THREE

Securing the Land: From customary land tenure to registered titled land?

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INTRODUCTION

Our aim in this chapter is to contribute to debates about land tenure in South Africa. We will focus largely on one central issue: what is the most secure system of land tenure for those who do not have private, titled land? At present, this debate is polarised among different lobbies and interests: those supporting titles registered in the Deeds Office; those advocating for localised customary tenure with or without some form of registration; and those favouring control by traditional authorities. It is difficult to see common ground, and this inhibits the emergence of consensus areas and potential progress. The South African Constitution provides a clear injunction to equalise rights to land. Section 25(6) states: 'A person or community whose form of tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress' (South African Constitution, 1996).

But the government has not been able to pass constitutionally acceptable legislation that puts this clause into practice. We analyse the current position and suggest policy paths that might draw on the strengths of at least some of the different perspectives. Our primary questions are whether there should be a single, national system of land tenure in South Africa and whether land held in customary tenure should gradually become part of the system of registered, titled land.

We start with a brief discussion of landholding in the country. This is rooted in the history of segregation and apartheid, which we will not examine here. However, we emphasise that there have been many forms of tenure historically, and it would be mistaken to suppose that these operated simply on a racial basis: that whites had private tenure from the start and that African people have always been locked into systems of communal tenure. We also argue that the primary rights in most forms of customary tenure rested in families. They were not in all respects 'communal' and they were not directly controlled by chiefs.

Evidence suggests that landholdings are under threat, especially in places where demand for land has intensified – around mining developments, peri-urban areas or land that becomes valuable because of its location on transport routes. Our approach is to prioritise the cementing of individual and family land rights to residential, garden and arable sites in the customary areas. All South Africans should hold their land in systems that secure ownership. There are currently signs that momentum is building around the issue of tenure. The government released a draft Communal Land Tenure Bill for comment in 2017. The 'Report of the High-Level Panel on the assessment of key legislation and the acceleration of fundamental change' (Parliament of South Africa, 2017) and the Presidential Advisory Panel on Land Reform and Agriculture (2019) made recommendations on tenure. These documents do not advocate all the same policies, nor do we agree with all the proposals. However, there are some concrete measures on the table; we shall refer especially to the Presidential Advisory Panel report as the latest document. The chapter's discussion commences with an overview on different forms of tenure.

VARIETIES OF LAND TENURE IN SOUTH AFRICA

In South Africa, land registered at the Deeds Office represents over 90 per cent of the area of the country. Most of it is owned privately by individuals, families and companies. This includes the farmlands that were reserved largely for white ownership up to 1991 and the great majority of land in the urban areas. State-owned land is also registered at the Deeds Office: including that owned by specific national departments, provincial governments, municipalities and state-owned enterprises. In 2017, 7,309,243 'land parcels' were registered at the Deeds Office with over nine million owners (DRDLR, 2017: 5).

Registered titled land is regulated under the Deeds Registries Act No. 47 of 1937 and its many amendments. The Deeds Offices and the Offices of the Surveyor General provide the administrative underpinning. Every single piece of such land is surveyed. The land is individually registered so that its area, boundaries and ownership is recorded, as well as the date of the last transaction and the purchase price. This system is digitised for current (but not all historical) landholdings and it is possible for any member of the public to get access to this information from the relevant Deeds Office for a small payment. Overall, this system is effectively administered.

Some black people did own titled land in both towns and the countryside in the late 19th and early 20th centuries. But they were prevented from purchasing such land for much of the 20th century, particularly after the 1936 Native Trust and Land Act. Many were deprived of privately owned land during the apartheid era of 1948–1994, although a limited number managed to access land. This exclusion was a fundamental aspect of racial discrimination and enormously short-sighted.

Since the apartheid land laws were abolished in 1991, and a little earlier in specific areas, there has been rapid expansion of black private land ownership. For example, roughly 50 per cent of the formal sites in Soweto became privately owned between 1984 and 1994 (Guduza, 1997). There has been widespread upgrading of landholding in other townships, where it was only possible to lease land in the apartheid era, and substantial purchase in suburbs formerly reserved for whites.

RDP houses, generally estimated at about three million, are also supposed to come with title. In October 2019, South Africa's Department of Human Settlements estimated that the backlog of title deeds for RDP properties given to beneficiaries was 863,222. A sizeable amount of farmland has also been privately purchased by black South Africans, although this has not been adequately quantified. The figures in the 2017 government land audit are confusing. They suggest that African individuals owned 4 per cent of the agricultural land held by private individuals and black South Africans as a whole owned 24 per cent, but this seems to include only about 40 per cent of agricultural land and excludes that held by companies, trusts, community property associations (CPAs) and other collective groups (DRDLR, 2017). This appears, therefore, to be over and above the 10 per cent transferred through government schemes. According to the audit, black South Africans held 44 per cent of erven, or urban land.

The system of private tenure is strongly protected in law and provides security and certainty if landholders follow the rules in transacting sites and transmitting it between generations; they also have to meet the costs that arise. Titles cover many forms of landholding, by individuals, families, co-owners, corporations and other collectivities; sectional title in various forms is another development. Private ownership has come under indirect pressure through informal settlements and in the debates and legislation on expropriation without compensation, which we will not discuss here. Nationalisation of land is also sometimes proposed, although the chairperson of the Presidential Advisory Panel on Land Reform and Agriculture, Vuyokazi Mahlati, noted that it was not envisaged in the Constitution and it was not evaluated in the report. We are assuming that private tenure will remain intact.

This chapter is focused largely on the areas of the country that comprised the former African bantustans, which are occupied by African people and where customary landholding systems survive. Our evidence suggests that these, along with some informal sites largely in urban and peri-urban areas, are the least secure. It is a little misleading to use 'customary' without some qualification because of its timeless and unchanging connotation. Pre-colonial systems were far

from static and they were modified over many years by government proclamations and controls. This happened both before and during the apartheid era when the bantustans were formally demarcated. A system of Permission to Occupy (PTO) was gradually introduced in most of the customary tenure areas. This involved a rough measurement of the land allocated (but not a systematic survey) and a written certificate from the magistrate's office with the occupier's name. It generally covered both residential and arable sites when the latter were available.

Since 1994, this old government system has largely broken down, and there is no clarity on the legal status of this tenure. The term 'off-register' land is also used for these landholdings because they are not formally recorded in the Deeds Office. These areas are often said to comprise 13 per cent of the land of the country, but it is probably a little more, because the state bought land rapidly to expand the bantustans in the 1980s and 1990s, and it also began to acquire land adjacent to the bantustans under the Provision of Certain Land for Settlement Act of 1993. If all this land is included, the areas of the former bantustans is probably 14–15 per cent (given as 14 per cent in the Presidential Advisory Panel report). Not all of this is held in forms of customary tenure.

To complicate matters further, some land within the former Transkei and Ciskei bantustans was held under individual or quitrent tenure, mostly in terms of the old Glen Grey Act of 1894. This land is surveyed and registered in the Deeds Offices at King William's Town and Mthatha. Individual tenure did not amount to full ownership in that land could not generally be bought and sold. Under the Upgrading of Land Tenure Rights Act (ULTRA, No. 112 of 1991, amended in 1996 and 1998), it has been legally possible for these landholders to upgrade their land to an unencumbered title, but this has not been done widely. Roughly one-third of the former Ciskei and 20 per cent of the former Transkei came under this system. In the final years of apartheid, some other homeland governments upgraded tenure in urban settlements that fell within their boundaries.

The Presidential Advisory Panel (2019) recorded that about 8 million hectares of land, or 9 per cent of the agricultural land, had been transferred, roughly 4 per cent (3 million hectares) through

restitution and 6 per cent (5 million hectares) through redistribution schemes. This land is held through trusts and CPAs – the latter created by legislation in 1996. Both are forms of collective ownership that differ from the systems of customary tenure in that the landholders generally have title to the land, recorded in the Deeds Office. But the CPA retains some similar elements to the customary areas in that individuals and families do not own their holdings. Members of the CPA have a right to land only through the collectivity.

In some cases, CPAs have taken ownership – through restitution awards – of existing, well-capitalised land, such as fruit plantations in Limpopo, wildlife farms like Mala Mala in Mpumalanga, or, in the case of the Wild Coast Sun, a hotel and casino. In many of these contexts, the members of the CPA realise their rights not as occupiers of the land, but as beneficiaries of income that accrues to the CPA through these enterprises, or as workers. Initially the state gave ownership to the beneficiaries of redistribution, but since 2011 it has stopped giving land purchase grants (Presidential Advisory Panel, 2019: 12), and under the Proactive Land Acquisition Strategy, which became the main focus of the redistribution programme, land has been given initially in leasehold.

A fifth important category of land comprises informal settlements, mostly in the urban and peri-urban zones of the country. The number of people in such settlements, sometimes estimated at seven million in 1994, may have declined through massive construction of RDP houses; it has recently been estimated at around three million (Hornby et al., 2017: 8) or perhaps one million structures. These landholders have no formal rights to land, but they are protected by legislation that restricts their removal. Some of these areas fall within the former homelands, and thus they may also overlap with customary systems.

Many of the figures given here are estimates and the categories are not hard and fast; it is difficult to get an overview of the changing position on the ground. The great majority of land by area is registered in around seven million active titles and there may be as many as five to six million landholdings that are off-register. The average size of titled landholding is much larger than that of off-register holdings, which comprise perhaps three to four million residential and garden

sites in the customary or communal areas, about one million informal landholdings, largely in the urban areas, and perhaps a similar number of untitled RDP houses. Thus, any attempt to extend titling to all the land in South Africa would be a major and long-term exercise, involving millions of families. In the next sections, we examine customary tenure and how it has been weakened by various land policy stakeholders.

CUSTOMARY TENURE: IS IT SECURE?

At present, there is little certainty respecting who has rights to the land in the customary or communal tenure areas of the former African homelands of South Africa. Are these rights held by family heads, families as a whole, local communities, chiefs and traditional councils or the state? Do they amount to a form of ownership and how do the layers of landholding and authority in these areas interlink? As noted, there is a good deal of evidence suggesting that landholdings are under threat, especially in places where demand for land has intensified.

Land held in customary tenure or in areas under traditional councils has been alienated in a number of places, such as the platinum belt of North West Province, at the Anglo American Mogalakwena platinum mine in Limpopo and at Somkhele coal mine in KwaZulu-Natal (KZN). A community at Xolobeni in the Eastern Cape has been threatened with removal for titanium mining. In all these cases, mining licences have been approved by the state and local chiefs have agreed to transfer land. Mining companies, which must allocate 26 per cent of their shares in new enterprises to black economic empowerment (BEE) beneficiaries, often choose to negotiate with chiefs when the mineral-rich sites fall within the former homelands. In the case of Bafokeng and Bapo, chiefs have benefited directly by controlling enterprises on the land over which they claim authority (Capps and Malindi, 2017). Some chiefs and traditional councils are asserting control over land and development initiatives on behalf of communities, while overriding the interests and consent of landholding families.

More broadly, the Ingonyama Trust Act (No. 3KZ of 1994) effectively grants control over all the customary land in KZN to the Zulu king (see Chapter 4 in this volume). The Trust's Board

has been attempting to change some of the customary landholdings into leaseholds, which require payments and imply that the land is owned by the king or Ingonyama Trust. The Traditional and Khoisan Leadership Act (No. 3 of 2019) enables traditional councils to establish partnerships with external agencies for the purposes of development. These require consultation with the affected community and a majority vote, but not consent by the specific landholders who may be affected. An attempt by the Western Mpondo king to enter such a partnership with a Chinese company, including the leasing of an estimated 10,000 hectares of coastal land, has been widely publicised (Bloom, 2019).

These examples suggest that when there is competition for land, the benefits tend to go to a limited elite. Comparative examples in Africa reinforce this view (Peters, 2013). Kojo Amanor (2008) argues that there has been a commoditisation of land in the hands of chiefs in Ghana over the last few decades. Even though chiefs appeal to tradition, there has, in effect, been a process of privatisation from above. Janine Ubink (2008), writing about the peri-urban areas around Kumasi, Ghana's second-largest city, shows that chiefs have redefined customary tenure in a way that enables them to sell peri-urban land at the cost of rural landholders.

The Presidential Advisory Panel (2019: 34) states:

> Traditional communal land administration systems … are under the jurisdiction and control of Amakhosi and their traditional councils … the traditional leaders argue that the current Western-imposed legislative framework fails to appreciate the interplay of individual and group rights; how these live side by side in a mutually beneficial, inclusive and harmonious fashion rather than in a competitive manner.

The panel therefore suggested that land tenure reform should build on African traditional systems. This section of the report is, however, immediately juxtaposed with that on gender, which begins (Presidential Advisory Panel, 2019: 36–37):

> Rights to control and use land are central to the lives of rural

> women, whose lives and livelihoods are derived from the land and its natural resources. The lack of land rights for women and girls threatens their living conditions, their economic empowerment, their physical well-being and their struggle for equality within a patriarchal society … Rules of access and inheritance in rural societies favour men over women and women with children over those without.

Representations by women to the panel were quite clear in seeing the Amakhosi and 'the oppressive hand of patriarchy' as the main problem. One woman spoke of the 'daily torment of women at the hands of traditional leaders' in a number of spheres, but especially in respect of land rights where women were 'compromised not only legally but through systemic unequal power relations in rural communities' (Presidential Advisory Panel, 2019: 37; see Mnisi Weeks, 2018).

The Presidential Advisory Panel does not resolve this contradictory evidence and we shall try to illustrate that the position presented by the chiefs, glosses over both historical and current realities. As court cases and succession disputes indicate, their role has not always been to create harmony. The Constitution and the 2003 Framework Act do not give authority over land, as suggested here. Although these Acts recognise traditional leaders, the 2003 Act specifies that powers are not carried over from the homeland era; they must be devolved explicitly in legislation. The government passed the Communal Land Rights Act (CLARA, No. 11 of 2004), which may have moved in this direction, but was invalidated by the Constitutional Court in 2010. The Constitutional Court decided that it had not been through an adequate procedure and that it did not guarantee the rights laid down in section 25(6) of the Constitution.

This formulation in the Presidential Advisory Panel report fails to recognise adequately either the history of customary systems or the interests of the most vulnerable rural landholders. Customary land law gave very strong rights to families; their residential and arable land, once granted, could not be removed, except in highly restricted circumstances. In a key legal text on customary immovable property, Alastair Kerr (1953; 1990) argued that in pre-colonial times, land

was sometimes associated with a particular chief, who had political authority but that 'the chief is not considered as the owner of the allotted land' (Kerr, 1953: 17). He used the term ownership to describe these African customary rights to homestead sites and arable fields.

This form of tenure was sometimes called communal tenure, but Kerr was clear that, on the basis of legal sources and court judgments, 'arable and residential land is not held in common' (Kerr, 1953: 25). Rights to occupy and use the allotted land were exclusive. Such sites were handed down from generation to generation without interference of the chiefs. This allocated land was heritable within the family, according to the rules for succession. In his reviews of ethnographic studies of southern Africa as a whole, Peter Delius emphasised that 'household rights to arable and residential land were strong in pre-colonial systems of land tenure' (Delius, 2008: 221). In parts of South Africa where there had been no strong chieftaincies, at least in the second half of the 19th century, land allocation and administration was localised (Ntsebeza, 2005; Beinart et al., 2017). We recognise that in parts of the customary tenure areas, where there has been a legacy of more powerful chieftaincy, reinforced during the bantustan era, traditional leaders play a role in allocating and administering land, and may sometimes claim strong authority or even ownership. But even in such areas in the Eastern Cape and KZN, they are sometimes challenged by communities and individuals who assert their rights to their land (Bennett et al., 2013; Yeni, 2019).

Interviews in uMgungundlovu Administrative Area in KZN, and in Bizana (Alfred Nzo District Municipality) in the Eastern Cape Province in 2011–2012 confirmed that landholders, who in these areas did not have PTOs, administered their land at a local level and considered their land grants permanent: 'Mpondo custom is that once granted land, the family have it forever' (Beinart and Wotshela, 2011–2012). Anthropologist Monica Wilson Hunter ([1936] 1964) recorded similar evidence some 90 years ago. Informants said that land was heritable within families, although it could not be bequeathed to individuals. The Constitution provides that where customary law applies, it should be considered by the courts. The Constitutional Court has also allowed for flexibility in interpretation of customary

law, accepting 'living customary law' as currently practised (Claassens and Budlender, 2016). Both historical examples and recent expressions of living customary law affirm the rights of landholders in customary systems. To varying degrees, these are respected in practice, but they are not secure in law.

As noted, customary land rights were overlaid in many districts by government proclamations and PTOs. Nicholas Kassier (2019) discusses a judgment in the KZN High Court in 2017 that gave an occupier, whose rights were based on a prior PTO, precedence over another group who claimed the site on the basis of a subsequent Ingonyama Trust lease. He suggests that a PTO 'is still a valid right' (Kassier, 2019). However, this was a complex case, where the PTO was held by a church and not by individual landholders and its broader legal force is uncertain. In an Eastern Cape case, the rights of a descendant of the holder of a PTO was considered by the judge to be protected by the Constitution and the Interim Protection of Informal Land Rights Act (IPILRA, No. 31 of 1996), even though the PTO had not been formally renewed (*Nandipha NO v. Irfani Traders cc*). Thus, some judgments appear to be protecting historical PTOs. But PTOs were not issued in all districts and they have not generally been formally issued since the 1990s, so that many local land grants do not have such certification. The written records, to the extent that they survive, are likely to be very uneven.

Since the invalidation of CLARA, the African National Congress (ANC) government has been unable to legislate on this issue. A new Bill was circulated for comment in 2017 but has not yet been reintroduced to parliament. The land rights of millions of South Africans, who hold their land in the former homelands, remain legally uncertain. In practice, most are probably fairly secure under local customary arrangements; but there are a number of examples where these have not provided adequate protection. These African landholders are located in some of the poorest parts of the country and land is an important asset for such families. Their rights should be secure. We explore several cases in the following sections, amplifying the uncertainty over how to apply customary tenure.

ROUTES TO INCREASING SECURITY: IPILRA AND THE COURTS

In 1996, the ANC government passed three Acts of importance in protecting the land rights of those who did not have formal titles. IPILRA was aimed especially at the former homelands. With respect to labour tenancy, which survived notably in KZN and Mpumalanga, the Extension of Security of Tenure Act (No. 62 of 1997) potentially provided security. The Prevention of Illegal Eviction Act (No. 19 of 1998) was designed to ensure that those who occupied land informally in urban areas had some protection from removal. IPILRA is valuable and has acted as a disincentive to undermining informal land rights. But it has rarely been enforced, or tested in the courts, and is seldom backed up by administrative support. It also reflects communalist approaches adopted in the 1990s. Under the Act, communities have the right to deprive families of their holdings by a majority vote 'in accordance with the custom and usage of that community' with only limited rights to compensation. In cases about mining at Mogalakwena (*Machoga v. Potgietersrus Platinum*) and Somkhele (*Global Environmental Trust and Others v. Tendele Coal Mining*), judges ruled in favour of larger traditional communities, led by the local chiefs, who supported mining, and bypassed the claims of the smaller groups of landholders who actually lost their land. This is a potential weakness of IPILRA and points to confusion over the meaning of community – a term that is used in IPILRA (Beinart et al., 2017: 100–102).

Two landmark judgments in 2018, *Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* and *Baleni, D and 128 Others v. Minister of Mineral Resources and Others*, potentially strengthened IPILRA, at least in respect of landholders being able to defend themselves from removal for the purposes of mining. In the Maledu case in the North West Province, the descendants of a group of African land purchasers, who had been required in 1919 to register their farm in the name of the Minister of Native Affairs, were defending their right to stop mining operations on this land without their consent. This Lesetlheng community claimed that they were the owners, and that the land had not been subsumed under the Bakgatla ba Kgafela

Tribal Authority, whose successor had consented to mining. They also had to show that a licence held under the Mineral and Petroleum Resources Development Act (MPRDA, No. 28 of 2002) did not override their rights as land occupiers. The High Court found against them and ordered their eviction. In respect of IPILRA, specifically section 2 (*Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*):

> The High Court found that this provision does not contemplate that each person who is a holder of informal rights to land should be consulted. It found that section 2(4) makes plain that when land is held on a communal basis [as the Court accepted in relation to this land] it suffices that a decision was taken by a majority of the affected persons.

This court judged the affected persons to be a 'community' comprising the whole of the area claimed by the Bakgatla ba Kgafela, which agreed to the mining lease in 2008. During the appeal, the Constitutional Court decided that it did not have to rule on the ownership of the farm, for which the descendants had applied, but that it had to take into account that they were occupiers and may be confirmed as owners. They found that the MPRDA had to be read in conjunction with the IPILRA and its 'underlying purpose … to provide security of tenure for the historically disadvantaged and vulnerable' (*Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*). This, in turn, connected with the constitutional provision to strengthen tenure for those who had been disadvantaged by past racially discriminatory laws and practices. The procedures under the MPRDA to consult the landholders had not been exhausted. The appeal was upheld and the rights of the affected landholders recognised.

Xolobeni is a coastal customary tenure area in the former Transkei. A mining company with a licence under the MPRDA planned to extract titanium; they were supported by the Department of Mineral Resources, the ANC, as well as the Amadiba chief, who became a BEE beneficiary. The threatened landholders were not, as in the Maledu

case, potentially private owners but customary landholders without PTOs. The Legal Resources Centre and Richard Spoor Attorneys, working with Advocate Tembeka Ngcukaitobi, took up the case on behalf of Duduzile Baleni, the local headwoman, and 128 community members. Xolobeni became a national and international issue, with political support mobilised by the Amadiba Crisis Committee.

When the case came to court in 2018, the lawyers prioritised a defence of community land rights based on IPILRA. They defined the community involved as the landholders and not the chieftaincy. The wording in IPILRA is 'any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group' (*Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*). This could potentially refer either to a local community or to a broader area under a traditional council. Judge Basson accepted that the 128 landholders were the relevant 'portion of a group' that constituted the community for the purposes of the Act. The support of the local headwoman, who also contested the authority of the chief and traditional council in this matter, was important.

In this case, too, the issue arose as to whether the MPRDA – which gives the holders of mining licences, together with the state, powers to override the interests of landowners – trumped the IPILRA. This provision in the MPRDA was intended to give the state more control over mineral deposits and facilitate new entrants into the mining economy. The post-apartheid state did not want black-owned mining companies to be hamstrung by existing white or corporate landowners. Judge Basson agreed that the broader intent of both IPILRA and this section of the MPRDA was to support those who had been most disadvantaged under apartheid. She concluded that the protections offered by the IPILRA, read together with the Constitution, outweighed the relevant section of the MPRDA. Any mining development in customary areas required the free, prior and informed consent of affected landholders. These two judgments have important implications with respect to who must be consulted and who must give full consent when landholders who have customary or informal rights are threatened. In this case, consent was required by

those who would experience deprivation.

The question of family land tenure was raised in the Xolobeni court papers (Beinart, 2018). The expert witness on customary law for the state argued that the traditional council of Amadiba as a whole was the appropriate authority to be consulted and to make decisions about land, and that the landholders of Xolobeni held their land from the chief and traditional council as 'lawful occupiers'. The lawyers for the 128 applicants disputed these formulations and argued that the families held their land as customary owners. This judgment did not directly address the strength of individual or family ownership. The judgment was made in favour of a collectivity, as provided for in the IPILRA. This Act does not distinguish between customary rights, which should, under the Constitution, be recognised as positive legal rights, and informal landholding. The IPLRA only provides a defensive remedy against deprivation of land rights. Nevertheless, the Act, bolstered by these recent judgments, is important. It should be made permanent and provided with administrative back-up.

The Xolobeni case illustrates some key issues with respect to customary land rights. There have been earlier cases that throw light on this question. In *Alexkor v. Richtersveld Community*, the Constitutional Court accepted the restitution claim by the community over an area in the Northern Cape that had been appropriated for mining in the 1920s. It also described the nature of the community's rights to that land. The court specified the significance of 'indigenous' or customary law, as recognised by the Constitution, and the judgment talked of community land rights as being 'akin to that held under common-law ownership' (*Alexkor v. Richtersveld Community*). Elsewhere, the judgment talked of 'ownership of the subject land under indigenous law'.

This was a positive statement of rights, with implications for other areas of customary tenure, but the court dealt only with collective customary ownership. In the Hlolweni restitution case, Fikile Bam, Chief Justice of the Land Claims Court, took the Richtersveld judgment as a precedent, but went further and ruled that the chiefs and former tribal authorities did not have the legal power to alienate land without the consent of those who had customary rights (*Hlolweni,*

Mfolozi and Etyeni Communities v. North Pondoland Sugar (Pty) and 2 Others). Claimant families collectively had a form of ownership over the land – this did not rest on being part of a traditional community under a chief. The award was made to a collectivity of those who lost land; they and the Department of Mineral Resources were directed by the court to form a CPA. Again, there was no clear statement in the judgment that cemented ownership of specific holdings by families or individuals. The judgment did not say that families could go back to the lands from which they had been forcibly removed for a sugar scheme 30 years before. The award was to the community collectively and there was subsequently a conflict between the claimant CPA and the local chief, both of whom claimed the land in the name of different communities. In 2019, however, the CPA was given a title over some of the land.

These issues came up again in the uMgungundlovu restitution case of 2014, initially contested by Sun International, for ownership of the land on which the Wild Coast Sun was sited. Again, the case was based on the collective right of the 106 claimants to the land and the chieftaincy was excluded. However, in this case, affidavits more clearly stated the significance of family ownership of land as a basis for the claim. These ideas were not tested in court because Sun International settled before court case proceedings started. The successful claimants for the Wild Coast Sun site were largely content to accept a settlement that disallowed their movement back onto their former land. Their rights were realised through a generous cash payment and membership of a CPA that became owner of the site and would receive annual rental payments. The courts have not yet – to our knowledge – expressed any clear detailed view concerning the nature of customary land tenure. The Constitutional Court has likened it to ownership, and this is an important concept that potentially gives the strongest possible collective rights to landholders. However, we do not know of a ruling that specifies the customary land rights of families or individuals. The following sections discuss possible legislative interventions to address this gap.

LEGISLATION FOR UPGRADING TENURE: ULTRA

Legislation is also potentially a route to enhance land rights and the ULTRA enabled certain surveyed sites in the former townships and homelands to be converted into privately held titles. These included lands held in surveyed individual tenure in the former Transkei and Ciskei. It also applied to deeds of grant issued for some townships and, for example, certificates of occupation given by the Bophuthatswana government in urban areas.

The Act has not been extensively implemented, except in a few major urban townships such as Mdantsane, part of East London, which formerly fell within the Ciskei, and in Thaba 'Nchu, which was placed for a limited period within Bophuthatswana (Umhlaba Rural Services, 2009). The ULTRA is potentially applicable to PTOs in the communal areas, and to traditional councils seeking collective, titled ownership over customary land, except for the former Transkei, Bophuthatswana, Venda and the Ciskei. The government has generally not extended the Act in non-surveyed customary areas, but has planned alternative legislation, notably the invalidated CLARA and its still-pending successor.

Opponents of the ULTRA argued that any exercise in titling may result in land being registered in the name of an individual, which might make it difficult for other family members, especially women, to realise their rights. Some of the older township sites, as well as PTOs, were held largely by men and upgrading could extend the exclusion of women. A Constitutional Court judgment in 2017 declared a section of the ULTRA unconstitutional for this reason (*Mary Rahube v. Hedsrine Rahube and Others*). The land had been upgraded and registered in the name of a male member of the family who attempted to sell it without the consent of a woman family member who lived there. The court recognised her interest in the site, annulled the sale and declared the relevant clauses in the ULTRA unconstitutional. Parliament was given the opportunity to amend the legislation and a draft Bill (Minister of Agriculture, Land Reform and Rural Development, 2020) has gone to the Portfolio Committee on Agriculture, Land Reform and Rural Development. This envisages that there will be no automatic

upgrading; applications will be needed, and procedures to allow full scope for women to become owners and for other family members to participate. If these amendments are passed, it is also likely to become nationally applicable to a wider range of tenure types.

Could the ULTRA – if successfully amended – be more widely applied? Chiefs are opposed to the extension of family or individually based private tenure within the customary areas. There are also strong lobbies, growing out of anti-apartheid struggles and NGOs, that have consistently opposed chiefly assertions over land but have also been opposed to privatisation, which they see as disadvantaging poorer people. Some, but not all, sections of the Presidential Advisory Panel embrace this view: 'We are faced with a situation where communalism is at the centre of African lived experience, therefore necessitating a different approach to the land tenure question' (Presidential Advisory Panel, 2019: 44).

A more nuanced analysis is developed in a recent collection titled *Untitled*, where the editors argue that 'the relationships through which many South Africans gain access to land and housing are messy, complex, multi-layered and poorly understood' (Hornby et al., 2017: 3). Donna Hornby and colleagues argue that some of the systems that have evolved outside of formal tenure arrangements are relatively well organised and operate according to a set of rules that are largely accepted locally; intervention should identify, and work from, the 'social tenures' on the ground. They do not see these simply as 'communalism', but they also mount a multifaceted argument against titled, private tenure and they ask who might lose rights in such a process? Titles, it is also argued, cannot easily cope with the layered rights that characterise customary systems, where landholders have access to commonage, as well as stronger family rights on residential and arable plots.

We have discussed some of the arguments for and against extending the system of titling in South Africa elsewhere (Beinart et al., 2017). We take cognisance of these and related points but believe that the evidence and arguments for a gradual movement towards a single national system of land tenure are stronger. The Presidential Advisory Panel was clearly divided on this issue. For us, as historians, it is

valuable to note that private titled tenure is not foreign to black South Africans. It was permitted on a non-racial basis in the Cape Colony in the 19th century. Following the 1905 Tsewu judgment, a spate of rural land purchases took place in the Transvaal. In both provinces, these continued beyond the Natives Land Act of 1913, although, by the 1920s, the government insisted that these should take place through traditional leaders or the state (Beinart and Delius, 2014).

The purchase of farmland by Africans was finally halted after 1936. Although the bantustans were predominantly held in customary systems of tenure, there were significant pockets of private, titled landownership in districts such as Umzimkhulu and in Bophuthatswana. Ownership was permitted in a number of cities, including Johannesburg suburbs such as Sophiatown and Alexandra, as well as in Evaton until the Group Areas Act. And elsewhere, many in the African elite, both chiefs and people, aspired to own land when this was possible. If they had not been curtailed by segregation and apartheid for many decades, more would have purchased land and the picture by 1994 would have been different. The scale of black-owned private property has increased rapidly in a relatively short period since it has been possible. Most people's lives are more commoditised and, following rapid urbanisation from the 1980s when the apartheid laws were loosened, perhaps 65 per cent live in urban or peri-urban areas.

Historical processes are also changing in the former homelands. Over the last 50 years, the percentage of people living in peri-urban contexts, or dense settlements within these areas, has greatly increased. At the same time, many people have stopped farming arable lands, though most still have gardens next to their homesteads. A minority own livestock, often wealthier people. Residential and garden sites are the major focus of investment for many families in the former homelands. We cannot give a percentage but perhaps over a third of the estimated 17–18 million people, who still live within the boundaries of the former homelands, are in dense settlements and peri-urban zones.

The question is, where do the greater dangers lie for those with off-register rights? Is this in upgrading? Or is it in customary systems? Evidence increasingly points to examples where customary owners have found it difficult to defend land against those with local political

power, allied to external investors. The social geography of mining has changed in the country and it is no longer concentrated in the old centres of the Witwatersrand. Other investment opportunities have arisen along transport routes near towns and cities on the coast. There is no simple answer and much depends on specific local contexts and the resources at stake. But markets in land are spreading. We would rather see landholders getting clear rights and being able to decide on, and benefit from, development, or to sell, rather than being sidestepped.

Upgraded private tenure with title registered in the Deeds Office is a secure system of land rights at present. Local intermediaries or collectivities, such as government officials, chiefs, CPA committees or communities, would not have discretion to remove land from individuals or families with title, except in clearly defined laws where compensation is payable. Intermediary control of land seems to provide rent-seeking opportunities that disadvantage poorer or less influential people. Gradual movement towards a single system would end the dualism in tenure that has so long been highlighted by those critical of segregation and apartheid.

The prohibition on African land ownership during most of the apartheid era had devastating results for the personal wealth of many African families – a hidden aspect of racial discrimination that inhibited accumulation and social mobility. It has been removed in the cities, but it remains intact in the former homelands and on CPA land. One reason for the relative economic security of most white South Africans is that they accumulated through property holdings over more than one generation. Strategies to counter this legacy must be inclusive and ensure that the rights of all existing customary and informal landholders are recognised. This includes emphasising that allocations are still possible on the remaining commonage, which is still the largest area of land within the former homelands. In this way, land ownership will be very widespread. Interviews in rural districts suggest that people believe they 'own' their land and use local vernacular words with something like that meaning.

We will leave aside the issue of smallholder production in this chapter; there is a large and complex literature on the relationship between tenure and production that we cannot review here. But it is

important to think creatively about unlocking the productive potential of the former homelands, which remain some of the poorest parts of South Africa. The traditionalist and communitarian approaches may continue to provide some rural people with varied access to land, but we suggest that policy should move on. Traditional authorities have been an important pole of power in the countryside for more than 60 years since the Bantu Authorities programme was introduced. Their involvement as claimants for land and power may not only ignite ethnicity and conflicting claims – as seen recently in Limpopo Province – but also facilitate elite capture of land and rural resources.

TENURE AND LAND ADMINISTRATION: A HYBRID ROUTE?

In 1999, Martin Adams, who worked in President Nelson Mandela's Department of Land Affairs, together with Ben Cousins and Siyabulela Manona, remarked that the existing land administration system was breaking down: 'This collapse includes loss of records, doubts as to which laws apply and the unauthorised issue of permits and other documents' (Adams et al., 1999: 15). The Presidential Advisory Panel found that little had changed: 'The state land administration system is excessively fragmented and disjointed, and in some contexts broken down completely' (Presidential Advisory Panel, 2019: 86). Local customary arrangements, chiefs and headmen, and sometimes local PTOs, continue to operate but generally without formal authority. There is evidence of localised systems of record keeping, from Monwabisi Park informal settlement in Cape Town (Barry and Kingwill, 2020), to rural areas such as Xolobeni in the Eastern Cape. These have a degree of local acceptance and may have weight as evidence of 'living customary law' in a court case, but their status in law is uncertain. Insecurity of tenure is thus compounded by the post-1994 weakness of land administration.

Siyabulela Manona and Rosalie Kingwill (2016) suggest a new system of land administration that gives strong rights to families who hold off-register land. They argue that titles are unsuitable and that attempts to legislate for communal land rights have failed or tend

to favour traditional authorities. They believe that major legislation is required in the shape of a Land Records Act or similar measures. This suggestion has been taken up both by the High-Level Panel (Parliament of South Africa, 2017) and the Presidential Advisory Panel (2019). The proposed land records system should be parallel to Deeds Registry, located in the same government department and articulate with it. Landholders should be able to upgrade to title if families agree. The Act should provide for clarifying and recording rights as a first step and for an administrative system that includes all sites that are currently off-register. The Presidential Advisory Panel does not see the lack of detailed survey in such areas as a central problem, but we suggest that it should be an element in the recordal of rights.

The development of an effective system of adjudication with trained officials would be necessary. A Land Records Act would work with legislation such as the IPILRA, but it would provide a positive statement of rights for families or individuals and would not be limited, as in the case of these Acts, to a defensive approach for broader collectivities. If such legislation is to be passed, then other Acts such as the IPILRA and ULTRA may need to be amended so that all can be complementary. In our arguments for a single national system of landholding, we are not suggesting a sudden, national process of titling. The state does not have the capacity and it may trigger political opposition. Providing families who live on customary land with security of tenure in the form of ownership is likely to be seen by most chiefs as a direct threat to their political authority. This cannot be overlooked in attempts to reform the tenure system, and policy recommendations will have to take this into account.

A slow process of the kind, which has been happening to a limited extent under the ULTRA, and is envisaged under a Land Records Act, is a possible route. It would start in the urban and peri-urban areas, and with RDP houses, where there is less complexity in relation to collective rights over common land. However, some important issues must be adequately thought through before this path is taken. The state would have to develop major new administrative capacity and pay the costs of research and first registration at a time of great financial stringency. Education and publicity will be needed as it is

vital that people understand what is being done. As we have noted, the area of land involved is probably less than 15 per cent, but the number of landholdings is large, maybe around five to six million if untitled RDP houses are included. The process needs to be scrupulously fair and free of corruption.

Although Manona and Kingwill are advocating a recordal of existing rights, and cementing them, rather than upgrading to title, we see the potential for this programme to be part of a longer-term movement, over a few decades, towards a single national system of landholding. The Deeds Office and Surveyor General Offices are well established, with clear processes and experienced officials. It is vital that the state ensures that these institutions have the capacity to expand and innovate as new technology becomes available. This may greatly reduce costs of recordal, registration and transactions. It would be possible to expand title to specific components of rural residential landholdings and fields without threatening other rights. Commonages were attached to private property settlements in the 19th-century Eastern Cape for white and black people. Alternatively, experiments could be developed to subdivide commonages (Beinart et al., 2017). The Presidential Advisory Panel (2019), among other sources, suggests that consolidated smallholder sites are likely to be most successful. Upgrading and registration need not preclude further allocation of residential sites on the commonages, which are probably still the largest areas of land in the former homelands. This would be important in ensuring that some land remains accessible at low cost.

REFERENCES

Adams, M., Cousins, B. and Manona, S. 1999. 'Land tenure and economic development in rural South Africa: Constraints and opportunities'. Working Paper No. 125, Overseas Development Institute, http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/4077/Adams%26Cousins-et_al-land_tenure_and_economic_development_in_rural_south_africa_costraints_and_opportunities.pdf?sequence=1, accessed 20 August 2020.

Amanor, K. 2008. 'The changing face of customary land tenure', in Ubink, J. M. and Amanor, K. (eds.) *Contesting Land and Custom in Ghana: State, chief and the citizen*. Leiden: Leiden University Press, 55–81.

Barry, M. and Kingwill, R. 2020. 'Evaluating the community land record

system in Monwabisi Park informal settlement in the context of hybrid governance and organisational culture'. *Land*, 9 (124), 1–34.

Beinart, W. 2018. Supporting affidavit, heads of argument bundle, *Baleni, D and 128 Others v Minister of Mineral Resources and Others*.

Beinart, W. and Delius, P. 2014. 'The historical context and legacy of the Natives Land Act of 1913'. *Journal of Southern African Studies,* 40 (4), 667–688.

Beinart, W., Delius, P. and Hay, M. 2017. *Rights to Land: A guide to tenure upgrading and restitution in South Africa.* Johannesburg: Jacana Media.

Beinart, W. and Wotshela, L. 2011–2012. Unpublished interviews in preparation for the uMgungundlovu (Wild Coast Sun) restitution case.

Bennett, J., Ainslie, A. and Davis, J. 2013. 'Contested institutions? Traditional leaders and land access and control in communal areas of Eastern Cape Province, South Africa'. *Land Use Policy*, 32, 27–38.

Bloom, K. 26 March 2019. 'China, the Pondo king and Namaqualand: In pursuit of the "Disney playground" deal'. *Daily Maverick,* https://www.google.com/amp/s/www.dailymaverick.co.za/article/2019-03-26-china-the-pondo-king-and-namaqualand-in-pursuit-of-the-disney-playground-deal/amp/, accessed 9 June 2020.

Capps, G. and Malindi, S. 2017. 'Dealing with the tribe: The politics of the Bapo/Lonmin royalty to-equity conversion'. Working Paper No. 8, Society, Work and Development Institute (SWOP), University of the Witwatersrand.

Claassens, A. and Budlender, G. 2016. 'Transformative constitutionalism and customary law'. *Constitutional Court Review*, 6, 75–105.

Delius, P. 2008. 'Contested terrain: Land rights and chiefly power in historical perspective', in Claassens, A. and Cousins, B. (eds.) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*. Cape Town: University of Cape Town Press, 211–237.

Department of Rural Development and Land Reform (DRDLR). 2007. 'Land audit report: Phase II: Private land ownership by race, gender and nationality', https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf, accessed 20 May 2020.

Guduza, C.M. 1997. 'Housing markets in Greater Soweto'. PhD dissertation, London School of Economics and Political Science, University of London.

Hornby, D., Kingwill, R., Royston, L. and Cousins, B. 2017. *Untitled: Securing land tenure in urban and rural South Africa.* Pietermaritzburg: University of KwaZulu-Natal Press.

Hunter, M. [1936] 1964. *Reaction to Conquest.* London: Oxford University Press.

Kassier, N. 2019. 'Current status of permission to occupy'. *Go Legal*, https://www.golegal.co.za/pto-rural-land-occupation/, accessed 9 June 2020.

Kerr, A.J. 1953. *The Native Common Law of Immovable Property in South Africa.* Durban: Butterworth.

Kerr, A. J. 1990. *The Customary Law of Immovable Property and of Succession.*

Grahamstown: Grocott & Sherry.
Manona, S. and Kingwill, R. 2016. 'Land Records Act: Proposals at a glance'. Unpublished paper prepared for the High-Level Panel, Cape Town.
Minisi Weeks, S. 2019. *Access to Justice and Human Security: Cultural contradictions in rural South Africa*. London Routledge.
Minister of Agriculture, Land Reform and Rural Development. 2020. 'Upgrading of Land Tenure Rights Amendment Bill', https://www.parliament.gov.za/storage/app/media/Bills/2020/B6_2020_Upgrading_of_Land_Tenure_Rights/b6-2020-upgrading-of-land-tenure-rights.pdf, accessed 20 August 2020.
Ntsebeza, L. 2005. *Democracy Compromised: Chiefs and the politics of land in South Africa.* Leiden: Brill.
Parliament of South Africa. 2017. 'Report of the High-Level Panel on the assessment of key legislation and the acceleration of fundamental change'. Parliamentary Monitoring Group, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf, accessed 20 August 2020.
Peters, P.E. 2013. 'Land appropriation, surplus people and a battle over visions of agrarian futures in Africa'. *Journal of Peasant Studies*, 40 (3), 537–562.
Presidential Advisory Panel on Land Reform and Agriculture. 2019. 'Final Report of the Presidential Advisory Panel on Land Reform and Agriculture', https://www.gov.za/sites/default/files/gcis_document/201907/panelreportlandreform_0.pdf, accessed 19 August 2020.
South African Constitution. 1996. 'Section 25 Amendment: Expert opinion', https://pmg.org.za/committee-meeting/28079/, accessed 26 August 2020.
Ubink, J.M. 2008. 'Struggles for land in peri-urban Kumasi and their effect on popular perceptions of chiefs and chieftancy', in Ubink, J.M. and Amanor, K. (eds.) *Contesting Land and Custom in Ghana: State, chief and the citizen*. Leiden: Leiden University Press, 155–182.
Umhlaba Rural Services. 2009. 'Situational analysis of the upgrading of Land Tenure Rights Act (ULTRA)'. Umhlaba Rural Services, East London.
Yeni, S. 2019. 'Traditional leadership, violation of land rights and resistance from below in Makhaseni village, KwaZulu-Natal', in Buthelezi, M., Skosana, D. and Vale B. (eds.) *Traditional Leaders in a Democracy: Resources, respect and resistance.* Johannesburg: MISTRA, 129–153.

Legislation

Communal Land Rights Act (CLARA, No. 11 of 2004).
Deeds Registries Act (No. 47 of 1937).
Extension of Security of Tenure Act (No. 62 of 1997)
Ingonyama Trust Act (No. 3KZ of 1994).
Interim Protection of Informal Land Rights Act (IPILRA, No. 31 of 1996).
Mineral and Petroleum Resources Development Act (MPRDA, No.

28 of 2002).
Natives Land Act (No. 27 of 1913).
Native Trust and Land Act (No. 18 of 1936).
Prevention of Illegal Eviction Act (No. 19 of 1998).
Provision of Certain Land for Settlement Act (No. 126 of 1993).
Traditional and Khoisan Leadership Act (No. 3 of 2019).
Upgrading of Land Tenure Rights Act (ULTRA, No. 112 of 1991).

Court cases

Alexkor Ltd and Another v. Richtersveld Community and Others (CCT19/03) [2003] ZACC 18, 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC).
Baleni, D and 128 Others v. Minister of Mineral Resources and Others (2018) (73768/2016).
Global Environmental Trust and Others v. Tendele Coal Mining (11488/17P) [2018] ZAKZPHC 62; [2019] 1 All SA 176 (KZP).
Hlolweni, Mfolozi and Etyeni Communities v. North Pondoland Sugar (Pty) and 2 Others (2010) LCC41/03.
Madumetsa, *Machoga v. Potgietersrus Platinum* (2006) 1(3498/06).
Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (CCT265/17) [2018] ZACC 41; 2019.
Mary Rahube v. Hedsrine Rahube and Others (2017), 101250/2015.
Nandipha NO v. Irfani Traders cc (2018) 4654/2017.
Mgungundlovu Community v. Minister of Rural Development and Land Reform, Transkei Sun International Limited et al., (2014) (LCC 10/2011).