions to control the jurisdiction of the missions led at times to open conflict between the missionaries and chiefs with intra-community consequences as tension grew between members of the missionaries congregation and non-converts.⁶² Finally, with the 'necessity to register all African owned land in the name of the Commissioner of Native Affairs' in the years following the end of the Boer War, it was 'revealed that much of the land ostensibly bought by missionaries was in fact owned by Africans'.⁶³ It is in this context

⁵⁸ PL Breutz *History of the Batswana* (1989) at 413.

⁵⁹ Ibid at 414.

⁶⁰ Simpson op cit note 52 at 365. Land grants by the sovereign have historically been a source of political authority and cannot be read as explaining the subsequent tenure relations between sovereign and grantee, or subject.

⁶¹ Ibid at 368.

⁶² See, Simpson op cit note 52 at 369.

⁶³ Ibid at 93.

then that we must place both the initial transaction between Chief Frederick Mogale and the missionary Jordt as well as the subsequent conflict and court case between the chief's heir Darius Mogale and the missionary.

As told in court the relevant transaction took place on April 18, 1876, two years after Mr Jordt had arrived and established himself as missionary to the community. It was however only thirty years later in 1905 when the farm Boschfontein was about to be passed into the name of the Commissioner of Native Affairs in trust for the tribe -- in terms of the creation of tribal reserves -- and when Chief Darius Mogale, attempted to sell mineral rights to the land on behalf of the tribe that missionary Jordt asserted ownership rights on behalf of the Hermansberg Mission Society.

In reconstructing the contested transaction there are a number of points of agreement revealed in the evidence of the different witnesses. First, it is common cause that Chief Frederick Mogale was seeking to obtain sixty pounds so as to complete payment for a land transaction which involved the purchase of land from one Orsmond. Second, that Chief Frederick Mogale received sixty pounds from Mr Jordt after the signing of a document which was drawn up and witnessed by a neighbouring Boer farmer and his brother-in-law. Third, that the land at issue had previously been granted to Mr Jordt as missionary by Chief Mogale and was worth more than sixty pounds at the time of the transaction and, fourth, that in 1898 Chief Darius Mogale refused to erect beacons indicating the boundaries of the contested land after Jordt had informed Darius Mogale that the mission society had purchased the land from his father.

Factual disagreement in the evidence focuses both on the very nature of the transaction -- whether it was a sale or loan agreement -- and on the question of whether the transaction, if it is held to have been a contract of sale, could have been validly entered into by the Chief. This second aspect is a mixed question of law and fact -- what consent must the chief obtain before entering into a contract of sale and whether the requisite consent was in fact obtained in this case. Witnesses called on behalf of the defendant, Chief Darius Mogale, acknowledged that there had been a transaction between Chief

Frederick Mogale and missionary Jordt involving sixty pounds⁶⁴ but stated that it was a loan to pay the costs of a case against Orsmond from whom Chief Frederick had purchased land.⁶⁵ As to the second issue, Chief Darius Mogale and all the witnesses called on his behalf stated that they either only heard about the claimed sale after Darius became chief or that Chief Frederick Mogale had discussed the problem of the debt to Ziervogel (the lawyer) and the fact that he was going to obtain the money from the missionary but could not have sold the land as this was neither discussed nor agreed upon by the council.

Although Jordt acknowledged that the community needed the money for the purpose of resolving a land transaction and that the chief initially asked his advice, he told the court that he offered to pay the sixty pounds if the Chief 'would and could lawfully sell the erf'.⁶⁶ The Chief, Jordt said, agreed to 'speak with his people' and later came to the missionaries house, with a group of his councillors and people, where the contract of sale was signed and the sixty pounds handed over. This version of events was repeated by Michiel Dorfling the brother-in-law of Van Staden who wrote the deed of sale and the other signatory to witness the written contract. Witnesses for the plaintiff included three members of the community who were present at the time of the transaction and stated that they had attended the community gathering or pitso where the 'Chief asked us if we could release him from debt to Jacob Ziervogel [and] we voted that if he saw

⁶⁴ See Jonathan Moqoa, August Moerane, Bethuel Masilo, Maria Mohale, evidence given *Hermansberg Mission Society v Commissioner for Native Affairs and Darius Mogale* supra note 50.

⁶⁵ See evidence of Bethuel Masilo, Maria Mohale in *Hermansberg Mission Society* case supra note 50.

⁶⁶ See evidence of Jordt in *Hermansberg Mission Society* case supra note 50.

a chance he was to release us'.⁶⁷ While Lukas Bil(w)ani told the court that the Chief had gone to 'Jordt to advance the money', he repeated Jordt's version of events and said the 'Chief told us Jordt would give the money if he could retain the ground ... we voted agreeing'.⁶⁸

The court's decision

Faced with this contradictory evidence the response of Chief Justice Innes was on the one hand to rely on the written contract upon which Chief Frederick Mogale had made a cross in the presence of two neighboring white farmers, and on the other hand to rely on the integrity and reputation of the missionary.

Turning to the merits of the case Chief Justice Innes states unequivocally that he is 'satisfied that the deed of 1876 was actually entered into'⁶⁹ and that the purchase price was paid. Rejecting the defendant's evidence that the transaction was in fact a loan agreement the Chief Justice said, 'I do not for one moment accept the story that the money was a loan by Jordt to the chief Frederik. If that were so, Mr Jordt cannot have forgotten it, and he must have been fabricating the story which he told the court. On this part of the case I unhesitatingly accept the evidence of Mr Jordt, not only from the respect which one has for the office which he holds, and for the work which he has done and is doing in this country, but from his demeanor in the witness-box, and the straightforward way in which he gave his evidence, which convinced me that he was speaking the truth'.⁷⁰

Having established to his satisfaction that the contract was in fact entered into, the Chief Justice then turns to consider the validity

⁶⁷ See evidence of Makaliana in *Hermansberg Mission Society* case supra note 50.

⁶⁸ See evidence of Lukas Bil(w)ani in *Hermansberg Mission Society* case supra note 50.

⁶⁹ *Hermansberg Mission Society* case supra note 7 at 140.

⁷⁰ *Ibid* at 141.

of the contract. In this regard he argues that given the fact that 'the chiefs are not acting for themselves ... [but as] trustees for their people', any valid and binding contract would remain 'valid and binding upon the present chief Darius and his tribe'.⁷¹ At issue then is 'under what circumstances a native chief, who is a trustee for his people, can validly sell tribal land'.⁷² It is clear the Chief Justice argues 'that the consent of the people must in some way or another be given'.⁷³

This analysis, according to Justice Innes, leaves the resolution of the case dependant upon two questions, first, 'how the consent of the people should be signified', and second, 'whether such consent was duly given in this particular instance'.⁷⁴ In answering the first of these enquiries the Chief Justice identifies two theories. The first theory is that the 'chief may sell land freely if he obtains the consent of his councillors', while the second argues that the 'acquiescence of the council in itself is not sufficient'.⁷⁵ In addition to the 'unanimous consent of the council ... the transaction sanctioned by the council, and approved by the chief, should be submitted -- in the case at any rate of people of Basuto origin -- to a pitso duly convened, and that it should be approved by the pitso'.⁷⁶

Deciding on the weight of expert evidence given by Mr HM Taberer, the Assistant Secretary for Native Affairs and Mr Theophilus

⁷¹ Ibid.

⁷² Ibid at 142.

⁷³ Ibid at 143.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

Shepstone,⁷⁷ the Chief Justice stated that he was 'inclined to accept the former' view based as it was on witnesses who 'could have no interest at all in the case, and who stated merely the result of their long experience'.⁷⁸ Chief Justice Innes thus concluded that 'the unanimous consent of the councillors or indunas is sufficient to justify the chief in disposing of or alienating the land of the tribe'.⁷⁹

Giving judgment for the plaintiff mission society the Chief Justice concluded his inquiry by finding not only that 'the council had given its consent to the contract between the chief Frederik and Mr Jordt', but that in addition there was 'evidence to show that a pitso had been convened and had also sanctioned the agreement'.⁸⁰ Finally, the judgment of the court held that 'defendant Darius Mogalie be, and is hereby condemned in the costs of suit'.⁸¹

⁷⁷ Better known as Offie Shepstone (see CP Potholm *Swaziland: The Dynamics of Political Modernization* (1972) at 11) the son of Sir Theophilus Shepstone and corrupt agent for the Swazi King Mbandzeni's concessions (see N Parsons *A New History of Southern Africa* (1982) at 174 and L Thompson *The Oxford History of South Africa* (1975) Vol.II at 277).

⁷⁸ *Hermansberg Mission Society* case at 143.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Judgment, 1906 Illiquid Cases, No. 99/06 at 537 of archive. Interestingly this condemnation to pay costs had unforeseen consequences for it was the debt incurred as a result of this case and a subsequent case, *Mogale v Engelbrecht and Others* 1907 TS 836 (1907) which led to 'Darius Mogale being deposed as chief by the Governor-General acting in his capacity as Paramount Chief under law number 4 of 1885 and was replaced by his cousin Filius Mogale.' Simpson op cit note 52 at 159. After being

Creating a customary rule

Given on the one hand the charged atmosphere of contending claims and struggles over land in the aftermath of the Anglo-Boer war and on the other the insistence by the British administration and courts that private property rights be upheld and land rights be freely transferable regardless of race,⁸² it is no surprise that the court finds in favour of the plaintiff missionary. However, in order to find for the plaintiff, the court must resolve two principle questions. First, it must find that the agreement between Chief Frederik Mogale and the missionary was a contract of sale of land the Chief had previously granted under indigenous tenure to the mission society. Second, that this contract was valid and remains binding on Chief Darius Mogale and the community. In order to decide on this second question the court was required to determine under what conditions a chief may enter into a contract for the sale of tribal land and whether these conditions were met. By implication then the court was required to define the tenure relations between sovereign and community in African society.

The first part of the court's enquiry is thus a question of fact and perception. While the Chief Justice is able to immediately dispatch this issue by relying on the written contract produced by the

deposed in 1908 Darius Mogale was banished from the district and only allowed to return after a long struggle in 1939 at the age of seventy-five. See Simpson at 160-62. In 1921 after the community had once again voted to have Edward Mogale, the son of Darius, replace Filius Mogale as Chief, the sub-native Commissioner forwarded a letter to the secretary of Native Affairs from several white farmers in the district who requested that Filius be kept on as Chief. Significantly, one of the signatories to the letter was one HJC Jordt.

⁸² See, Krikler op cit note 47 at 42-3 and the case of *Tsewu v Registrar of Deeds* 1905 TS 130 which Chief Justice Innes affirms again in the *Hermansberg Mission Society* case at 141-2.

missionary, this is achieved only by discounting all the contending evidence and relying implicitly upon the parole evidence rule which forbids the introduction of extrinsic evidence tending to contradict or vary the terms of a written contract.⁸³ Explicitly however, the court refers to the fact that the deed 'bears the mark of the chief Frederik', but then asserts that 'on this part of the case I unhesitatingly accept the evidence of Mr Jordt'. This emphasis seems to imply that at some level the Chief Justice recognizes that neither of the parties to the contract -- one Setswana speaking the other German -- could have independently understood the written contract, which was in Dutch, and that the distinction between signing a deed of sale or a written mortgage may not have been apparent to the Chief.

In fact, evidence entered by the defendant acknowledged that there had been a transaction but claimed that it amounted to a loan. The missionary himself acknowledged that the Chief initially sought a loan and could not understand why he wished to purchase land already granted to him, while one of the witnesses to the transaction told the court that the 'ground was at that time worth more than sixty pounds'.⁸⁴ Given the fact that the tribe was actively engaged in the purchase of land during this period it seems unlikely that they would have agreed to sell land for less than its market value. Furthermore, the language used in the oral evidence speaks of the missionary being willing to 'give money if he could retain the ground'⁸⁵ while the defendant's witnesses, including councillors to the deceased Chief Frederik Mogale, acknowledged the transaction they denied they would

⁸³ WJ Hosten, AB Edwards, C Nathan, F Bosman *Introduction to South African Law and Legal Theory* (1983) at 399.

⁸⁴ Dorfling, evidence given in *Hermansberg Mission Society* case supra note 50.

⁸⁵ Lukas Bil(w)ani for plaintiff.

have 'consented to the alienation of this land'.⁸⁶ Although it is impossible to determine the exact nature of the transaction it is significant that mortgage transactions were also known to the parties⁸⁷ and while the missionary may have intended to secure the

⁸⁶ August Moerane, evidence given in *Hermansberg Mission Society* case supra note 50.

⁸⁷ In 1908 the chiefdom was two thousand pounds in debt on farms mortgaged to the Hermansburg Mission Society (see Simpson op cit note 52 at 159) although this debt may in fact have been imposed as security for the costs awarded to the Mission Society as a result of this case. However, mortgage agreements between African communities and colonial entities were common practice in the nineteenth century. Three examples will serve to illustrate this usage. First, in 1884 the Boers annexed Barolong lands in the Thaba'Nchu area of the Orange Free State; after taking the bulk of the territory for themselves, they 'recognized two tiny African locations and 95 farms belonging to individual Barolong landowners'. L Platzky & C Walker *The Surplus People: Forced Removals in South Africa* (1985) at 74. By 1900 only 54 of the original 95 farms remained intact, the other Barolong landowners having 'lost their land to the whites by taking out mortgages which they could not pay back' (ibid).

Second, after East Griqualand was annexed in 1874, whites were recognized as owning 63 of approximately 505 farms granted by the Griqua polity. Five years after restrictions on the sale of Griqua titles were lifted, however, approximately half of the Griqua titles had changed hands. W Beinart 'Settler Accumulation in East Griqualand from the Demise of the Griqua to the Natives Land Act' in Beinart, Delius and Trapido (eds) *Putting a Plough to the Ground: Accumulation and Dispossession in Rural South Africa 1850-1930* (1986) at 264-5. 'The titles passed very largely into the hands of local merchants and

land as private property, Chief Frederik Mogale, his councillors and the community may have understood the pointing out of the land and documentation as part of a mortgage transaction. Given the close relationship at the time of the transaction between the missionary and the community, in which missionaries and communities recognized the

speculators to whom many Griqua, in trying to establish themselves on the land, had become indebted. Some Griqua landowners undervalued their only substantial asset and used it directly to pay debts. But the white traders also enforced payment in land rather than offering long term mortgages' Ibid. In a short time the Griqua, a 'landed community, allied to the colony, became ... a collection of landless people with a deep-seated sense of grievance' ibid at 260.

In a final example, the lawyer and later parliamentarian VG Fenner-Solomon used 'legal' sleight of hand to hasten the dispossession of the Kat River people. Following the passage of the Boedel Erven Act in 1905 -- which defined who had legal right to land among the Kat River people -- 'Solomon extended credit to them on a lavish scale Or so he claimed.' J Peires 'The Legend of Fenner-Solomon' in B Bozzoli (ed) *Class, Community and Conflict: South African Perspectives* (1987) at 73. He did not ask for receipts and he kept no records. When transfer deeds arrived from Cape Town, Fenner-Solomon informed his clients that they owed him amounts, including government charges, legal fees and personal loans, many times what they were expecting. Although he 'offered them time to pay, he demanded that they immediately sign power of attorney for him to pass bonds payable to himself... . Co-heirs were made jointly indebted and severally liable for the payment of the bond, so that the whole property could be expropriated for the default of a single heir'. Ibid at 73-4.

reality of contending sovereignties⁸⁸ it is not outlandish to imagine such a confusion in a context of mutual cooperation but three-way language barriers in which the principle actors could only communicate through translators.⁸⁹ Finally, it is now acknowledged that social relations, including legal relationships, were subject to continued renegotiation particularly in colonial interactions.⁹⁰ Whether the community was attempting to renegotiate a deal made in a time of need or whether the missionary was attempting to ensure the future security of the Mission Society's property⁹¹ in a time of dual sovereignty and growing political instability will remain an open question. However these subtleties were not available to the court as it sought to reshape Transvaal property law by definitively asserting private property rights and the right of Africans to participate in the land market -- a pursuit which would be reversed again by the 1913

⁸⁸ 'Now the natives had two Lords ... [and] the chiefs were glad when a missionary settled down with the tribe. This was of great significance for them as regards the government and the white population and they would listen to the missionaries' advice and words' *Hermanburger Missionblatt* (July 1910) at 195, quoted in Simpson op cit note 52 at 365.

⁸⁹ Interestingly the missionary Jordt's evidence before the court in 1906 was given through the government interpreter, see note 50 at 512.

⁹⁰ See, Berry op cit note 6 and S Roberts 'Tswana Government and Law in the Time of Seepapitso, 1910-1916' in Mann & Roberts op cit note 6.

⁹¹ Significantly, Jordt only employed a surveyor to survey the ground in 1897, see note 50 at 513, many years after the death of Chief Frederik who died in about 1880, Breutz op cit 58 at 414.

Land Act.⁹²

The second part of the court's enquiry sought through an examination of law and fact to determine whether the contract of sale was valid and binding on Chief Darius Mogale. In pleadings before the court Chief Darius Mogale argued that 'even if Frederik did enter into a deed of sale purporting to sell to the plaintiffs the portion of the farm Boschfontein ... he did so on his own responsibility and without reference to or consent from his tribe'.⁹³ Although the Chief Justice again dispatches with the Chief's objection, this time by asserting that factually the 'council had given its consent to the contract', and that in addition 'there was evidence to show that a pitso had been convened and had also sanctioned the agreement',⁹⁴ there are again interesting unresolved contradictions on the record.

First, the evidence of community agreement comes from three of the community witnesses for the plaintiff, of whom at least two are acknowledged to be part of the 'Diederich faction' who had left the community eight years before in a conflict with Darius Mogale.⁹⁵ Secondly, the defendant's witnesses, including Chief Frederik Mogale's wife and four of his surviving councillors,⁹⁶ all denied knowledge of the sale and by implication denied that the community consented. Significantly, denial by four of Chief Frederik's councillors also implies

⁹² See, for example, the Chief Justice Innes's masterful application of technical legal arguments to deny the legality of past government practice in the recently defeated South African Republic in *Tsewu v Registrar of Deeds* supra note 82.

⁹³ The *Hermansberg Mission Society* case supra note 7 at 136.

⁹⁴ Ibid at 143.

⁹⁵ See evidence of Lukas Bil(w)ani and Koos Makaliana supra note 50.

⁹⁶ Jonathan Moqoa, August Moerane, Bethuel Masilo and Ephrain Mohale supra note 50.

that the Chief could not have had the unanimous consent of his council which the court asserted as the rule applied in deciding whether the Chief had the power to alienate the land.⁹⁷ Finally, the failure of the Chief's councillors to sign the contract of sale, or even to sign as witnesses to the agreement raises doubts in a context where both 'expert witnesses' suggested to the court that contracts involving the transfer of land between colonists and African communities were usually executed by both chiefs and their councillors so as to indicate that consent had been obtained. Evidence that this practice was common in the Transvaal is revealed by Henry M Taberer, Assistant Secretary for Native Affairs, who told the court that 'contracts which are filed in my office are usually executed by the Chief and his council'.⁹⁸

Despite these indications of countervailing evidence the most troubling and consequential aspect of the decision was the court's formulation and resolution of the legal enquiry. Prior to resolving all factual issues in favor of the plaintiff, the court had to make a determination as to the degree of consent required to validate a Chief's alienation of tribal lands. Evidence on this issue was presented by a series of witnesses on both the plaintiff's and defendant's behalf. Differences in the evidence does not however divide on this basis, rather the two distinct theories emerge on one side from the evidence of two ex-Native Commissioners, an Assistant Secretary for Native Affairs and one Theophilus Shepstone, while on the other side a different rule was advanced by two of Chief Frederik Mogale's

⁹⁷ Although unstated it seems from the record that the court is relying in large measure -- in weighing the burden of proof and probabilities -- on the assertion by Offie Shepstone that he had '[n]ever known a chief attempt to alienate unless he had consent of his council. The chances in favor of his having the consent in a case like the present are overwhelming'. Shepstone evidence given in the *Hermansberg Mission Society* case supra note 50.

⁹⁸ Evidence given in the *Hermansberg Mission Society* case supra note 50 at 529.

councillors and Chief Darius Mogale.

While the colonial administrators and experts focused on the relationship between the chief and his council, suggesting either that the pitso -- which was characterized as a particularly 'Basuto' institution -- merely confirmed prior decisions or was only called upon to decide matters of grave concern, the African witnesses argued that the consent of the pitso was essential. Although both Taberer and Shepstone argue that the chief's position 'with regard to land is that of Trustee for his people',⁹⁹ they both insist that the chief cannot act without the unanimous consent of his councillors who are characterized as representatives of the tribe. While this focus on the relationship between the chief and his councillors is clearly restricted to an analysis of political decision-making in African society the denial of the power of the pitso -- made up of all married men through whom land is held by families -- has the effect of denying the existence of property rights in land vis-a-vis political authority in African societies. Recognizing the essential role of the pitso would have made it harder to confirm transfers of African land in the colonial period but also would have acknowledged that under indigenous law African people had rights distinct from political authority in those societies.¹⁰⁰

In formulating his approach to this question Chief Justice Innes draws on the evidence of the colonial administrators and situates his analysis within a social evolutionary conception of African society propounding as pure dicta the proposition that 'when the natives first settled in this country, in Natal, and in other parts of South Africa, when they were governed entirely by their own customs and laws, the notions of separate ownership in land, or of alienation of land, by a

⁹⁹ Taberer evidence given in the *Hermansberg Mission Society* case supra note 50.

¹⁰⁰ See, H Ngubane *The Role of Monarchy and of traditional Authorities Generally in Indigenous Land Tenure in South Africa* submission to the Cabinet Committee formed to investigate the Ingonyama Trust Act, May 31, 1994.

chief or anyone else, was foreign to their ideas'.¹⁰¹ However, he argues, that as this case demonstrates the situation has changed and now 'natives do endeavor to obtain rights over land by contracts which the law does not prohibit',¹⁰² and thus, given the entry of African communities into the market, land must be alienable by chiefs under certain circumstances. Thus while simultaneously denying the existence of 'notions of separate ownership', in African society, and confirming the alienability of African lands the court confines the question of property rights in African societies to questions of political 'consent' or more specifically to an issue of sovereignty.

Despite all the contending evidence introduced by African participants in the trial Chief Justice Innes then asserts that the weight of expert evidence is on the side of the theory advanced by the colonial administrators, and he states specifically that he was 'impressed by the evidence of Mr Shepstone and Mr Taberer ... both of whom could have no interest at all in the case, and who stated merely the result of their long experience'.¹⁰³ While neither of them is involved in the specific case Mr Taberer was deeply implicated as Assistant of Native Affairs in the shaping and implementation of post-war 'native' policy and the evidence of Offie Shepstone is highly questionable given his previous corrupt involvement in the procurement of African lands and anti-African activities during this same period.¹⁰⁴

¹⁰¹ The *Hermansberg Mission Society* case supra note 7 at 142.

¹⁰² Ibid.

¹⁰³ The *Hermansberg Mission Society* case supra note 7 at 143.

¹⁰⁴ This raises the question, requiring further consideration, of the role of informants, experts, 'native accessors', individual researchers and anthropologists in the construction of 'customary tenure.' Advocating particular versions of custom, these participants are often unconsciously formulating their observations in order to promote or influence particular interests or government

policies. Whether as colonial administrators, judicial officers, or sympathetic anthropologists those engaged in the documentation and elucidation of 'customary law' consciously and unconsciously created and recreated norms, rights and obligations that at best reflected their own culturally bound notions or at worst revealed a blatant eurocentric if not racist prejudice towards these 'other' colonized communities. Recent scholarship on the history of law in Africa (see Mann & Roberts op cit note 6) has thoroughly demonstrated the relationship between the emergence of particular notions of customary law and the economic, social and political context of colonialism and the African response to colonial rule (see eg Chanock op cit note 32 at 70-71). However, the roles and motivations of participants in the construction of customary law at a very specific level have not received as much attention in the legal arena as has been the case in other contexts, such as anthropology. The complexities of these relationships were revealed, for example, in the debate over the construction of land rights in the case of Algonquian Hunting Territories, in which the 'social praxis and political advocacy' of the main protagonists had a profound impact on their construction of ethnographies and their understanding of whether private property forms existed in Native American hunting societies before contact with Europeans (HA Feit 'The Construction of Algonquia Hunting Territories: Private Property as Moral Lesson, Policy Advocacy, and Ethnographic Error' in GW Stocking Jr (ed) *Colonial Situations: Essays in the Contextualization of Ethnographic Knowledge* (1991) at 129). While going unchallenged in law, the question of the construction of ethnography, upon which the sources of customary tenure and customary law in general have historically relied, continues to arouse great controversy in anthropology and other social sciences (see, for example, the furor created after Edwin Wilmsen challenged the accepted

Although the courts assertion of a rule to the effect that for 'all the Bantu peoples, including the basutoes, the unanimous consent of the councillors or indunas is sufficient to justify the chief in disposing of or alienating the land of the tribe', may have been consistent with the Chief Justice's notions of evolutionary development by facilitating the participation of African chiefs in the land market, it was his framing of the issue that had the greatest resonance in colonial jurisprudence. The issue is not that colonial governments applied policies which either misinterpreted or perverted established indigenous rules or law, but rather how a pattern of government or colonial intervention -- including the responses of the colonized -- is implicitly assumed into the formal 'legalization' of indigenous law and the process of transforming colonial policy and practice into legal authority and precedent. It is this transformation of the property rights of indigenous communities into a legal form constructed in the context of colonial intervention -- and the elevation of this particular construction to formal legal authority -- that had profound consequences for disposition of indigenous land rights. This particular formulation of property rights which placed a 'feudal' construction on the relationship of indigenous rulers to the property rights of their subjects had profound consequences for indigenous communities throughout the formerly colonized world as it became 'legally' generalized 'throughout the empire.'¹⁰⁵

Customary tenure and the political consequences of rightlessness

The consequences of this interaction for indigenous land law was the complete collapse of property rights into issues of sovereignty and

anthropological notions of the San people of Botswana as examples of isolated pre-historic hunter-gatherers, arguing that they have a complex and long history of interaction with other inhabitants of Southern Africa. See, EN Wilmsen *Land Filled with Flies: A Political Economy of the Kalahari* (1989) and the debate it provoked in the journal *Current Anthropology*.

¹⁰⁵ *Sobhuza II v Miller and Others* supra note 9 at 525.

political authority. This collapse originates according to Martin Chanock in two features which dominated the context in which customary tenure evolved. On the one side indigenous tenure was scrutinized in order to determine the validity of colonial claims to land grants and concessions made by African chiefs. On the other, the 'creation of a segregated system of land holding' in which African rights to land were confined to 'areas designated for African occupation', could only be justified if the indigenous system was different from the British one and where the reserves were, 'in terms of property law, to be reserves of the rightless, legally dependent on chiefs and communalism',¹⁰⁶ despite documented patterns of individual use.¹⁰⁷ Any recognition that these observed patterns of individual use inside reserves were akin to ownership -- even if limited by the inability to individually alienate -- would have created 'the possibility of conceiving of such rights having existed outside' the reserves or even suggested that such rights might be established in areas designated for European colonial settlement.¹⁰⁸ Thus, for example, it was the brief recognition by the colonial courts of the right of African communities to enter the market and purchase land in *Tsewu v Registrar of Deeds*¹⁰⁹ which contributed to the passage of the 1913 Land Act in South Africa, prohibiting Africans from even obtaining 'recognized ownership' through the acquisition of common law rights to land.¹¹⁰

Having constructed a vision of African property rights under

¹⁰⁶ Chanock op cit note 4 at 75.

¹⁰⁷ See M Gluckman 'African Land Tenure' (1945) 3 *Human Problems in British Central Africa* 1 at 8, 10-11, quoted in Chanock op cit note 4 at 75.

¹⁰⁸ Chanock op cit note 4 at 75.

¹⁰⁹ Supra note 82.

¹¹⁰ See TRH Davenport & RS Hunt (eds) *The Right to the Land* (1974) para 65-68 at 40-43.

'customary law' in which the most important rights -- rights to allocate, alienate, and of reversion -- were vested exclusively in the political authority as embodied by the chief, it was but a short step to the assertion that the loss of sovereign powers to the colonial authority made African land rights subject to administrative authority. This collapse of property rights into the realm of chiefly authority held equally debilitating consequences for the political rights of Africans as it had for their property rights. Founded in the practices of 'indirect rule' as first advocated by Theophilus Shepstone and further modified by the policies of Lord Lugard, the 'preservation' of 'native lands and traditional authorities' became the justification for the exclusion of Africans from broader political participation.¹¹¹ While political rights were extended in the Cape and Natal to those few African individuals who had obtained sufficient common law property rights during the colonial period, it was through an attack on these rights that the process of their disenfranchisement began.¹¹²

The denial of African property rights is thus implicated in the demise of the Cape franchise and the exclusion of the African majority in the construction of a segregated polity in which the white minority was to enjoy democratic participation while the black majority would continue to live under colonial and later neo-colonial domination in the 'independent' bantustans.¹¹³ It is the political consequences of the negation of African land rights that leads Martin Chanock to conclude that we need to think about legal rights in land 'as central to the nature of the modern African polity, and the role of, and "rule of" law in African states. For these important economic, and ultimately political, rights, remain subordinate to an administrative regime, which offers landholders no rights as against the state. One need not espouse romantic ideas about rights, or the rule of law, to see that this has

¹¹¹ See A Ashforth *The Politics of Official Discourse in Twentieth-Century South Africa* (1990) at 35-7.

¹¹² See *R v Ndobe* 1930 AD 484.

¹¹³ See H Klug *Carter lecture* University of Florida, forthcoming.

consequences for the political society.¹¹⁴

CONCLUSION: THE IMPERATIVE OF QUESTIONING LEGAL PRECEDENT

Indigenous land rights have been either completely denied by formal legal systems, or their content has been mystified by a process of colonial construction. In this context, the High Court of Australia found it necessary in the *Mabo* case to challenge the 'validity of fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years'.¹¹⁵ Justifying his stance Brennan J argued that 'to maintain the authority of those cases would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land'.¹¹⁶ Arguing in similar vein Deana J and Gaudron J noted that 'the two propositions in question provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices'.¹¹⁷

Despite this recognition of common law aboriginal title and the role this doctrine has played in the recognition of indigenous rights to

¹¹⁴ Chanock op cit note 4 at 82.

¹¹⁵ *Mabo v The State of Queensland* supra note 23 at 109.

¹¹⁶ Ibid at 58.

¹¹⁷ Ibid at 109.

occupation and use of land in Canadian and United States jurisprudence -- and even the role it may come to play in the South African context¹¹⁸ -- it must be asked whether the refusal to recognize a right of indigenous ownership is not merely an extension of the original refusal to recognize any rights at all. If the legal construction of customary law -- equating indigenous land rights to the common law rights of occupation and use -- is really a product of colonial imperative and resistance as well as a reflection of the efforts of contending advocates embedded in nineteenth Century conceptions of property and social-evolutionary conceptions of historical development, then it is necessary to reconsider whether the distinction between common law ownership and indigenous land rights of occupation and use is not false.

While the concept of ownership in common law -- whether Anglo-American or Roman-Dutch -- has been considered flexible enough to incorporate a wide range of specific tenure arrangements such as joint ownership, sectional-title and other innovative forms of ownership, the land rights of indigenous peoples have continued to be seen as falling short of ownership. Thus even as we recognize that the right to freely alienate is only one incident -- peculiar to freehold title - - of the bundle of rights which together may reflect an individual or a group's ownership of an object, the law still refuses to acknowledge that indigenous property regimes in which individuals may have all the incidents of ownership or co-ownership but not the right to freely alienate outside of the community, constitute a form of ownership. This leads to the absurd formalism reflected in the argument that 'while matters of ownership, mortgage, servitude, sale or lease of immovable property must normally be dealt with under the law of the land [common law], rights of possession, occupation or use of land are often intended by their grantor or possessor to be governed by customary law, and may be dealt with under that system'.¹¹⁹

¹¹⁸ See TW Bennett 'Redistribution of Land and the Doctrine of Aboriginal Title in South Africa' (1993) 9 *SAJHR* 443.

¹¹⁹ JC Bekker *Seymour's Customary Law in Southern Africa* 5 ed (1989) at 50.

Significantly, this characterization of customary law as not knowing ownership has even been challenged with regards to residential and arable land within the South African debate on customary tenure.¹²⁰

This continued negation of the property rights of 'others,' in circumstances where in the social sciences even common property regimes are recognized as containing forms of ownership,¹²¹ must be seriously reconsidered. If the maintenance of this negation is to have the effect of denying African land holders the same degree of constitutional protection of their property as those members of society who were not denied the right to purchase freehold title, it would pose a serious threat to the legitimacy of the property clause in the 1993 Constitution. It is in this context that the statutory form of tenure -- permission to occupy -- most common under apartheid must be recognized as a gross violation of the inherent ownership rights of those who have continued to hold their lands in terms of the land ethic recognized within African communities.¹²²

¹²⁰ See AJ Kerr *The Customary Law of Immovable Property and of Succession* 3 ed (1990) at 61-5.

¹²¹ See DW Bromley 'Property Relations and Economic Development: The Other Land Reform' (1989) 17 *World Dev* 867 at 872.

¹²² See C Cross 'An Alternate Legality: The Property Rights Question in Relation to South African Land Reform' (1992) 8 *SAJHR* 305.