

Land reform and agrarian change in southern Africa

An occasional paper series



The Communal Land Rights Act and women:
Does the Act remedy or entrench discrimination and the
distortion of the customary?

Aninka Claassens

No. 28

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ISBN: 1-86808-620-8

First published: September 2005

Cover illustrations: Colleen Crawford Cousins

Layout: Designs for Development

Copy-editing: Samia Singh

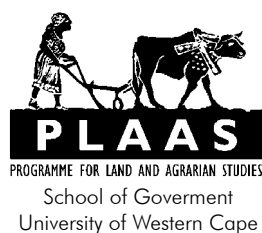
Printing: Digital Bureau.com

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The Communal Land Rights Act and women: Does the Act remedy or entrench discrimination and the distortion of the customary?

Aninka Claassens

Aninka Claassens wrote this paper during 2005 while contracted by the Legal Resources Centre to co-ordinate research into the potential impact of the CLRA. This paper is jointly published by the Legal Resources Centre (LRC) and PLAAS. It is one of the products of an LRC research project to investigate the potential impact of the Communal Land Rights Act on rural people and LRC rural clients. The Legal Resources Centre acknowledges the generous support of the Ford Foundation in funding the research project which took place during 2004–2005.



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1. Introduction

This paper discusses the likely impact of the Communal Land Rights Act (CLRA) of 2004 on the land rights of rural women. It asks whether the Act is likely to enhance or undermine tenure security, not only for women, but for rural people in general. In the context of declining rates of marriage it focuses particularly on the problems facing single women. It examines two inter-related issues. The first is the content and substance of land rights, including the question of where rights vest. The second relates to power over land, particularly control over the allocation and management of land rights.

It begins with an account of the parliamentary process and the last minute changes to previous drafts. The Bill was opposed by all sectors of civil society with the singular exception of traditional leaders. The most vehement opposition came from rural women and women's organisations who argued that the Bill undermined the principle of equality in favour of an alliance with traditional leaders. By contrast, traditional leaders welcomed the Act as a triumph of tradition and African custom.

The Constitution guarantees the right to equality and also recognises customary law and the institution of traditional leadership. During the constitutional negotiations there was a battle between women's representatives and traditional leaders about which should take precedence – equality or custom. Traditional leaders argued that the constitution would not be successful if it relied on 'foreign concepts and institutions' (Maloka & Gordon 1996:47)¹. Equality won, but the inherent tension between the different provisions means that a clash has long been anticipated. Some have seen the Act as manifesting that anticipated clash.

The paper argues that the Act in fact has little to do with custom or tradition. Instead it entrenches key colonial and apartheid distortions that exaggerated the power and status of the government and traditional leaders in relation to land, and undermined the strength and status of the land rights vesting in people – women in particular. It argues that the Act conflicts with, and undermines, key features of indigenous systems of land rights. These features continue to manifest themselves in rural (and indeed urban) South Africa. They have been extraordinarily resilient in the face of conquest, denial, forced removals and the overlay of a barrage of laws and legal constructs that conflict with them.

The paper describes the layered and 'nested' nature of land rights within African rural areas. It focuses on the status of women's land rights within the family. These fit into a hierarchy of nested rights which includes family rights within the village or clan, and the rights of villages or user groups to specific portions of land within the broader community or 'tribe'. The paper argues that colonial interventions have had a major impact on internal power relations, particularly by re-conceptualising the nature of land rights. Previously, power was mitigated by the existence of strong land rights vesting in women within families, and in family and user groups within wider communities. Allocation and control functions were decentralised and managed at the different levels of a layered system. However, internal power relations within the family changed when the household head was made the 'owner' of family land. Similarly, when chiefs were made 'trustees' of tribal land, control and allocation functions were re-conceptualised as 'delegated downwards' as opposed to being referred upwards – through a process which varied according to whether and which higher authority was recognised.

The paper argues that the consequences of colonial and apartheid misrepresentations and distortions of pre-existing systems of land rights were particularly disastrous for women. It looks at the two key issues raised by women during the parliamentary process. The



first was that enhancing the powers of traditional leaders over land was likely to reinforce patriarchal power relations – to the detriment of women’s access to land and security of tenure. The second was that the Bill would entrench past discrimination against women by ‘upgrading’ and formalising ‘old order’ rights held by men. Rural women cited the practice of women being evicted from rural land when their marriages end or their husbands die as a problem. They said current insecurity would deepen if rights presently held by men were formalised and registered as ‘new order’ land rights, especially as the Bill proposed that land rights could be bought and sold.

The CLRA provides for the transfer of title to land from the state to ‘communities’.² The definition of community is vague, but a senior official of the Department of Land Affairs told Parliament’s Portfolio Committee on Land Affairs that the department estimates there are 892 communities eligible for transfer of title. This is the number of tribal authorities in South Africa. The sister Act to the CLRA is the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). The TLGFA includes a transitional provision, which deems existing tribal authorities to be traditional councils, provided they meet new composition requirements within a year.³ The CLRA provides that where traditional councils exist, they will be land administration committees. One of the powers and duties of the land administration committee is to ‘represent a community owning communal land’.⁴

While title will be transferred to the community represented by the traditional council, the Act also provides for the simultaneous registration of individual rights within the boundaries of ‘communal ownership’. It provides that ‘old order’ rights will be converted into registered ‘new order’ rights. It does not define the content of ‘new order’ rights. The Minister will determine the content of those rights, and who the holders will be.⁵ The Minister also determines the boundaries of the land to be transferred.⁶

Having described the parliamentary process, the paper asks whether the conversion of old order rights to new order rights will entrench the consequences of past discrimination against rural women. This raises questions about the content and status of women’s rights to land. Thereafter it looks at changes in land allocation practices and asks how the CLRA is likely to impact on positive (though uneven) changes in practice, which are seeing more land being allocated to single women. This is situated in the context of recent debates about tenure reform and the ‘development of customary law’.

The next section deals with the issue of power relations and accountability and discusses the impact of power relations on

women's land rights. It describes and explains the intersection between the CLRA and the newly-enacted TLGFA.

Finally the paper asks whether the CLRA is likely to enhance or undermine security of tenure for women and for rural people generally. It suggests that the registration provisions of the Act are unlikely to be implemented at scale, and that the legacy of the Act may be to re-enforce apartheid era 'tribal authority' structures at the expense of equality and democracy on the one hand, and indigenous accountability mechanisms on the other. It looks at what the alternatives would have been, and argues that the starting point for tenure reform should be to assert and secure the rights of the people who use and occupy land, most of whom are women.

2. The parliamentary process

A wide range of rural people and civil society organisations made submissions against the Communal Land Rights Bill during the parliamentary process.⁷ There were also tensions within the African National Congress about the Bill, and within the tri-partite alliance, with the labour federation, the Congress of South African Trade Unions (Cosatu) and the South African Communist Party lobbying that it should be re-formulated, or at least held over until after the 2004 elections (Vapi 2003).

Much of the controversy related to last-minute changes, which saw a fundamental change in the role of traditional leaders in land administration. Whereas in previous drafts the representation of traditional leaders on land administration committees had been set at a maximum of 25%, the new draft gave 'reformed' tribal authorities far-reaching powers – in respect of both ownership and administrative functions on communal land. One of the key issues raised was why rural people should not be able to choose their representatives on the same basis as urban people. Another was that the two Bills failed to repeal the hated Bantu Authorities Act, and instead gave perpetual life to the tribal authorities created by the Act. Concern was also expressed that the Communal Land Rights Bill did not contain provisions that hold land administration committees accountable to the people whose land rights they control and whom they 'represent', instead they were accountable only upwards to the Minister and appointed land rights boards.

There was an outcry from organisations dealing with gender issues, including the Commission on Gender Equality and the



parliamentary Joint Monitoring Committee on the Quality of Life and Status of Women. Rural women broke into Zulu as they made impassioned pleas to the parliamentary Land Affairs Portfolio Committee that the Bill should be scrapped. Both the South African Human Rights Commission and the Commission on Gender Equality submitted legal opinions, which argued that various provisions of the Bill were in conflict with the Constitution. The gender arguments are discussed below.

The Bill that was submitted to Parliament in October 2003 was substantially different from a previous draft that had been gazetted for public comment in August 2002. The new Bill⁸ was gazetted on 17 October 2003 and public hearings were held within a month. This rushed time frame left both rural people and civil society organisations scrambling to understand it and prepare submissions in time. Nevertheless, representatives from over 70 rural communities made their way to Parliament and made submissions;⁹ and a wide range of civil society organisations made both oral and written submissions.

In response to criticism of the Bill, the Department of Land Affairs proposed various amendments to the portfolio committee. Most of the amendments related to areas of constitutional vulnerability that had been identified in legal opinions. The most dramatic change for women was the inclusion of a provision that deems old order rights to be vested jointly in all spouses; and a provision stating that women are entitled to the same land rights and security of tenure as men (Sections 4(2) and 4(3)). The provisions dealing with the powers of traditional leaders were reworded in a more ambiguous way, but were not substantially changed.

Despite an attempt by the then Speaker of Parliament, Dr Frene Ginwala, and the then Chairperson of the National Council of Provinces, Naledi Pandor, to have the Bill retagged as a Section 76 Bill¹⁰ (*Cape Times*, 11 February 2004), thereby requiring more consultation with the provinces and a delay until after the elections, the Bill was unanimously adopted by Parliament and passed through the Section 75 route.¹¹ As will be discussed in Section 4, the CLRA was widely perceived to be a pre-election deal with the Inkatha Freedom Party and organisations representing traditional leaders. The President signed the Bill into law on 14 July 2004. At the time of writing (July 2005) it has not yet been brought into operation. It will be brought into operation on a date to be determined by the President.¹²

3. The conversion of old order rights to new order rights – The implications for women

3.1 The CGE legal opinion

The Commission for Gender Equality (CGE) argued that the Bill entrenched past discrimination against women by formalising ‘old order’ rights held by men into secure ‘new order’ rights which would also be held by men.

It submitted a legal opinion, which argues that ‘old order rights’ are principally derived from – or recognised by – law, including customary law.¹³ It discusses the fact that key apartheid laws, the Black Areas Land Regulations R188 of 1969 in particular,¹⁴ provide that land may be allocated only to the male head of the family.¹⁵ It argues that customary law, as currently practised,¹⁶ also discriminates against women being allocated land and having security of tenure. It states that the Bill, by securing old order rights derived from discriminatory laws, reinforced a system in which there is structural discrimination against women.

Furthermore, it argues that the insecure tenure held by African women is the result of racially discriminatory laws. Other women are not subjected to the gender discrimination embedded in the Black Administration Act, the South African Development Trust and Land Act and the Black Land Regulations. The opinion states:

70. It follows that African women are, in the words of section 25(6) of the Constitution, people “whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices”. They therefore have a constitutional right to tenure which is legally secure or to comparable redress.

The CGE argument, that the Bill failed to give effect to Section 25(6) of the Constitution, can be substantially expanded by looking at the nature of women’s land rights prior to the impact of discriminatory laws and practices, and by showing how particular laws and practices worked to undermine women’s rights to land.

3.2 Rural women’s land rights undermined by racial laws and practices

The following discusses the Section 25(6) argument that rural women previously had stronger rights to land, which were undermined by racial laws and practices. Currently, the predominant practice is that the male household head holds rural land on behalf of the family. This is reflected, not just in regulations such as R188, but also in



how customary law operates and disputes are resolved. The practice explains why women are so often evicted when their marriages break down, but is a distortion of pre-colonial customary law. The 2004 Bhe judgement in the Constitutional Court quotes Prof Thandabantu Nhlapo as follows:

The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land for example, was a major distortion (Nhlapo 1995:162).¹⁷

In *African women in South Africa* Jack Simons (1968:194) describes how, originally, the family, rather than the individual, had full legal capacity, with each family member having a clearly defined position with recognised claims and obligations. Each member of the family had recognised claims to the property attached to their respective 'houses':

The house is more than a dwelling. It is a distinct unit, a legal cell within the complex of a joint family, which is made up of a number of houses. Every wife constitutes a house, together with her children, the fields which she cultivates and the livestock set apart for her use (Simons 1968:194).

This description of a wife having strong and specific rights to her 'house' property and in particular to the fields she cultivated is described by Preston-Whyte (1974) and in ethnographic accounts of the Tswana by Schapera (1970) and of the Zulu by Reader (1966). The accounts emphasise that the male family head could not make decisions that impacted on house property, without the consent of the wife of that house. Women were in a relatively strong economic position within the family as producers of food, and because of their pivotal role in the joint family enterprise of farming and subsistence.

Furthermore, there are various accounts of land being allocated directly to women, and not to women via their husbands, and accounts of unmarried women and widows being allocated land directly. In many instances fields are described as 'belonging' to women (Schapera 1943:136).¹⁸

A 1931 account of the 'life and customs' of the Xhosa by the African missionary John Henderson Soga is one example:

Each wife of a chief or of a commoner has a grant of land given her for the upkeep of her family. Once granted it can only be forfeited by some misdemeanour on her part, or it may lapse through the death of the holder...(Soga 1931:383).

Writing in 1951, Monica Wilson states of Keiskammahoek:

There is much confusion over the rights of women in inheritance of land. Under the traditional law of the Xhosa-speaking people a field for cultivation was allotted to every married woman or widow. It appears usually to have been inherited (along with any property held by a woman in her own right) by her youngest son, but this was not of great importance when land was plentiful and fields frequently abandoned. Until 1927 Africans who married under common law without an ante-nuptial contract were held to be married in community of property and their children, irrespective of sex, were entitled to equal shares of property. Many such marriages took place in Keiskammahoek district and as has been shown... a considerable amount of freehold land has been inherited by, or through, women. It was not unusual too for a man in a communal village to give a field to a daughter, married or unmarried. Since 1927, however, common law marriages of Africans are not held to be in community of property unless they specifically state that they wish them to be, and tables of succession, which exclude inheritance by women are applied. At the same time the administration opposes the granting of fields to any woman except a middle-aged or elderly widow. The net effect is to reduce the land rights of women very considerably (Wilson & Elton Mills 1952:133, emphasis added).

Wilson describes the process whereby, through interventions by native commissioners and because of increasing land shortages, 'rights over fields came to be regarded as male property to be inherited by the eldest son, or where polygyny survived, by the eldest son of each house'. (Wilson & Elton Mills 1952:133).

Jack Simons (1968) quotes Barry with regard to the impact of Proclamation 227 of 1898, which introduced the rule of 'one man, one lot', and changed the 'traditional system of landholding which allowed each wife to have her separate fields.' He also describes how administrative policy favoured men being allocated land, and how officials objected 'strenuously and with growing emphasis to the allocation of land to unmarried women'. He says that over time headmen stopped allocating arable land to women and allocated it only to men. In those instances that they did allocate land to women, the commissioner would cancel the grant (Simons 1968:261-5). Simons attributes the worsening situation of women, both to the imposition of racial laws, policies and administrative procedures, which systematically discriminated against African women, and to growing land shortages and pressure on land. As he shows, increasing pressure on land was itself a direct result of racially



discriminatory laws and policies that restricted the area of African land occupation.

There is a range of historical and ethnographic accounts that indicate that women, as producers, previously had primary rights to arable land, strong rights to the property of their married houses within the extended family; and that women, including single women, could be and were allocated land in their own right. Furthermore, there are accounts of women inheriting land in their own right. However, native commissioners applying racially-based laws such as the Black Land Areas Regulations and South African Development Trust betterment regulations repeatedly intervened in land allocation processes to prohibit land being allocated to women.

The problems caused by racial laws were exacerbated in other ways. As Nhlapo (1995) points out:

Enthroning the male head of the household as the only true person in law, sole holder of family property and civic status, rendered wives, children and unmarried sons and daughters invisible in a social and legal sense.

Furthermore, customary inheritance law was codified in a way that did not encompass the household head's duty to preserve the property for family members who had specific rights in it, and imposed a rigid rule of male primogeniture, thus undermining women's ability to inherit land and rights in land under specific circumstances.

The CGE opinion argued that by formalising rights derived from past racially discriminatory laws, and distorted customary law, the Communal Land Rights Bill undermined rather than enhanced women's tenure security. The historical evidence that women previously had strong and relatively independent rights to land strengthens the section 25(6) argument – that women are entitled to security of tenure because their current vulnerability arises from past racially discriminatory laws.

3.3 Do the section 4(2) and 4(3) amendments fix the problem?

In order to address the argument that the Bill formalised land rights held by men that derived from past discriminatory laws and therefore undermined women's rights both to equality and to tenure security in terms of section 25(6), the Bill was amended. The Act now provides:

4(2) An old order right held by a married person is, despite any law, practice, usage or registration to the contrary, deemed

to be held by all spouses in a marriage in which such person is a spouse, jointly in undivided shares irrespective of the matrimonial property regime applicable to such marriage and must, on confirmation or conversion in terms of section 18(3), be registered in the names of all such spouses.

4(3) A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person.

While women members of the portfolio committee welcomed Sections 4(2) and 4(3) as an improvement, they raised questions about the formulation of Section 4(2), particularly in relation to its impact on unmarried women.

Family rights – and unmarried women within the family

Section 4(2) is likely to have the effect that land, which is a family asset, will be registered in the names of two spouses, to the exclusion of other family members. This would decrease the tenure security of female family members who are not wives, including widows, unmarried women or divorced sisters. Janet Small quotes a woman from Ragwadi talking about the problems facing a divorced woman who had been allocated land in her son's name:

If [the son] marries, the site belongs to him and his wife. There is no future role for his mother in decisions about the household. She becomes only a parcel. If there are problems she has no option but to leave and go and stay with a daughter (Small 1997:47).

The Act provides that converted new order rights are potentially alienable (see Sections 9, 18(3)(d)(ii) and 24(3)(b)), thus introducing the risk that land could be sold from underneath family members whose rights are not explicitly protected and whose names are not registered.

A feature of land titling schemes throughout Africa has been increased vulnerability and evictions of people with 'secondary' as opposed to 'primary' rights. Women have been particularly badly affected.¹⁹ The only way to offset this inherent problem is to ensure that tenure legislation explicitly protects vulnerable categories of people, and includes procedures that protect and assert women's rights during and after formalisation processes.

The CLRA fails to provide that family members must consent to transactions in the land. Nor is there a provision to ensure that the proceeds from land sales must be distributed amongst



all family members in accordance with their rights in the land. This is particularly serious in the context of the Aids epidemic in South Africa and its impact on orphaned children. There is also no requirement or procedure to ensure that the spouse consents to transactions in the land.

One way to avoid the negative impact on unmarried women would have been for the Act to recognise the family-based nature of land rights; and vest land in the family as opposed to in individuals. To protect women and to facilitate registration, the land could have been registered in the names of two family nominees, with the requirement that at least one of the nominees must be a woman. Another key protection would be the requirement of family consent procedures prior to the registration of transactions in the land. These procedures could have required special recognition and protection of the rights of particular family members to specific parts of the land. Ambreena Manji (2003) has argued that consent requirements may afford women more effective protection from having land sold from under them, than joint vesting provisions that do not explicitly restrict men's ability to sell land unilaterally.

Structure of rights in the Act

The Act does not acknowledge the family-based nature of land rights in rural areas. Instead it provides that rights vest in 'communities' or 'persons'. It envisages a rights enquiry process that will happen prior to the transfer of title to communities, on the basis of which the Minister will 'determine' the rights of individuals within communities and ensure that a register of these rights is in place prior to, or simultaneously with transfer of title to the broader community.

The Act envisages the conversion of 'old order rights' to 'new order rights'. A 'new order right' is defined as 'a tenure right in communal or other land which has been confirmed, converted, conferred or validated by the Minister in terms of Section 18.' The Minister determines whether an old order right is to be confirmed, converted into ownership, or into a comparable new order right,²⁰ or cancelled (Section 18(3)(d)). The Act provides that 'old order rights' can be cancelled only with the written agreement of the holder (Section 13) who must receive comparable redress (Section 4 and 18(3)(d)(iii)).

Section 4(2) now provides that an old order right held by a married person is deemed to be held by all spouses. This is an improvement – but does it adequately protect the rights of other female family members in the land?

It could be argued that this is the wrong test, that Section 4(2) shares what a man has with his wife or wives, and the problems faced by other women do not derive from Section 4(2) but from other provisions of the Act. It is certainly the case that the problems

created for single women stem from the basic structure of the Act: its choice to impose a structure of exclusive individual rights on a pre-existing system of family rights; its failure to assert women's land rights within the family, or as producers and users of land; and the fact that it formalises rights deriving from discriminatory laws and distorted customary law without adequate protections for unmarried women. However, the issue at this stage is not whether 4(2) is good or bad, but whether the amendments (of which it is an integral part) remedy the problem of the Act entrenching past discrimination at the expense of equality and security for women.

Single women already suffer particular tenure vulnerabilities. Submissions by rural women described instances of widows and divorced women being evicted from their homes, and also the problems facing single mothers in being allocated land. Does Section 4(3) solve the problem for single women? It provides that 'a woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man'. This implies that sisters who occupy family land (for example unmarried sisters, or divorced sisters who have returned to their natal homes) would be entitled to the same security of tenure as their brothers. Yet, as already described, most old order rights are held by men. Section 4(2) contradicts the implications of Section 4(3) by vesting what will often be family property, within which women have 'secondary' use and occupation rights, exclusively in a male and his spouse – to the exclusion of other female family members, in particular the man's mother and his sisters.

The General Household Survey of 2003 indicates that 41% of rural women over 18 are neither the household head, nor married to the household head.²¹ In other words 41% of rural women live in households where other people will be the holders of land rights, to their exclusion.

Section 4(3) is potentially contradicted not only by Section 4(2), but also by the entire tenor of the Act, which focuses not on current use and occupation of land, but on formalising old order rights into exclusive land tenure rights held by two people. Insofar as the Act discriminates against single women, it is in contravention of Section 9 of the Constitution, in particular the injunction that marital status may not be a basis for discrimination.

3.4 Rural women as holders of old order rights?

The contradiction would disappear if women's use and occupation rights also fall within the definition of old order rights. If they do, then women's use and occupation rights could be formalised and registered alongside those of men, and their security would be guaranteed through the registration of overlapping new order rights.



The definition of old order rights provides that old order rights ‘derive from, or are recognised by law, including customary law, practice or usage’. The problems of rights deriving from law and customary law have already been discussed. The question is whether ‘practice and usage’ will confer the status of old order rights on women’s current use of land and thereby offset the problem of old order rights deriving from discriminatory laws that ignored and undermined women’s rights in land.

Law, practice and usage

The first problem is whether practice and usage are counter-posed to law, or whether ‘practice and usage’ should be interpreted as part of law. The provision is ambiguously worded and is capable of either interpretation. Is it law, including customary law, practice and usage? Or is it law, including customary law, plus practice, plus usage?

Taking the potentially more positive interpretation for women, that practice and usage are additional sources of old order rights, the next question is what do practice and usage mean? Practice holds out less hope than usage, precisely because of the problem of current practice discriminating against women. In practice men assert that they are the holders and controllers of family land. In practice men evict widows and divorced women, and get away with it. In practice, women have to struggle to be allocated land.

At the same time, much family land is, in practice, occupied and used by women. However, their status and security on this land is vulnerable because their rights have come to be characterised as ‘secondary’ and subservient to those of the male household head. As argued previously this is, at least in part, the consequence of colonial and apartheid laws that mis-conceptualised and undermined the strength and relative independence of women’s land rights within the family.

Usage is therefore likely to be a much more helpful qualification for women’s land rights than ‘practice’. Even in situations where men were allocated the land by traditional leaders and issued with ‘exclusive’ Permission to Occupy (PTO) certificates, women occupy and use the land. In most rural areas the cultivation of arable land remains the prerogative of women as opposed to men.

Thus the meaning of the word ‘usage’ in the CLRA is critical to an understanding of the Act’s potential impact on women. If it means ‘use’ then women will be the holders of overlapping old order rights. If it means ‘habitual or customary practice’ then it entrenches the discriminatory status quo.

There are various indications that the drafters of the Act did not intend ‘usage’ to mean ‘use’ but used it in the context of ‘habitual or customary practice’.²² The word ‘usage’ appears in the Interim

Protection of Informal Land Rights Act 31 of 1996 (IPILRA) in the definition of informal land rights. In IPLIRA ‘usage’ clearly has the meaning of habitual or customary practice.

1 (1) (iii) “*informal right to land*” means—

- (a) *the use of, occupation of, or access to land in terms of—*
- (i) *any tribal, customary or indigenous law or practice of a tribe;*
 - (ii) *the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in...*

While one law cannot automatically be used to interpret another law, it seems likely that the drafters were using the word in the same context. The schema of the CLRA, which provides for registers of new order rights, communal general plans and the conversion of old order rights into ‘ownership or into a comparable new order right’ (Section 18(3)(d)(ii)) is not consistent with a model of multiple overlapping use rights on top of upgraded PTO rights.

It may be argued that the way in which government officials understand the term is not relevant to how a court would interpret it. However, their interpretation is very relevant to how the Act is likely to be implemented and thus its impact on women. Unless the CLRA is challenged and the term ‘usage’ is given a positive interpretation by a court, there is a strong likelihood that ‘usage’ will be interpreted as a habitual or customary practice. For it to be interpreted any other way would lead to major difficulties in implementing the model of tenure reform envisaged by the Act.

If the matter came before a court, the court would look for an interpretation that is consistent with the Constitution and secures women tenure rights. Presumably it would look for the most favourable interpretation of usage. It would, however, face the difficulty of the exclusions in sections 4(2) and 4(3) which both refer to ‘usage’. Section 4(3) is particularly problematic. It provides that:

A woman is entitled to the same legally secure tenure, rights in or to land and benefits from land as is a man, and no law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person.

The context indicates that ‘usage’ means a ‘habitual or customary practice’. It cannot mean ‘use’ in this context. Similarly, it would be virtually impossible to interpret ‘usage’ in Section 4(2) as anything other than ‘habitual or customary practice’. Since it is a principle of law that a word must be interpreted consistently within an Act it is difficult to see a court interpreting the word ‘usage’ in the definition of old order rights as ‘use’.



3.5 Asserting 'use' against 'law'

How would asserting 'use' against 'law' work in practice? Even if a court did interpret 'usage' as 'use', it would not be sufficient to address the practical problems women would face in asserting 'use' rights against rights recorded in certificates, and rights that have been allocated and witnessed by headmen and tribal councils. Use rights are nebulous unless there is a clear definition of what length and circumstances of use qualify as an old order right. If a woman has cultivated a piece of land on and off over time, but has not had the money to plough it for the last two years, does she have a use right? Is her use right a right to use the land 'on and off', or a right to use it always? What if her brother says that she used the field only with his permission, which he only gave her occasionally and invokes the exclusion provision in the definition of 'old order rights' – on the basis that her 'right or interest' was based on his 'temporary permission' granted and withdrawn by him as the lawful occupier?

The Act's failure to define use rights together with the deep ambiguity about the meaning of 'usage' – the absence of measures to assist women to assert and defend use rights, and the titling paradigm adopted by the Act as a whole – combine to create a very difficult and unequal environment within which to assert use rights against recorded rights. Thus, even a positive interpretation of 'usage' as 'use' is unlikely to counteract the likelihood that the registration provisions in the Act will further undermine the security of tenure of unmarried women living on family land.

4. The CLRA and the development of customary law

This section considers hard fought processes of change in land allocation practices, and questions whether the wording of Section 4(2) will inhibit processes of positive change. It then refers to current debates about tenure reform and the development of customary law; and asks whether the CLRA is consistent with key features of indigenous systems of land rights.

4.1 Processes of change – Land allocation to single mothers

The National Land Committee (NLC) and the Programme for Agrarian Studies (PLAAS) at the University of the Western Cape held a series of consultation meetings on the Bill with rural communities during 2002 and 2003. Many women recounted the difficulties they face in trying to secure land allocations from traditional leaders. They explained that the general practice is for residential land to be allocated only to married men.

In Batlaros in the Northern Cape, a traditional leader said that land is now also allocated to single mothers. He was immediately challenged by a woman who stood up and asked why then, he had refused to allocate land to her (Claassens 2003). At Mpindweni in the Eastern Cape, women said that unmarried mothers have to struggle to be allocated land, and if they succeed it is allocated in the name of a male relative. KwaZulu-Natal women said that single women, especially widows, and women who do not have sons, are seldom allocated residential sites. They said the problem is worse in areas administered by tribal authorities, and that trusts and communal property associations generally allocate land to women on a more equal basis. Participants at the Sekhukhuneland meetings said that stands are not allocated to single women unless they are over 40 and have children.

While the meetings indicated that land allocation to single mothers is a serious problem, they also indicated that uneven processes of change are underway.²³ This is also the conclusion of a recent study by Alcock and Hornby (2004) in KwaZulu-Natal, which describes changes in the process of land allocation to women. The study concludes that while current practices confirm concerns about the patriarchal nature of tribal structures and systems, the changes currently taking place draw attention to the capacity of tribal structures to adapt and respond to the broader social and political context in which they function.

Some of the dynamics at play in relation to land allocation to women were illuminated at a recent meeting in Kalkfontein, Mpumalanga.²⁴ Young women challenged the community structure as to why women are not represented on the land allocation sub-committee.²⁵ Single mothers in Kalkfontein have been allocated residential sites for the last ten years or so, after they challenged the previous practice of allocating sites only to 'sons' of the community. They argued that as 'daughters and grand-daughters' they are just as much 'descendants' of the original purchasers as sons are, and that they also need to be able to house their children. At the meeting the land allocation committee conceded that daughters are entitled to residential stands, and also that women should be included in their committee. However, they raised recent problems of 'outside' men marrying Kalkfontein women and then causing trouble in the community by refusing to acknowledge the authority of the committee in resolving disputes. They said the problem arose when women who had been allocated land subsequently married 'outside' men, who thereby gained access to the community's land without first having had to agree to live by its rules. They said that the land of the Kalkfontein descendants is being diminished by 'outside' men gaining access to land rights in this way.



Women at the meeting acknowledged the problems cited by the committee, and said that they were also concerned about unruly ‘outsider’ men getting land rights at Kalkfontein by marriage. They argued passionately, however, that this problem should not be used to justify reverting to the old system of women not being allocated land. They said that single women need residential sites desperately, and no one can say for sure that a single woman will subsequently marry, or that her husband will be ‘troublesome’.

Traditional leaders often justify their reluctance to allocate land to single women by reference to the danger of ‘outside’ men gaining rights in the community via marriage. They say that land allocation follows the patrilineal line and land must be preserved for the children of the sons of the community. However, it is also clear that customary practices are undergoing a process of change and adaptation in the face of pressure from women, and the increasing incidence of single women establishing families of their own.

How is the CLRA likely to impact on this process of change?

Section 4(2) does not provide that rights previously reserved for men must now be shared by their wives, instead it provide that any old order right held by a married person is now deemed to be jointly held by his or her spouse. Land allocations to single women qualify as old order rights; they derive from (changing) customary law and practice.

The effect of section 4(2) is that once a single woman marries, her land rights will be jointly owned by her husband, to the exclusion of her children, including the children she had before her marriage. Yet in many instances custom has adapted precisely to recognise and secure the rights of children born to unmarried mothers. These children carry on the patrilineal line of the mother’s father, because they have not been claimed into their father’s line through marriage.

The wording of the section may impact negatively on the fluid and negotiated changes currently underway in rural areas. It will not assist rural women in their efforts to change current norms. Furthermore it undermines the land rights of children – both male and female – born to the woman before her marriage, and will affect their relationship with their step-father.

If the purpose of Section 4(2) is to address past discrimination against women it is unnecessary for it to have been worded reciprocally in this way. Not only is it likely to impact negatively on current processes of change in relation to customary law, it also means that land women managed to acquire despite past discrimination now vests jointly in their husbands. Moreover, the clumsy wording of the section means that men and women living in communal areas do not have the same options concerning matrimonial property regimes as other South Africans.

4.2 The development of customary law

One of the reasons that questions about the development of customary law are important is that legislative reforms often have a very limited impact in practice (Okoth-Ogendo 2002). There are a host of problems concerning the adequate implementation of new laws, and about vulnerable people finding out about laws that are designed to protect them, let alone finding and paying for lawyers who could help them enforce their 'new' rights. These problems are particularly acute in isolated rural areas.

Moreover, laws that do not acknowledge or mesh with underlying values and existing institutions often end up as nothing more than 'overlays' that further complicate contested situations (Cousins & Hornby 2001). In this context, processes of internal change that are hard fought and slowly shift existing practice and values are likely to have a more lasting impact than inadequately implemented new laws. Thus it is important to pay attention to processes of change in existing practices and customary systems, and to ask whether and how the CLRA is likely to inhibit or assist positive processes of change in customary law and within customary systems.

4.3 Current debates about tenure reform

It is widely recognised that land titling schemes in many parts of Africa (Kenya is an oft-cited example) have not met their objectives (Bruce et al. 1994; Platteau 1995). They have been extraordinarily expensive to implement and to maintain and have often reverted to 'informal' or customary systems. Titling per se does not appear to be a significant variable in relation to profit and productivity. And titling processes tended to be 'captured' by elites and used to consolidate their position at the expense of vulnerable categories of people including women. On the other hand, customary systems have proved unexpectedly resilient even in the face of overlaid titling schemes.

[E]mpirical evidence now shows that whether regarded as "law" or not, indigenous norms and structures, particularly in respect of land relations, continue to operate as sets of social and cultural facts which provide an environment for the operation of state law (Okoth-Ogendo 2002).²⁶

A new consensus has emerged, subscribed to by major institutions such as the World Bank, that for tenure reform to work, it should build on the dynamics of customary systems and recognise and support existing social institutions (Whitehead & Tsikata 2003).

Some authors have raised concerns about this new orthodoxy.



Whitehead and Tsikata (2003) ask about the implications for women of the 're-turn to the customary'. They raise important questions about power relations, and the impact of reinforcing institutions in which women are not represented. Philip Woodhouse (2003) too, raises questions about power dynamics within 'customary' institutions, and their role in the process of enclosure and land sales, which is taking place throughout Africa. He questions whether ahistorical and romantic notions of the customary do not ignore and thereby enable current processes of enclosure and land sales which disadvantage the poor and the marginal in society.

These are important questions, which will be addressed below. At this point, however, the question is whether the Communal Land Rights Act is in line with the prevailing view that it is important for tenure reform to build on and recognise the dynamics of the 'customary'?

4.4 How 'customary' is the CLRA?

At a fundamental level the Act is not consistent with the principles underlying pre-colonial customary systems. Nor is it consistent with the 'indigenous norms and structures' that Okoth-Ogendo describes as continually manifesting themselves as 'social and cultural facts' in African systems of land rights.

The rights and obligations of individuals, families, villages and 'tribes' operate relative to one another. For example, the land rights of individuals within the family are mediated by those of other family members. Similarly, family rights to residential sites and arable fields, while strong and secure, are mediated by – and operate relative to – the needs of other families within the village, who may graze their cattle on another family's fields after harvest, or ask for unused arable land if they have none. If there are no residential sites for adult children of the community, part of the communal grazing area will be converted to residential sites. Furthermore, while sub-groups or villages have rights to particular blocks of arable and grazing land, their rights exist within the context of the needs and rights of the wider society. The fact that the intersection of rights and uses at different levels is sometimes contested illustrates rather than contradicts this feature of current tenure system.²⁷

Okoth-Ogendo describes the African commons as an inclusive system managed and protected by a social hierarchy composed of different levels and layers of rights. He refers to rights of access to land; and rights of control of power. He describes that rights of both access and control are exercised at different levels of the social hierarchy. Furthermore they are function specific and:

Will vary in nature and content with the kind of land-use activity in which an individual member of society or group of such members are involved. ... for example cultivation, grazing, transit, energy etc. Each of these would attract different levels of control exercised at different levels of socio-political organisation. Thus while an allocation of power for cultivation purposes is often made and controlled at the family level, an allocation for grazing purposes would be a matter of concern for a much wider segment of society. The primary obligation of those in whom the power of control is vested being to guarantee access to present members and to preserve the land resources of the unit for the benefit of future generations...(Okoth-Ogendo 1989, emphasis added).

It is a truism to say that land holding patterns reflect and embody social relations. The system of shared and relative land rights in rural African areas embodies the culture of *ubuntu*, in that each person's rights and status is mediated by the needs, strength and cohesion of the wider groupings within which he or she derives their rights, identity and security. In the 2004 *Bhe* judgement the Constitutional Court referred to the centrality of *ubuntu* in customary law.²⁸ Pius Langa is quoted as follows: '(Ubuntu is a culture) which regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights'.²⁹

The CLRA as a whole superimposes the western construct of absolute and exclusive land rights on inclusive African systems of relative and 'nested' rights, thereby fundamentally changing them. It provides for the transfer of title to 'communities' with the Minister determining the boundaries of the land to be transferred. Ownership at this level 'trumps' the rights that exist at lower levels, for example the right of a particular village within the 'community' to particular blocks of arable land. It also relegates family and individual rights to less than ownership. While the Act does provide for the registration of individual 'new order' rights, these ignore the family based nature of land rights and undermine the rights of family members other than the household head and spouse.

Moreover, the Act centralises power and authority over land to the structure that represents the 'community', thereby increasing its power relative to that of bodies at more decentralised levels of the system, for example village councils, local committees, headmen, and family structures. This centralisation of power reinforces the distortion caused by ownership being vested at one level of a layered system. Furthermore it moves power to a level where women have experienced marginalisation and decades-long exclusion – and away from the localised discussions and meetings where women are often vocal and influential.



5. Traditional councils and power over land

This section describes some of the concerns about power relations that women raised during the parliamentary process. It describes how the CLRA and the Traditional Leadership and Governance Framework Act intersect to give apartheid-era tribal authorities unprecedented powers over land, provided that they change their composition within a year. It looks at the impact of the two Acts on democratic and indigenous accountability mechanisms and argues that the Acts entrench the colonial model of traditional leaders being accountable upwards to the state, as opposed to downward to the people whose land rights they control.

5.1 Parliamentary submissions

Power relations were the key issue highlighted in submissions opposing the CLRB by structures representing women's interests. Lulu Xingwana MP, chairperson the parliamentary Joint Monitoring Committee on the Improvement of Quality of Life and Status of Women, addressed the Land Affairs portfolio committee. She said that women are neither respected by, nor represented on, existing tribal councils, and that to give these structures powers over land would reinforce patriarchal power relations and impact negatively on women. She expressed the concern that the Bill sent a message, which would strengthen the status of traditional leaders at the expense of women's rights.

The Commission on Gender Equality submission said that existing traditional institutions 'are not democratic in their formation, are highly patriarchal, and historically have underpinned the subordination and oppression of women' (CGE 2003:2). The Women's Legal Centre (2003:15) submission criticised the Bill for failing to provide positive measures to deal with the 'systemic discrimination' practised by the institution of traditional leadership in refusing to allocate land to women.

Representatives of rural women's organisations made passionate speeches about the danger of the Bill entrenching existing inequalities in power relations. For example, Ms Shabalala of the KwaZulu-Natal Rural Women's Movement described current cases of women being evicted by their estranged husbands, or husband's families, and said:

These things happen because amakhosi allocate land only to men. Women can only get land through men. Women are not respected at home. When there are dispute and evictions, the amakhosi

say that they cannot get involved within family problems.... If the bill gives amakhosi power over land our suffering will become worse. We will go back to the old days – yet we have been looking forward to rights of our own. If parliament does not hear us and does not understand that we are talking about our lives, and suffering that is happening every day, then it is like amakhosi. It also does not respect us (Govender 2004).

Because of the nature of African systems of land rights, and the fact that land rights derive from social relations and exist relative to the claims and needs of others, the forum in which land rights are negotiated and disputes are resolved has a direct impact on security of tenure. The processes and institutions that negotiate land rights determine who gets land and who is able to retain it in the face of competing claims. The issue of land administration structures is thus critical for women, and will have a determining impact on their access to land, and the security of the rights they manage to attain.

Past experience of the tribal authorities created under the Bantu Authorities Act of 1951 has not been good for women (Small 1997; Thorp 1997; Cross & Friedman 1997; Mann 2002). In most instances women are not represented on these structures; and in many rural areas women are still not allowed to speak at tribal authority meetings or in tribal courts (Claassens 2003:32).

5.2 How do the CLRA and the TLGFA fit together?

There were dramatic changes to the Communal Land Rights Bill during October 2003. The version of 3 October provided that a traditional leader could nominate a maximum of 25% of the membership of a land administration committees, but only if the community rules allowed him to do so. The Bill provided that the remaining 75% of land administration committee members must 'be persons not holding any position in traditional leadership and must be elected by the community'.³⁰ However, on 17 October another Bill was published. This Bill defined land administration committee to mean:

- (a) *a traditional council, in respect of an area where such a council has been established or recognised; and*
- (b) *a land administration committee established in terms of section 21, in respect of any other area.*³¹

This change can only be understood in the context of contestation around the Traditional Leadership and Governance Framework Bill (TLGFB), which was being debated in the Provincial and Local Government Portfolio committee at the time. The TLGFB provided



for traditional councils to replace the old bantu or tribal authorities introduced by the Bantu Authorities Act of 1951.

The bill came under attack both by representatives of organisations representing traditional leaders, and by representatives of the Inkatha Freedom Party, which at that time held political power in KwaZulu-Natal. They criticised the Bill for failing to meet promises that traditional leaders would be given appropriate legislative powers. Lungisile Ntsebeza has documented the tortuous process of previous attempts to introduce new legislation pertaining to traditional leaders (Ntsebeza 2003). Over the last ten years Inkatha and the traditional leader lobby have threatened to disrupt various elections if their demands were not met. Local government elections were twice postponed because of agitation by traditional leaders.

In October 2003 the country was gearing up for the 2004 general election, and tensions around the issue were running high – as they had prior to other elections. Once the changes to the Communal Land Rights Act were made public, however, vocal opposition to the TLGFA died down and various traditional leaders made statements welcoming the CLRB as ‘finally’ giving traditional leaders their due (Hofstatter 2003). Inkosi Patekile Holomisa, the president of the Congress of Traditional Leaders of South Africa wrote:

The bill confirms the long-standing historical fact that African land belongs to African communities jointly with their African traditional leaders. The three entities – land, people, traditional leaders – are inextricably bound together...Undoubtedly this is a well balanced piece of legislation (Holomisa 2004).

Inkosi Mpiyezintombi Mzimela, the chair of the National House of Traditional Leaders, also welcomed the Communal Land Rights Bill. Of the controversy pertaining to women’s land rights he wrote:

A male member of a community is expected to care not only for his own wife or wives and their children, but also for the families of deceased male members of his family, and they honour that obligation. There are no such obligations in western culture and traditions. Understandably, then, the male will have the dominant property right to go with his greater responsibility (Mzimela 2003).

The CLRA and traditional councils

There is some confusion about the meaning of the CLRA provisions concerning the role of traditional councils in land administration.³² The sections that have generated most confusion are Sections 21(2) and 22(2). These were not materially changed when the Bill was enacted. They provide:

21(2) If a community has a recognised traditional council, the powers and duties of the land administration committee of such community may be exercised and performed by such council.

and

22(2) Subject to 21(2), the members of the land administration committee must be persons not holding any traditional leadership position and must be elected by the community in the prescribed manner.

Many people found these sections confusing. One of the questions hotly debated was the meaning of ‘may’ in Section 21(2). Did it introduce a choice for communities to decide whether they wanted a traditional council to administer their land rights? Or was its function to enable a statutory body created under another piece of legislation (the TLGFA) to be imposed as the body that would administer land rights, irrespective of the wishes of the community? Most legal opinions said that the ‘may’ means ‘must’ because it does not introduce another option with regard to the composition of land administration committees, nor does it set out a procedure to enable the community to choose between different options.³³

In the context of this debate the words ‘subject to...’ in Section 22(2) are particularly important and perplexing. Moreover, Section 22(2) introduces something diametrically opposed to 21(2) – it cuts traditional leaders out of a role in land administration completely. Many people asked ‘subject to what?’ Even if Clause 22(2) means ‘subject to the community’s choice’, which most lawyers agreed it could not, why should it explicitly prohibit traditional leaders from playing a role in land administration? Why not leave it up to a community to find the balance and combination that suits them?

The last-minute changes to the CLRB generated a furious controversy, including within the African National Congress. The Chairperson of the portfolio committee responsible for the TLGFB, Yunus Carrim, walked into the Land Affairs portfolio committee public hearings on the Bill and demanded a right to speak. He insisted that his committee had not known about the last-minute changes to the CLRA when they approved the TLGFB. He offered to resign from Parliament if anyone could ever show that he had known that the CLRB would provide for traditional councils to get land administration powers. The hearing was packed with rural delegates who had come to Parliament to oppose the Bill. People were sitting on the floor and in every available space. They watched, bemused, as Carrim, a senior ANC MP, challenged Andile Mngxitama of the



National Land Committee to prove that he, Carrim, had known about the new sections in the CLRB when his committee approved the TLGFB.³⁴

It was only in late January 2004, long after the public hearings were over, that light was shed on the meaning of section 22(2). On 26 January Dr Siphos Sibanda, the Director of Tenure Reform at the Department of Land Affairs, gave a presentation to the portfolio committee about the implementation plans for the CLRB. He indicated that the CLRB, once approved, would be brought into operation on a date to be determined by the President. He said that this would not be before 2005. When asked about the reason for the delay (after all the Bill was being rushed through the parliamentary process with unseemly haste) he said that conflicting laws must first be repealed, and that these laws would be repealed by provincial laws enacted in terms of the Traditional Leadership and Governance Framework Act. He pointed out that the TLGFA was only framework legislation, and that each province must still enact its own legislation consistent with the Framework Act.

The Inkatha Freedom Party member, Mr Ngema, asked why it was necessary for the implementation of the CLRA to be delayed by the provincial TLGFA process. He suggested that existing tribal authorities could get on with the land administration job 'in the meantime'. Dr Sibanda replied that the CLRA does not give powers to existing tribal authorities. The statutory body that it empowers is the 'recognised traditional council'.

Traditional councils come into being through two sections of the TLGFA. One of these is Section 3, which enables the Premier of a province to recognise traditional councils 'in line with principles set out in provincial legislation.' The other, Section 28(4), falls under the heading of 'Transitional Arrangements'. It provides that existing tribal authorities are deemed to be traditional councils, provided they comply with the composition requirements of the TLGFA within a year of the commencement of the Act.

Suddenly the words 'subject to' in section 22(2) made sense. A community will have a recognised traditional council if it meets the composition requirements of the TLGFA. 'Subject to' this requirement, traditional leaders will be cut out of a role in land administration entirely. Section 21(2) is the carrot for traditional leaders to co-operate with the new quotas and Section 22(2) is the stick.³⁵

The tempting sweetness of the carrot was made plain during the same presentation by Dr Sibanda. When asked how many rural communities the Act applied to, he gave – to the astonishment of many – a precise answer – 892. He went on to explain that this was the number of existing tribal authorities in South Africa, and gave

a breakdown of the number of tribal authorities per province. He said that the numbers might increase slightly in future because of the existence of 'landless tribes' who are petitioning the Department of Land Affairs to provide them with land. He said that it was possible that these tribes may, in future, be recognised as 'traditional communities' with 'traditional councils' in which case they, too, would qualify for land transfers.

Dr Sibanda's input made it clear that the Department of Land Affairs considers the boundary of 'community' to coincide with the boundaries of existing tribal authorities.³⁶ Tribal authorities exist virtually wall-to-wall in the former homelands. Thus, practically every rural 'community' living on 'ex-homeland' land will 'have' a traditional council, as long as the existing tribal authority meets the composition requirements within a year. Communities and groups of people who oppose, or define their identity as separate from that of existing tribal authorities nevertheless fall within the jurisdictional boundaries of one or other tribal authority. In terms of the CLRA, they face the prospect of their land rights being subsumed within the title transferred to tribal authority units and of traditional councils having the legal authority to represent them as the 'owner' of their land. Section 5(2) provides that 'despite any other law' the Minister may determine that the title of land currently belonging to trusts or communal property associations (CPAs) may be endorsed to reflect the 'community' as the owner of such land. Committees and trusts established through restitution settlements may thus find their land subsumed within a larger community title, and traditional councils imposed as their representatives. This is deeply controversial for many people, particularly in situations – like the Makuleke – where the tribal authority co-operated with the initial removal and opposed the restitution claim.

5.3 Composition of traditional councils – women's quota

What are the 'reforms' introduced by the TLGFA? They pertain mainly to the composition of traditional councils. The Act provides that 40% of the members of a traditional council must be elected. Furthermore, 30% of the members of a traditional council must be women. However, as noted previously, the women need not be elected, they may be 'selected by the senior traditional leader'.³⁷ Section 3(2)(d) provides:

Where it has been proved that an insufficient number of women are available to participate in a traditional council, the Premier concerned may, in accordance with a procedure provided for in provincial legislation, determine a lower threshold for the particular traditional council than that required by paragraph (b).



This provision was added because of vehement protests by traditional leaders during the portfolio committee hearings that most women are not suited or prepared to be members of traditional councils.

Women who made submissions about the CLRB expressed concern about the 30% quota provision (which is also in the CLRA). They said that because the women's quota does not need to be elected, there is a likelihood that traditional leaders will select acquiescent female relatives to sit on traditional councils. They also said that 30% representation is too low, especially in the context of existing dynamics which undermine and silence women. Moreover, since most people living in communal areas are women, their representation should be at least 50%. The contention that there are more women than men in communal areas is borne out by the 2001 census, which shows that 58.9% of people over 18 years of age living in 'tribal areas' are women.³⁸

The bigger issue is whether the quotas introduced by the new Acts mitigate other problems introduced by the Acts. How does the benefit of the 'reforms' compare with the quid pro quo of imposing traditional councils as land administration committees?

5.4 Accountability within indigenous systems

An issue repeatedly raised during the public hearings was that of democracy, and the concern that the two new laws pre-empted rural people's right to choose their own representatives on the same basis as people living in other parts of South Africa, particularly urban areas. A related issue is the likely impact of the Acts on accountability within indigenous systems, and in particular on the accountability of traditional leadership to rural communities.

The nature of accountability within traditional systems and the impact of past laws on pre-colonial accountability mechanisms and systems of land rights is a complex subject that is beyond the scope of this paper. Some key issues are, however, raised here – because of the relevance of power relations to women's land rights and critical questions about the accountability of traditional councils to rural people, including rural women.

The history of South Africa shows that the boundaries of authority of traditional leaders shifted all the time, depending on the outcome of wars and depending on any particular leader's capacity to preserve or extend his authority in the face of challenges from others. Sometimes the challenges came from rival groups, sometimes from 'royal' brothers disputing the chieftaincy and sometimes from lesser 'chiefs' challenging the hierarchy of seniority, influence and control. Power was mediated by the existence of competing loci of power, which existed in a state of constant tension (Schapera 1956:207; Bennett 1995:67).

Only leaders who enjoyed support could mobilise people to go to war on their behalf, or support them in the face of challenges by others. The proverb *inkosi yinkosi ngabantu*³⁹ (a chief is a chief through the people) expresses the role of popular support in maintaining 'royal' authority.

However, a sequence of interventions by white governments undermined the nexus of accountability between support and royal authority. In pursuance of the colonial policy of 'indirect rule' popular leaders were deposed and others put in their place. The Black Administration Act of 1927 made the governor general the supreme chief of all 'natives', with the power to impose and depose chiefs. The colonial government also introduced a system of salaries for chiefs, reversing leaders' dependence on contributions and tribute from below and redirecting the flow of power and resources downwards from government as opposed to upwards from ordinary people.

The Bantu Authorities Act of 1951 made chiefs agents of government. According to Govan Mbeki (1964):

Many Chiefs and headmen found that once they had committed themselves to supporting Bantu Authorities, an immense chasm developed between them and the people. Gone was the old give-and-take of tribal consultation, and in its place there was now the autocratic power bestowed on the more ambitious Chiefs, who became arrogant in the knowledge that government might was behind them.

The Act provided for the government to determine the area of jurisdiction of tribal authorities, with fixed boundaries published in the Government Gazette. This gave chiefs powers over people living within their 'jurisdictional' boundaries irrespective of whether those people supported them or not. It thereby severely undermined one of the key mechanisms of accountability: the opportunity for people to ally themselves with a challenger, who with their support would previously have been able to 'expand' his sphere of authority to include them.

Chief Albert Luthuli had this to say about the Bantu Authorities Act:

The modes of government proposed are a caricature. They are neither democratic nor African. The Act makes our chiefs, quite straightforwardly and simply, into minor puppets and agents of the Big Dictator. They are answerable to him only, never to their people. The whites have made a mockery of the kind of rule we



knew. Their attempts to substitute dictatorship for what they have efficiently destroyed does not deceive us (Luthuli 1963:200).

The homeland system further undermined the nexus of accountability between traditional leaders and rural people. In many cases traditional leaders took up positions in homeland parliaments and were simply not available to fulfil local leadership and dispute resolution functions. During the 1980s the situation of alienation between traditional leaders and the rural population was so severe in some areas that the army was called in to guard 'royal' kraals against attacks by angry residents.

Obviously the response of rural people and traditional leaders to the interventions of white governments and the homeland systems varied dramatically. Some traditional leaders resisted the imposition of 'top-down' controls and in various areas people mobilised to support their traditional leaders (Beinart 1982).⁴⁰

Changes to the way in which systems of authority and land rights were conceptualised and intersected with one another are central to an understanding of the likely impact of the CLRA on land rights, and women's land rights in particular. Martin Chanock (1991) has written about the co-incident of interests between colonial administrators and chiefs in exaggerating the role of traditional leaders in land allocation processes. On the one hand, it suited colonial governments to downplay the strength of existing individual or family-held land rights because then colonial land grabs could be explained away on the basis that they did not undermine existing 'property rights'. On the other hand, a central role for chiefs reinforced the system of indirect rule:

There is a profound connection between the use of the chieftaincy as an institution of colonial government and the development of the customary law of land tenure...The authority of the chiefs was maintained by their role as allocators of land, and so was the dependence of their subjects (Chanock 1991: 64).

Chanock (1991) and Colson (1971) document the way in which the flow of authority upwards from the holders of land rights was reversed and re-conceptualised as power flowing downwards from the state, via traditional leaders who were held to be the custodians of 'communal' land. In the process the strength of user rights to land, particularly women's land rights, was downplayed and undermined, as were local decentralised and participatory processes of land allocation and dispute resolution.

Nhlapo (1995) writes that although African law and custom had always had a patriarchal bias,

The colonial period saw (this) exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young (Nhlapo 1995:162).

He warns of the consequences of favouring group interests over those of individuals, writing that 'In patriarchal societies group interests are framed in favour of men' (Nhlapo 1995:160).

Just as colonial distortions undermined the nature and existence of women's land rights within the family, so they undermined the strength of individual and family rights relative to 'tribal ownership'. They undermined the status of decentralised decision-making processes at lower levels of 'nested' systems, relative to the powers of centralised tribal authorities.

5.5 Entrenching the distortion of the customary

The TLGFA now deems apartheid-created tribal authorities to be traditional councils and the CLRA gives traditional councils the right to 'represent the community as the owner of communal land' (Section 24). Not only do traditional councils retain jurisdiction over imposed and fixed boundaries of land, thereby undermining a primary mechanism of accountability, they exercise land ownership powers as well. Claassens (2001) discusses how the exercise of landownership functions by a traditional leader – following the transfer of title to a 'tribe' – impacted on land-related disputes. Section 3 of the Act confers 'juristic personality' on 'communities', thereby enabling them to own land. The Inkatha Freedom Party has long proposed that title to 'communal' land should be transferred to tribal authorities. This Act has that effect. While title will vest in the 'community' as opposed to the traditional council per se, traditional councils are imposed as the bodies that represent communities.

Not only are the rights of individuals and sub-groupings trumped by this over-arching 'ownership', but traditional leaders get land ownership powers which will fundamentally transform the nexus of their relationship with the occupants of the land. There is nothing in either Act that makes traditional councils accountable downwards to the people that they 'represent'. Christina Murray (2004) writes of the TLGFB:

(T)he silence of the Traditional Leadership Bill on community participation in decision-making is doubly curious. First, traditional leaders boast that it is intrinsic to traditional democracy that the voices of all members of the community are heard. Secondly the National Constitution requires public participation at in legislative processes at national, provincial and



local level. It would seem an even more obvious requirement at community level.

The CLRA does not require traditional councils or land administration committees to get authority from the people whose land rights are at issue when entering into deals with external investors or selling communal land. To the extent that there is oversight of their powers, this comes from provincial land rights boards in the case of the CLRA and from the Premier or other traditional leaders via the Provincial Houses of Traditional leaders in the case of the TLGFA.

Interestingly, a recent Bill to repeal the Black Administration Act of 1927⁴¹ seems to acknowledge the problem of traditional leaders acting unilaterally and seeks to amend the TLGFA to retain a modernised version of Section 3(1) of the Black Administration Act. It provides for the TLGFA to be amended so that:

An obligation incurred by a traditional leader of a traditional community does not bind that traditional community or land owned or rights in land held by that traditional community unless that obligation has been authorised or adopted by the traditional community in terms of subsection 2.

Subsection 2 provides that the decision:

must be the informed and democratic decision of the majority of the male and female members of that traditional community who are 18 years or older and who are present or represented by a proxy at a general community meeting convened by the traditional council of that traditional community for the purpose of considering such obligation and of which adequate notice has been given.

The amendment cross-refers to Section 24(2) of the Communal Land Rights Act which provides that land rights boards must authorise disposals of communal land.

It is ironic that the only provision in either the TLGFA or the CLRA which binds traditional councils to act only with majority community consent should be belatedly 'imported' from a law that formed a cornerstone of colonialism and apartheid.

While the proposed amendment saves a protection that would have been repealed with the Black Administration Act, it remains flawed by the problem of community boundaries. In terms of Section 28(3) of the TLGFA existing 'tribes' are deemed to be 'traditional communities'. Sub-groups of people with rights in particular areas,

and groups who contest current tribal boundaries will often be a minority who can be outvoted by the majority of the 'tribe'. Moreover, the interests of the 'minority' group may be diametrically opposed to those of the larger group. For example the problem of 'tribes' contesting the restitution of land to groups moved from specific areas, claiming the land 'as a whole' belongs to the tribe 'as a whole'.

In any event, the old Black Administration Act provision (which remains in force until the Act is repealed), has not been effective in dealing with the problem of some traditional leaders selling land allocations.⁴² The CLRA provides that part-time provincial land rights boards must authorise 'disposals' of communal land.⁴³ Do land allocation fees qualify as disposals? The potential ambiguity in the wording of the CLRA plus the distance of provincial Land Rights Boards means the problem is likely to remain and get worse.⁴⁴ Distant land rights board members have neither the same incentive nor capacity to monitor disposals as the rural people whose land right are at stake.

Section 41 of the CLRA provides that it is an offence to grant new order rights in land without the approval of the community or its land administration committee, or, in the case of state land, the consent of the Minister.⁴⁵ Once title has been transferred to the 'community' the consent of the land administration committee will be sufficient to obviate this offence. Yet in many areas it is precisely people allied to tribal authority structures that are accused of 'selling' or condoning the selling of land allocations.

6. Conclusion

6.1 Can the registration of new order individual rights happen at scale?

While the CLRA provides no downward accountability for land administration committees, it does protect individual land rights by providing for the registration of individual new order rights simultaneously with the transfer of title to communities. The Act provides that the Minister (as opposed to a traditional council) will determine both the content and holders of new order rights.⁴⁶

A major question is the scale on which the transfer and registration provisions of the Act are likely to be implemented. The Department of Land Affairs has a poor delivery record in relation to the targets it has set itself. In ten years it has redistributed less than 3% of the land, against its target of 30% by 2015. The restitution process has also been much slower than anticipated (Hall et al. 2003). Neither of these programmes is as ambitious as that



envisaged by the CLRA – the transfer of title to 892 ‘communities’ and the registration of new order rights for an estimated 18 million people.⁴⁷

During January 2003 the DLA told the Land Affairs Portfolio Committee that the estimated implementation costs for the Bill were R500 million per annum. This was a sevenfold increase from the estimate of R68 million which had accompanied the October draft of the Bill. A Democratic Alliance member of the portfolio committee suggested that an error of this magnitude indicated that the logistics of implementation had not been taken into account during the drafting process.⁴⁹

Treasury has allocated the Department only R11 million for 2005/06, R25 million for 2006/07 and R27 million for 2007/08 for the implementation of the Act (National Treasury 2005:722). The budget refers to the Department’s plans to ‘pilot’ the Act in seven areas during 2005/06. The selected pilot areas are all in KwaZulu-Natal. The budget states that ‘as soon as the required land administration boards and land administration committees have been set up in communal land areas, the transfers will begin’ (National Treasury 2005:724).

Titling processes are notoriously slow and expensive, even when sufficient money and political will are available. In South Africa the process is likely to be particularly complex because of centuries of forced overcrowding within the bantustans, and the ‘resettlement’ of successive waves of people after forced removal or eviction from ‘white’ South Africa. The transfer process is likely to become bogged down in intractable boundary disputes between different groups. Because of its highly centralised nature, the registration process is also likely to be very slow. The lack of clear definitions in the Act, and the reality of overlapping vested interests in land, are both likely to generate disputes and internal contestation.

Ben Cousins (2004) has expressed reservations about whether the transfer and registration provisions of the CLRA will ever – or could ever – be implemented at scale. There is a real danger that the main impact of the Act will be to legitimise and buttress an expanded role for traditional leaders in land administration, without the potential balancing factor of registered individual rights.

6.2 Law and power

Laws are powerful at a symbolic level, regardless of whether they are implemented. It is likely that a lasting legacy of these two Acts will be to bolster the power of traditional leaders relative to that of the holders and users of family or individual land rights. People act within the constraints of local power relations, which are in turn significantly affected by the stance of government. A key concern

raised during the portfolio committee hearings was that the new laws would harden the terrain within which rural people struggle for change, and that whereas traditional leaders had been relatively receptive to pressure while their status was unclear, now they would revert to the arrogance and abuses of the apartheid era when they had been sure of government support. With these two Acts the government is seen to have shifted sides – away from democracy and equality as non-negotiable values, and towards an alliance with traditional leaders. To the extent that this shift has been informed by a ‘reform agenda’, it is an agenda of quotas and composition requirements, not of holding leaders accountable to rural people.

6.3 Culture and rights

One of the discourses in the debate about the Communal Land Rights Act has been about the value of upholding the ‘customary’ and the African against ‘imported’ human rights values such as ‘equality’.

In fact, the Act is likely further to undermine indigenous systems of accountability and decentralised systems of land rights in favour of entrenching top-down systems of power and centralised ownership; deriving from colonial and apartheid interventions that denied and distorted African systems of property rights. It provides the worst of both worlds, in that it entrenches the distortion of the customary, while at the same time undermining the principles of equality and democracy – which rural women assert in their struggles against patriarchal power relations in the countryside. To counterpoise culture and rights ignores the reality that rural people assert rights that derive from a range of values and experiences. These include both the struggle for democracy and equality under apartheid, and land rights that derive from custom and membership of a community. Many rural people in South Africa consider access to land to be an inherent human right or ‘birth-right’, an intrinsic component of which is participation in decisions about the land.

Just as characterising human rights as ‘foreign’ seeks to undermine their validity, so characterising the customary components of land rights as ‘merely cultural’ undermines their strength, and cuts the ground from under the feet of people who assert them in challenging processes of dispossession, whether by the state or by leaders cloaked in ‘African tradition’. A false dichotomy between rights and culture reinforces the interests of those elites who characterise human rights as ‘un-African’. Such a dichotomy also ignores the strength and value of customary African values in relation to land, which are redistributive, inclusive and prioritise basic needs within a system of relative rights.



The Act brings to mind Nhlapo's words in 1995:

Protection from distortions masquerading as African custom is imperative, especially for those they disadvantage so gravely, namely, women and children (Nhlapo 1995:162).

6.4 The alternative?

What alternatives were available to government? It is unlikely that customary law on its own could ever have 'developed' to fix the deep distortions that have already taken place, and the problems women face. In any event, society has changed from the conditions that gave rise to pre-colonial customary systems. There is no longer abundant land available close to where people live, the economy has changed dramatically, and the structure and composition of the family is undergoing profound change. The clock cannot be turned back.

If government had chosen to put its emphasis on strengthening the land rights of users and occupiers relative to those of 'communities', it would have strengthened women's land rights and created conditions more conducive to power flowing upwards from the holders of land rights to the layered structures that mediate and manage land rights. This is not an argument in favour of the individualisation of land rights or exclusive ownership. Rather, it seeks to balance group and individual rights within a framework that recognises and accepts the existence of 'nested' systems of land rights with special protections for the rights of women – both because women are the primary users of rural land, and in order to address the consequences of past discrimination against them. This would also be more consistent with pre-colonial systems of land rights, which recognised the strong rights of women to arable land and to 'house' property within the extended family.

In the current context of distorted customary law it is critical for women that there be a clear and explicit recognition of existing use rights as the key determinant of land rights. To be effective, this would have to be supported by procedures and institutions that are designed to address the reality of existing inequality, including inequality in power relations.

The ambiguous wording of the CLRA in certain key respects is likely to benefit the holders of formalised rights arising from past discrimination, over the holders of undefined and tenuous use rights. However, notwithstanding the problems in the Act, women are likely to use whatever is available in their efforts to secure land rights. They will combine whatever is useful from the 'customary' with whatever can help them from the Act. Those married women who find out about the Act will be able to use the joint vesting provision

to protect themselves from eviction by estranged husbands. Because old order rights are deemed to be jointly held, registration is not a prerequisite for this protection.

However, the other problems introduced by the Act will outweigh these potential benefits for married women. A fundamental problem is the Act's impact on single women. This is twofold. On the one hand, single women living in extended families are likely to find the land they use being registered as the property of other people. On the other hand, the wording of the joint vesting provision may impact negatively on current hard-won processes of change that are seeing single mothers being allocated land in their own right.

A central problem is that imposing traditional councils as land administration committees will reinforce patriarchal power relations to the detriment of women's land rights. The tribal authorities that are deemed to be traditional councils are the custodians and witnesses of the discriminatory status quo. The decisions and processes they would have to challenge to assert women's land rights are decisions and processes with which they are closely identified. They stand accused of disrespecting women, an accusation not inconsistent with the efforts of traditional leaders to lower the women's quota to less than 30% during the parliamentary process.

Rural women suffer particular discrimination and disadvantage within rural society in relation to land rights. They are also part of rural society; and measures that undermine accountability in general will impact negatively on women too. There is a real danger that the CLRA, by trumping existing land rights with 'communal ownership', and imposing traditional councils as the representatives of rural communities, will undermine existing systems of land rights, and make traditional leaders both less accountable and less responsive to pressure for change.

Endnotes

1. From a Congress of Traditional Leaders of South Africa (Contralesa) resolution that was forwarded to the Constitutional Assembly.
2. Section 3 of the Act enables communities to acquire 'juristic personality', thereby becoming capable of owning and disposing of immovable property.
3. Section 28(4).
4. Section 24 (1). See Section 4 of this paper for an analysis of the points summarised here.
5. Sections 18(3)(d) and 18(4).
6. Section 18(2).



7. For example representatives from over 70 rural communities, rural NGOs, the Human Rights Commission, the Commission on Gender Equality, the Congress of South African Trade Unions, the National Union of Mineworkers, the Legal Resources Centre, the South African Council of Churches, the Women's Legal Centre, the Programme for Land and Agrarian Studies and the National Land Committee.
8. B67 2003 (*South African Government Gazette*, 25562, 17 October 2003.)
9. They were assisted by the community consultation project on the CLRA that was jointly run by the National Land Committee and the Programme for Land and Agrarian Studies.
10. A Bill which affects the provinces in terms of Section 76 of the Constitution.
11. A Bill which does not affect the provinces in terms of Section 75 of the Constitution.
12. Section 47.
13. An 'old order right' was (and remains) defined as a tenure or other right in or to communal land which—
 - (a) is formal or informal;
 - (b) is registered or unregistered;
 - (c) derives from or is recognised by law, including customary law, practice or usage; and
 - (d) exists immediately prior to a determination by the Minister in terms of section 18, but does not include—
 - (i) any right or interest of a tenant, labour tenant, sharecropper, or employee if such right or interest is purely of a contractual nature; and
 - (ii) any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier.
14. Made under the Black Administration Act of 38 of 1927 and the Development Trust and Land Act 18 of 1936.
15. These regulations are still on the statute book, as are other key apartheid laws such as the Black Administration Act and the Black Authorities Act. They are likely to be repealed by provincial laws relating to traditional leadership.
16. In this context it should be noted that the R188 regulations governing Permission to Occupy certificates (PTOs) had a direct impact on customary law. They provided that PTOs for residential and arable purposes could be granted only by native commissioners, after consultation with the tribal authority or chief or headman. While headmen or tribal councils were

directly involved in the land allocation process, the allocation was not valid until the commissioner issued a PTO certificate. Commissioners often vetoed headmen's allocations to women thereby changing the practice of women being allocated land in their own right. See Wilson and Simons's accounts in the main text.

17. *Bhe v Magistrate, Khayelitsha and others* (Commission for Gender Equality as amicus curiae); *Shibi v Sithole and others*; *SA Human Rights Commission v President of the Republic of South Africa and another* 2005 (1) SA 580, 2005 (1) BCLR 1 (CC) Paragraph 89.
18. Schapera (1943) writes of the Tswana: 'The fields used by a family are generally called by different names. There is always a *tshimo ya mosadi*, "the wife's fields". It is cultivated primarily for subsistence and its crops are controlled by the wife. There may also be a *tshimo ya monna*, "the husband's field". Its crops are grown for sale rather than subsistence...'
19. See also Lastarria-Cornhiel, S. 1997. Impact of privatization on gender and property rights. *Africa World Development*, 25.
20. The Minister also determines the nature and extent of new rights (Section 18(3)(d)(ii)).
21. Analysis of 2003 General Household Survey data by Debbie Budlender, January 2005.
22. The Concise Oxford Dictionary (1944) defines 'usage' as n. manner of using or treating, treatment, *as met with harsh u., damaged by rough u.*; habitual or customary practice esp. as creating a right or obligation or standard, *as sanctified by [usage], an ancient [usage], contrary to the [usage] of the best writers*; (Law) habitual but not necessarily immemorial practice.
23. This was borne out by subsequent field investigations by the author into land allocation processes in other areas, for example in Makuleke during September 2004 and at Mundzedzi during October 2004 and at Kalkfontein during November 2004.
24. 4 November 2004. Attended by Aninka Claassens and Moses Modise from Legal Resources Centre.
25. Kalkfontein is communally owned by the descendants of the original purchasers. They do not recognise the nearby Tribal Authority as having jurisdiction over their land, and have long administered the land through an elected community structure.
26. See also Berry (1989).
27. See for example Thembela Kepe's (2004) account of contested boundaries in Mkambati. People living in Khanyayo village who were forcibly removed lodged a restitution claim to the land they had lost. However the Thaweni Tribal Authority strongly opposed the claim 'arguing that no single village falling under its jurisdiction could lodge a claim for land that would belong to that community alone'.



28. *Bhe v Magistrate, Khayelitsha and others*, 45 and 163.
29. *Bhe v Magistrate, Khayelitsha and others*, 163.
30. Section 32, Notice 2520 of 2003 (*South African Government Gazette*, 25492, 3 October 2003.)
31. Section 1, B67-2003 (*South African Government Gazette*, 25562, 17 October 2003.).
32. For example the traditional leaders' submission states: 'Section 21 is unclear in various respects and we are of the view that it should be written in sufficiently clear language so that everyone who reads it can understand it' (Mzimela 2003).
33. This interpretation is supported by the views expressed by the Head of Legal Services of the Department of Land Affairs, Mr Colin Brocker. In response to a question about what would determine whether a traditional council would serve as a land administration committee he responded that wherever traditional councils exist, they will fulfil this function. See Parliamentary Monitoring Group Minutes for the Agriculture and Land Affairs Portfolio Committee 27 November 2004 available at <http://www.pmg.org.za>.
34. During the parliamentary Portfolio Committee on Land and Agriculture hearing on the CLRB on 13 November 2003 (witnessed by the author).
35. The extraordinary effectiveness of this approach is confirmed by recent developments in KwaZulu-Natal. Despite strong opposition to the TLGFA election process for the 40% quota by IFP leader Mangosuthu Buthelezi and a court application by him to stop the elections (brought in his capacity as Chairman of the Provincial House of Traditional Leaders), the *Sunday Times* (18 September 2005) reported that 160 of the province's 286 *amakhosi* had endorsed the process and were participating in the elections.
36. Deputy Minister of Land Affairs Dirk du Toit estimated that the CLRB applies to 18 to 20 million people. This gives an average community size of around 20 000 people if there are 892 'communities'.
37. Section 3.
38. Analysis of the raw data of the 10% sample of the 2001 census by Debbie Budlender.
39. This proverb exists in all the major South African languages. For example *Morena ke-morena kabatho* in Sesotho.
40. Luthuli (1962: 200) describes how he resigned from the chieftainship at Groutville because of controls exercised over him in terms of the Bantu Authorities Act.
41. Repeal of the Black Administration Act and Amendment of Certain Laws Bill of 2005. The Bill provides for insertion of Section 7A into Act 41 of 2003.

42. Most of the community submissions about the Bill described the problem of chiefs and headmen selling land allocations to 'outsiders', and warned that the CLRB would re-enforce this practice. The growing tendency for some traditional leaders to treat communal land as their 'private property' and to 'sell' residential allocations has been remarked on by various authors. For example Cross and Friedman (1997:50) 'Some chiefs now seem to see land as their private property. This trend further marginalises women'. The sale of land allocations to 'outsiders' by headmen was also reported to the author during recent field research in Mudzhedzi, Makgobistad, Ntlhaveni, Rakgwadi and Malelane.
43. A DLA presentation to the portfolio committee indicated there will be one board per province with a staff of about five people. Board members will be part time and paid on an *ad hoc* basis for attending meetings.
44. The submission of the Coalition of Traditional Leaders to the Land Affairs Portfolio Committee states: 'There appears to be no reason why a Land Administration Committee or a Traditional Council acting in this capacity should have to apply for consent to a Land Rights Board for the right to dispose of communal land, especially if the purchaser is a community member.' The big question is whether the oversight is limited to disposals and 'purchases' that deliver title, or whether it includes the 'ordinary' allocation of residential and arable sites 'for a fee'.
45. Sections 41(2) provides: 'Any person who grants or purports to grant to any other person, other than a member of the community, a new order right in communal land—
 - (a) in contravention of, or without complying with, a community rule;
 - (b) without the prior consent of the community or its land administration committee or, in the case of State land, the consent of the Minister:
is guilty of an offence.'It is not clear whether an 'and' or an 'or' is implied between (a) and (b). However even if the section is interpreted to mean that allocations must also be consistent with community rules, the problems already cited with the community rule making process apply.
46. The submission of the Coalition of Traditional Leaders objected to this section. It said that it was inappropriate for the Minister to have the power to determine and change rights and that '...Traditional leaders, as the custodians of land rights, should play a major role in the identification and documentation of existing rights'.
47. Deputy Minister for Agriculture and Land Affairs Dirk du Toit estimated that 18 to 20 million people would be affected by the



Bill. On the basis of his estimates the average size of the 892 'communities referred to by Dr Sibanda would be around 20 000 people each.

- ^{48.} Andries Botha of the DA, quoted in *ThisDay*, 27 January 2004.

References

- Alcock, R & Hornby, D. 2004. *Traditional land matters: A look into land administration in tribal areas in KwaZulu-Natal*. Pietermaritzburg: Legal Entity Assessment Project (LEAP).
- Beinart, W. 1982. *The political economy of Pondoland 1860-1930*. Johannesburg: Ravan.
- Bennett, TW. 1995. *Human rights and African customary law*. Cape Town: Juta.
- Berry, S. 1989. Social institutions and access to resources. *Africa*, 59(1).
- Bruce, J, Migot-Adholla, S & Atherton, J. 1994. The findings and their policy implications: Institutional adaptation or replacement? In *Searching for land tenure security in Africa*, edited by J Bruce and S Migot-Adholla. Dubuque, IA: Kendall/ Hunt.
- CGE (Commission on Gender Equality). 2003. *Submission to the Portfolio Committee on Agriculture and Land Affairs. Communal Land Rights Bill (B67-2003), 10 November 2003*.
- Chanock, M. 1991. Paradigms, policies and property: A review of the customary law of land tenure, in *Law in colonial Africa*, edited by K Mann and R Roberts. London: James Currey.
- Claassens, A. 2001. *'It is not easy to challenge a chief': Lessons from Rakgwadi*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Research report; no. 9.)
- Claassens, A. 2003. *Community views on the Communal Land Rights Bill*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Research report; no. 15.)
- Colson E. 1971. The impact of the colonial period on the definition of land rights, in *The impact of colonialism*, edited by V Turner. Cambridge: Cambridge University Press:193–215.
- Cross, C & Friedman, M. 1997. Women and tenure: Marginality and left hand power, in *Women, land and authority: Perspectives from South Africa*, edited by S Meer. Cape Town: David Philip.
- Cousins, B. 2004. No way to communal land rights: boundary disputes will stall the CLR Act. *New Agenda*, 16, fourth quarter: 18–24.
- Cousins, T & Hornby, D. 2002. *Leaping the fissures: Bridging the gap between paper and real practice in setting up common property*

- institutions in land reform in South Africa*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Land reform and agrarian change in southern Africa occasional paper; no. 19.)
- Govender, P. 2004. Parliament gives rural women a raw deal. *Sunday Times*. 15 February.
- Hall, R, Jacobs, P & Lahiff, E. 2003. *Final report*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Evaluating land and agrarian reform in South Africa series; no. 10.)
- Hofstatter, S. 2003. Traditional leaders support land bill. *ThisDay*. 14 November.
- Holomisa, P. 2004. Chiefs bill gives pride of place to traditional leaders and customs. *Business Day*. 11 February.
- Kepe, T. 2004. *Land restitution and biodiversity conservation in South Africa: Analysis of challenges and the case of Mkambati, Eastern Cape Province*. Paper presented at Queen's University, Kingston, Canada, 2–5 May 2004.
- Luthuli, A. 1962. *Let my people go*. Johannesburg/London: Collins.
- Maloka, T & Gordon, D. 1996. Chieftainship, civil society, and the political transition in South Africa. *Critical Sociology*, 22(3):47.
- Manji, A. 2003. *Co-ownership or consent clause in the Uganda Land Act: An Irish solution to an African problem? Protecting women's interests in family land in Uganda*. Paper presented at the United Nations Food and Agriculture Organization/ Oxfam GB workshop on women's land rights in southern and eastern Africa, Pretoria 17–19 June.
- Mann, M. 2000. *Women's access to land in the former bantustans: Constitutional conflict, customary law, democratisation and the role of the state*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Land reform and agrarian change in southern Africa occasional paper; no. 15.)
- Mbeki, G. 1964. *South Africa: The peasants' revolt*. London: Penguin.
- Murray, C. 2004. *South Africa's troubled royalty: Traditional leaders after democracy*. Canberra: Centre for International and Public Law, Australian National University. (Law and policy paper; no. 23).
- Mzimela, M. 2003. Rights bill returns land taken by force. *Business Day*. 2 December.
- National Treasury. 2005. *Estimates of national expenditure*. Pretoria: National Treasury.
- Nhlapo, T. 1995. African customary law in the interim Constitution, in *The Constitution of South Africa from a Gender Perspective*,



- edited by S Liebenberg. Cape Town: Community Law Centre, University of the Western Cape in association with David Philip.
- Ntsebeza, L. 2003. Democracy in South Africa's countryside: Is there a role for traditional authorities. *Development Update*, 4 (1).
- Okoth-Ogendo, H. 2002. *The tragic African commons: A century of expropriation, suppression and subversion*. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. (Land reform and agrarian change in southern Africa occasional paper; no. 24.)
- Okoth-Ogendo, HWO. 1989. Some issues of theory in the study of tenure relations in African Agriculture. *Africa*, 59 (11).
- Platteau, J-P. 1995. *Reforming land rights in sub-Saharan Africa: Issues of efficiency and equity*. Geneva: United Nations Research Institute for Social Development (UNRISD). (UNRISD discussion paper; no. 60.)
- Preston-Whyte E. 1974. Kinship and marriage, in *The Bantu-speaking peoples of southern Africa*, edited by WD Hammond-Tooke. London: Routledge Kegan Paul.
- Reader, DH. 1966. *Zulu tribe in transition. The Makhanya of southern Natal*. Manchester: Manchester University Press.
- Schapera, I. 1943. *Native land tenure in the Bechuanaland Protectorate*. Alice: Lovedale Press.
- Schapera, I. 1956. *Government and politics in tribal societies*. London: Watts.
- Schapera, I. 1970. *A handbook of Tswana law and custom*. Munster-Hamburg: LIT Verlag and International African Institute.
- Simons, J. 1968. *African women: Their legal status in South Africa*. London: Hurst.
- Small, J. 1997. Women's land rights: A case study from the Northern Transvaal, in *Women, land and authority: Perspectives from South Africa*, edited by S Meer. Cape Town: David Philip.
- Soga, JH. 1931. *The Ama-Xosa: Life and customs*. Alice: Lovedale Press.
- Thorp, L. 1997. Access to land: a rural perspective on tradition and resources, in *Women, land and authority: Perspectives from South Africa*, edited by S Meer. Cape Town: David Philip.
- Vapi, X. 2003. SACP calls for scrapping of controversial land bill. *ThisDay*, 14 November.
- Whitehead, A & Tsikata, D. 2003. Policy discourses on women's land rights in Sub-Saharan Africa: The implications of the re-turn to the customary. *Journal of Agrarian Change*, 3 (1 and 2).
- Wilson, M & Elton Mills, ME. 1952. *Land Tenure: The Keiskammahoek Rural Survey, Vol IV*. Pietermaritzburg: Shuter and Shooter.

Women's Legal Centre. 2003. *Submission on Communal Land Rights Bill before Land Affairs Portfolio Committee, November 2003.*

Woodhouse, P. African enclosures: A default mode of development. *World Development*, 31 (10).

