1 Introduction

How do legally defined rights to resources become effective command over those resources? What are the limits to social change through legal reform? These questions are having to be confronted, often painfully, by rural people, land activists and government officials involved in South Africa's post-apartheid land reform, central components of which comprise ambitious and wide-ranging 'rights-based' laws and programmes. Two central issues are: supplementing the passing of new legislation with the detailed design of programmes to implement these laws, and the interplay of formal and informal institutions in the complex social arenas within which people actually live. The environmental entitlements framework helps us to explore these questions. Their wider relevance is outlined by McAuslan (1996), who asserts that legal reforms can restructure land relations more generally, and who finds the South African rights-based approach persuasive[1].

2 A Rights-Based Land Reform: Problems and Prospects

South Africa's post-apartheid government has embarked on a wide-ranging and ambitious programme of land reform, designed to redress the legacy of centuries of dispossession, racially defined and discriminatory legal frameworks and deep rural poverty. The three principal components of land reform are a market-assisted redistribution programme, restitution of land to people who were dispossessed by racially discriminatory legislation or practice, and a tenure reform programme aimed at creating tenure security within a variety of tenure systems. Both restitution and tenure reform are 'rights-based', with new laws creating the basis for claims to land and resources. Elements of the redistribution programme involve new legal regimes which specify the rights and duties of the beneficiaries of land reform (e.g. within the legal entities which allow groups to jointly own and control land). Gender equality, provided for by South Africa's new Constitution, is a central goal of land reform (Department of Land Affairs 1997: 17). Laws creating new land rights are thus a central feature of the new policy framework.

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[1] This is significant given that McAuslan has been involved in drafting new land legislation in Tanzania.

How Do Rights Become Real?

Formal and Informal Institutions in South Africa's Land Reform

Ben Cousins

Critics of the government's land reform programme characterise it as 'minimalist', pointing to the compromises which were agreed in the negotiations preceding the 1994 elections. These saw the inclusion of a Property Clause in the new Constitution which limits the powers of government to expropriate land, the limiting of land restitution to those cases which occurred after 1913, and the adoption of a market-based programme of redistribution which some assert will fail to address the land needs of the poor and marginalised (National Land Committee 1995; Levin and Weiner 1997). For the critics, the state should be more directly involved in acquiring and redistributing land to those in need, and should have greater freedom to do so. The compromised and constrained policy framework is seen to limit the usefulness of rights-based laws (Bernstein 1997), and the adoption of this 'legalistic' approach is sometimes perceived as an expression of the historical weakness of rural popular organisation in South Africa.

The prospects at present for an expanded and more interventionist role for the state in land reform are slim[2]. This means that for the majority of the rural population much will depend on the efficacy of the rights-based laws and programmes currently being enacted and implemented. A central question is thus: how can government policies and programmes ensure that 'rights in law' become 'rights in reality'? The latter will entail rural South Africans actively making use of new legal frameworks to successfully press their claims to land and natural resources – on a daily basis within their livelihood systems and strategies, in gaining access to new land via government programmes or the market, in legitimate and functioning systems of inheritance and transfer, and in defending those rights against the (unlawful) claims of others. It will therefore bring together *de jure* and *de facto* rights and duties in relation to land, and transcend, in daily practice, the radical disjunction between the two that is still the chief characteristic of black land tenure systems in South Africa (see Cross 1991 for a graphic description). Land reform must thus make provision for the effective implementation of the new rights-based laws, or the rights defined so precisely

in neatly printed Government Gazettes will be little more than 'paper tigers', and toothless ones at that.

What are the conditions required for effective implementation? In the South African context the following can be identified:

(i) adequate **information** on land rights; this implies effective **communication** of legal reforms to potential beneficiaries;
(ii) **institutional capacity** (inside and outside government) to advise and support rights-holders and facilitate their active use of the law;
(iii) accessible and efficient **systems to record and register rights**;
(iv) **in case of disputes, access to the courts**, or alternative conflict resolution mechanisms;
(v) an integrated and functional **system of land administration** at different levels of government (which can perform many of the functions listed here).

Given the crisis of capacity currently experienced by the South African state, these conditions of effective bureaucracy are somewhat daunting; however, they do not fully define the problem. Two further dimensions need to be considered: the first is that of the content and strength of the rights defined in law, and thus of the terrain of struggle within which these rights-based laws are drafted and then enacted; the second is that of how these formally defined rights intersect and interact with other institutional frameworks, both formal and informal, in the real world contexts of the prospective rights-holders. Both centrally involve issues of power, authority and contestation, and require us to consider law as only one source of rule-making in society.

3 Rules and Practices: Formal and Informal Institutions

The environmental entitlements framework elaborates a disaggregated view of institutions which mediate access to and use of natural resources (Leach *et al.* 1997; this **Bulletin**). The approach moves from a critique of much of the new institutionalist economics as functionalist and hence

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[2] The recent adoption by government of a macroeconomic policy framework (GEAR), which gives priority to massive reductions in state expenditure and a radical downsizing of the civil service, offers little hope of an expanded role for the state in land reform in the forseeable future; if anything, a cut in the land reform budget is more likely.

tautologous in its premises towards a perspective which distinguishes between rules and practices, and explores the relationships between them. Points of departure include Ostrom (1986), who views rules as prescribing room for manoeuvre rather than determining behaviour, and Gore (1993), who analyses the 'unruly social practices' which often challenge legal rules of entitlement to resources. This points towards the contested (and indeterminate) nature of institutional orders, and their embeddedness within unequal and dynamic social relations.

A key distinction is that between formal and informal institutions. Formal institutions, put simply, are those backed by the law, implying enforcement of rules by the state, while informal institutions are upheld by mutual agreement, or by relations of power or authority, and rules are thus enforced endogenously (Leach *et al.* 1997: 26). Some refer to the latter as socially accepted moral rules, which constitute an alternative 'moral economy' (Gore 1993; Thompson 1991; Scott 1976).

How do formal and informal institutions relate to one other? Gore (1993), in his discussion of Sen's entitlements theory of famine, suggests that they coexist, but also interact in a complex and dynamic manner. He cites Sally Falk Moore (1975), who asserts that **reglementory processes** ('all those attempts to organise and control behaviour through the use of explicit rules') take place at a multiplicity of levels within society, and within a variety of social fields. Numerous conflicting or competing rule-orders exist, characterised more often than not by 'ambiguities, inconsistencies, gaps, conflicts and the like' (Falk Moore 1975: 3). In times of crisis (e.g. famines) informal rule-orders can take precedence over legal property rights as rules of entitlement to food or other commodities (Thompson 1991).

In this 'extended' view of entitlements the relationship between formal and informal institutions can only be understood by referring to the rule/practice distinction, and in terms of an analysis of power and the politics of meaning. Falk Moore refers to the 'continuous making and reiterating of social and symbolic order.. as an active process.... existing orders are endlessly vulnerable to being unmade, remade and transformed' (*ibid.*: 6; Gore 1993: 453). Institutional analysis must therefore include

both a structural analysis of complexes of rule-orders (i.e. 'questions of domination/autonomy, hierarchy/equivalence, proliferation/reduction, amalgamation/division, replication/diversification in the relations within and among the constitutive levels and units', Falk Moore 1975: 28), and also a processual and actor-oriented analysis of struggle, of action which is 'choice making, discretionary, manipulative, sometimes inconsistent, and sometimes conflictual' (Falk Moore 1975: 3).

The environmental entitlements approach calls for analysis of both formal and informal institutions at the micro-, the meso- and the macro-levels, and of relationships between levels (Leach *et al.* 1997: 26). In the context of community-based resource management, institutions mediating resource use need to be located within a complex institutional 'matrix', which links the position of social actors at the micro-level to the macro-level conditions which prevail in the wider political economy context. Including an analysis of power and difference as central issues allows us to see that these matrices are likely to be very messy, and characterised by the 'gaps, ambiguities and conflicts' highlighted by Falk Moore.

The complexity of both the structural and the processual dimensions, as well as the need to always focus on both aspects simultaneously, is well illustrated in South Africa's tenure reform programme. The notion of 'messy matrices' of institutions could help to inform the difficult choices inherent in policy making and implementation.

4 Tenure Reform: A Terrain of Struggle Over Rights

The challenge to make rights real is at the heart of the tenure reform component of South Africa's land reform. This programme attempts to address the systemic insecurity of tenure of black South Africans which is the result of a labyrinthine maze of discriminatory legislation which drastically circumscribed both the areas in which blacks were allowed to hold land rights, and the form of those rights. Instead of ownership, they were issued with permits or leases, while the land belonged to the state (or state bodies), as 'trustees'. Communal tenure systems were subjected to the imposition of pro-government traditional leaders (and then to

abuse and corruption by these elites), to authoritarian forms of land use planning and resettlement, and to attempts at privatisation. Women are discriminated against within all tenure systems. Farmworkers are particularly vulnerable as are farm dwellers (those who occupy commercial farmland because they have nowhere else to go, but have no recognised rights as workers or tenants). Inadequate institutional support has been provided to all these 'second class' systems of black land rights, creating internal disorder and administrative chaos (Claassens 1995; Department of Land Affairs 1997).

In addition, tenure problems have been exacerbated by forced removals and other apartheid policies which resulted in the extreme overcrowding of land in black townships, the so-called 'homelands', and those areas of black-owned freehold land which managed to survive the onslaught of the state. This means that tenure rights are often overlapping and conflicting. The holders of prior rights were forced to accommodate thousands of 'refugees from apartheid', who were sometimes told by state officials that they had been awarded this land in compensation, or who became informal tenants without clear contractual agreements. This has contributed to uncertainty, disputes, land invasions, warlordism, and endemic violence.

The policy reponse to this legacy entails a commitment to creating legally enforceable rights to land, within a unitary system of registration which incorporates a diversity of tenure options, including group and 'traditional' forms of tenure. However, tenure systems must be consistent with constitutionally guaranteed human rights (equality, freedom from discrimination, due process). The Bill of Rights within the new constitution also includes rights to security of tenure for those whose tenure is insecure as a result of past discrimination, or to comparable redress. The latter provision indicates that solutions to tenure insecurity on the vastly overcrowded areas formerly reserved for blacks will have to involve access to alternative land or resources – tenure reform, in other words, includes a land redistribution component (Department of Land Affairs 1997).

This rights-based approach translates into a number of activities. One is a programme of legislative reform which will upgrade second class rights into full, registered ownership, with a diversity of options as to forms of ownership and internal rules. For many areas this will mean transferring 'state' land to its rightful owners, on condition that constitutional provisions are complied with. A second component involves procedures and criteria for adjudicating between competing claims in situations of overlapping and conflicting rights. Thirdly, to prevent upgrading of rights for some leading to massive evictions of others, protection of vulnerable groups of occupants (tenants, farmworkers and farmdwellers), is needed. This requires new laws which govern the circumstances under which land owners can evict occupants, and which regulate and protect the rights of tenants and other occupants. Fourthly, policy needs to specify procedures to provide alternative land to enable vulnerable occupants to become the holders of independent land rights – and address the underlying problem of overcrowding.

Envisaged is an approach which puts the onus on local stakeholders to devise and implement practical solutions to tenure disputes, and which provides incentives to combine on-land solutions (e.g. regulated occupancy rights for some) with off-land solutions (such as state-financed acquisition of alternative land) for others. Many of these policy principles have yet to be translated into legislation or programmes of implementation – partly because in 1996 the Department of Land Affairs decided to embark on a two year 'investigation and field testing' phase before deciding on the final shape of its specific proposals. This phase is still in progress. However, some significant tenure reform laws have been enacted since the new government assumed office, and experience with these to date has brought sharply into focus the problem of ensuring that rights on paper become rights in reality.

5 Law in Practice

The **Land Reform (Labour Tenants Act, 3 of 1996)** protects the existing rights of labour tenants (people who provide labour to land owners in return for the right to use portions of farms for cultivation or grazing). It also makes provision for labour tenants to acquire land (either those portions of the farms they occupy and use, or alternative land), using the government's Settlement/Land

Acquisition Grant which is the main financial instrument used by land reform beneficiaries for land acquisition.

The system of labour tenancy came into being in the nineteenth century in the wake of large scale land grabbing by white settlers, who at the same time suffered from a labour shortage on their farms. It survived in two provinces, Mpumalanga and KwaZulu-Natal, despite decades of legislation aimed at abolishing it, and in the early 1990s it was estimated that 30 – 40 000 families were still subject to the system (Gumbi 1996). Rendering these contracts illegal made labour tenants highly vulnerable to evictions by land owners – who began to evict on a large scale following the reforms of the 1990s, in expectation of land reform measures by a new democratic government, and in the face of vociferous lobbying by land activist NGOs affiliated to the National Land Committee and by the Legal Resources Centre.

Following unsuccessful attempts in 1994 to negotiate a moratorium on evictions, the new law was drafted by June 1995, largely by NGO activists outside of government[3]. Its content was subject to negotiations with interest groups such as commercial farming unions, and after a great deal of acrimony was eventually made law in 1996 (with retrospective application to the earlier date). The Act creates mechanisms for transforming labour tenants into land owners, while protecting the rights of those still operating in terms of the system. Tenants can only be evicted when they are in breach of their labour contract, or are guilty of misconduct, or when the owner has specific needs for the land they occupy or use. Evictions must follow set procedures, and must be referred by magistrates to the Land Claims Court if the evictee can establish that he/she falls under the Act (Department of Land Affairs 1997: 49).

Commercial farmers saw this law as the 'thin edge of the land reform wedge' and fought hard to dilute the rights of labour tenants. The Act in its final form saw major compromises being made by the Minister of Land Affairs and by the ANC in Parliament in the face of this strong opposition, and against the back-

drop of the continued power of the commercial farming lobby within the post-apartheid agrarian order. Most problematic is the excessively narrow definition of labour tenants, which makes it difficult to defend their rights effectively; magistrates are also interpreting the Act very conservatively. There is wide consensus that the Act is flawed, and amendments to remedy its defects are now being drafted.

Despite these problems, some informants feel the Act is having a positive impact, with much fewer evictions now taking place than before (Hathorn pers. comm.). Others state that the Act has created uncertainty, heightened tensions on farms, and led to a paralysis in rural social relationships (Clacey pers. comm.). This is partly because the redistributive component of the Act is not working at all well, with virtually no applications for land ownership going through. There is general agreement within both government and the NGOs that not enough thought was given to implementation of the Act, with senior government officials stating that they now see themselves as 'naive' in their approach to rights-based laws. The NGOs somewhat belatedly developed plans to 'push government' to implement the Act and to develop 'test cases' to set legal precedents, but have not enacted these plans to date.

Another problem in implementing the Act lies in its reliance on local magistrate's courts to determine whether or not an evictee falls within the definition of a labour tenant (which is problematic in its definition in any case), since local magistrates, as the NGOs have pointed out, are closely linked to commercial farmers through local social networks. This is an example of informal institutions undercutting the formal instruments of the law, and underlines the ways in which laws are embedded within wider social and political dynamics – dynamics which were centrally important in the drawn out negotiations over the specific provisions of the Act, and will be again in the attempt to amend the Act to strengthen the rights of labour tenants.

Some of the lessons learned from these problems around the Labour Tenants Act are informing the

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[3] At the time there were relatively few 'new bureaucrats', drawn from the NGO sector, in the Department of Land Affairs.

stategies of government and the NGOs in relation to a new rights-based law currently before parliament – the **Extension of Security of Tenure Bill**. This aims to provide security of tenure for all vulnerable occupants on farms and in peri-urban areas, regulating the relationship between owners and occupiers and protecting the latter against unfair evictions.[4] The Bill also provides incentives for owners and occupiers to create alternative arrangements, usually land ownership for vulnerable occupants, which will provide long term independent tenure security. These incentives take the form of government subsidies for on-site or off-site settlement and development.

More thought has gone into the practical implications of passing this legislation – plans are being made to communicate the new structure of rights, via a variety of media, to farm workers and dwellers and tenants on black-owned land, to provide training to legal practitioners and paralegals, and to contract in NGOs to provide these services on behalf of government. NGOs linked to the National Land Committee had undertaken a national and provincial campaign to fight pre-emptive evictions from farms and to inform and mobilise farm workers and dwellers. The Bill makes provision for all evictions to be automatically referred to the Land Claims Court. Again, power dynamics will determine just how strong the rights in the new law will be – with the land activist NGOs at one end of the spectrum, the farmer's lobby at the other, and government somewhere in the middle. Time will tell whether or not the implementation measures being planned for prove to be effective in creating tenure security.

An important piece of rights-based legislation is the **Interim Protection of Informal Land Rights Act, 31 of 1996**, which was designed as an interim measure, over two years, to protect people with insecure tenure rights pending longer term legislation being put in place (Department of Land Affairs 1997: 62). The Act recognises that most people in the former homelands, as well as in other areas such as South African Development Trust land, despite the fact that they occupy the land as if they were its

owners, and are recognised as such by their neighbours, are unable to establish a clear legal right to the land, due to the legacy of discriminatory laws and practices and of administrative disorder referred to above. Pending the confirmation of these informal rights, the Act provides for defensive mechanisms against their loss by, for example, illegal sales of communal land by corrupt chiefs, or development projects initiated without consultations with the holders of the land.

Consideration is now being given to making this a permanent piece of 'protective' legislation. However, this Act has hardly been used since its approval by Parliament in early 1996. Not only have its potential beneficiaries not been informed of its existence and the rights that it provides, but even government officials, and especially those in departments other than Land Affairs, and those in provincial governments, are barely aware of its provisions or implications. For instance, along the undeveloped Wild Coast of the Eastern Cape, where ecotourism ventures are being touted as major investment opportunities for foreign and local capital, this lack of awareness could have disastrous consequences for local communities whose grazing land, forest areas and coastal resources are now being eyed by powerful outside interests (Kepe 1997; this **Bulletin**).

6 Ownership, Governance and the Role of the Chiefs in Land Tenure

South Africa's tenure reform policy framework acknowledges that, as a result of past policies and practices, conflicts over land rights are central and unavoidable (Claassens 1995). It is attempting to create procedures for the resolution of these conflicts through the creation of an enabling framework of rights-conferring laws; and processes and procedures which allow for negotiation and compromise. The following types of conflict will have to be confronted:

● between traditional leaders and tribal members over who are the rightful owners of 'state' or 'trust' land;

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[4] Evictions can only occur in accordance with the law and by order of Court, and if lawful, but not caused by the conduct of the occupier, will not be permitted unless adequate alternative accommodation is available and there is no appropriate alternative to eviction.

Occupiers who have lived on the land for a certain period of time (either 10 or 20 years, still to be decided by the legislature), and have reached a pensionable age, or are disabled former employees, will have the right to remain on the land.

- between traditional leaders and local government officials over land administration powers or functions;
- between men (and traditional leaders in particular) and women over gender equality in relation to land rights;
- between competing claimants to disputed tenure rights;
- between commercial farmers on the one hand, and farm workers, farm dwellers and labour tenants, on the other; and
- between local groupings with competing visions of the desired form of ownership, or over the content of internal rules, or over boundaries between sub-groups.

The first three of these involve the vexed issue of the powers of traditional leaders in contemporary systems of tenure which, in South Africa, are required to be consistent with the Bill of Rights. This example illustrates well how the notion of a 'messy matrix' of institutions and entitlement relationships might be employed by analysts and policy makers.

At the heart of the new policy framework is a distinction between 'ownership' and 'governance', which was blurred in the past in the former homelands and on South African Development Trust land where the state was both owner and administrator. The White Paper on land policy states that 'the Tenure Reform programme will separate these functions, so that ownership can be transferred from the state to the communities and individuals on the land' (Department of Land Affairs 1997: 93). It also states that:

> It will be set out in law that the members of the landowning group will have the power to choose the structure which represents them in decisions pertaining to the day to day management of the land and all issues relating to members' access to the land asset. A majority of members would also be able to set aside unpopular decisions made by the land management structure. (Department of Land Affairs 1997: 66)

The White Paper acknowledges that in some areas the administration of communal tenure by chiefs and tribal authorities is 'popular, functional and relatively democratic'. However, in others it is clearly subject to abuse, and it is intended that:

> ... the above measures would enable functional and popular traditional systems to continue operating, while providing a strong and guaranteed route for a majority of dissatisfied members to replace control over land by illegitimate structures with new democratic institutions. (Department of Land Affairs 1997: 67)

This statement of intent cuts away at the primary source of chiefly power and authority in the past – control over land. This control was largely undermined by the colonial and apartheid regimes, but chiefs and tribal authorities in some areas retained important powers, and the post-apartheid era has seen traditional leaders making a strong bid for a much wider range of powers, including land ownership in so-called tribal areas.

As Mamdani (1996) points out, the fusion of judicial, political and economic power in the person of the chief is a characteristic feature, which he terms 'decentralised despotism', of the colonial (and post-colonial) state in Africa. It is clear that the proposed extension of democratic rights of citizens to co-owners of communal land constitutes a frontal attack on this legacy, and it is not surprising that it is being resisted so vehemently – nor that this politics of 'citizen and subject' is most vitriolic, and often physically dangerous, in the province of KwaZulu-Natal, the power base of the Inkatha Freedom Party.

A further complication arises from the fact that newly elected local government structures, particularly at the fourth tier of government, are contesting the administrative powers of chiefs, as well as attempting to take control of communal lands so that they can implement development projects (eg. housing projects, the building of schools, business centres).

All of these factors mean that at present the rights, duties, responsibilities and powers of the social actors and institutions operating at different levels within the matrix of communal land administration are ambiguous, conflictful, and highly contested. These relationships are summarised in Figure 1, a prime example of a 'messy matrix'. Again, it is clear that enacting the proposed law will not by itself resolve the conflicts; it may create a framework within which processes of 'democratisation' of land

Figure 1: Ownership and Governance in Communal Tenure: A 'Messy Matrix' Analysis

	Groups of co-owners	Chiefs and councils of elders	Local government bodies	National laws
Ownership rights	Policy suggests ownership should be vested in members of the group; some groups may accept ownership by chief or other bodies on behalf of group ('in trust')	Many chiefs claim ownership on behalf of the group; most are resistant to claims to land by local government bodies; some accept that members are true owners	Need to acquire land for public purposes; many are resistant to providing services on 'privately owned' land	Will confer rights of ownership to members of groups, on condition that constitutional principles are adhered to
Administration of land rights e.g. allocation of plots	Could elect a representative body to administer; OR could decide that local government administers land; OR could accept chief and council as administrators	Many resist the separation of ownership from governance; BUT some accept that their role is as administrators not owners	Could provide land administration services if co-owners decide this is desired	Will attempt to clearly separate ownership from governance functions
Land use decisions (e.g. location of arable, residential and grazing lands)	Owners and users could decide; OR co-owners may allow administrators to decide	Could assist in administration and resolution of boundary disputes; OR make decisions on behalf of group	Assist in administration and resolution of boundary disputes; OR make decisions on behalf of group	Will provide for rights of owners to make decisions on land use
Ownership of land for public services	Co-owners could allow certain lands to be alienated to local government for purposes of service provision	Could accept that local government owns land for service provision; many will resist local government owning land	Duty to provide public services to all citizens – currently in dispute with groups and traditional leaders over land ownership	Enabling framework of local government legislation which needs to provide a clear role for traditional leaders

rights can occur, but active agents will have to press their claims and struggle to make their rights realities. This might well require the kind of connection between (localised) struggles over property rights and a (wider) politics of land pointed to by Bernstein (1997: 30).

The matrix in Figure 1 includes only formal institutions – which the chieftancy and Tribal Authorities certainly are. However, traditional leadership draws much of its legitimate authority from its embeddedness in the social and cultural life of rural communities, where the discourses of 'tradition' and associated cultural identity are still persuasive for many. Where not fully accepted and legitimate, traditional leaders still wield considerable informal power over the lives of their subjects. Even strong critics of the abuses of chieftancy, such as Levin and Mkhabela (1997), who show that many rural people support the democratisation of land administration, admit that a 'deep-seated respect' for the chieftancy is widespread, and that 'popularly recognised cultural rights, institutions and ceremonies' should be respected. Kepe (1997; this **Bulletin**) provides evidence of the strong interconnections between the informal institutions, including traditional leadership at various levels, which regulate resource use along the Wild Coast of the former Transkei. These include patriarchal social institutions, which will prove resistant to the principle of gender equality being promoted by tenure reform policies.

Thus the matrix would be made even more 'messy', but also more consistent with complex realities, if informal institutions and the strategies and practices associated with them were included within it. As Thompson (1991: 97) remarks: 'At the interface between law and agrarian practice we find custom. Custom itself **is** the interface, since it may be considered both as praxis and as law'.

7 Conclusion

What, then, are the prospects for the rights-based laws which form such a central component of South Africa's land reform translating into realities? This article has suggested that there are two crucial dimensions which need to be considered by government agencies, land activist organisations, and the potential holders of these rights. One is the relationship between different kinds of formal institutions, at different levels (including rights-conferring laws, but not limited to them), as well as the complex interplay between formal and informal institutions in the social fields within which rights to resources are asserted and resisted. The second is that of strategy and tactics – of the power dynamics through which rights are defined in law, but also in practice. As Hunt (1991: 247) writes:

Rights take shape and are constituted by and through struggle. Thus, they have the capacity to be elements of emancipation, but they are neither a perfect nor exclusive vehicle for emancipation. Rights can only be operative as constituents of a strategy of social transformation as they become part of an emergent 'common sense' and are articulated within social practices.... They articulate a vision of entitlements, of how things might be, which in turn has the capacity to advance political aspiration and action.

This 'rights without illusions' perspective suggests that, however necessary rights-based laws are in the South African context, they are far from sufficient; they are, in fact, just the beginning point for an effective politics of property rights.

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