

# **A critical evaluation of the South African land tenure policy: a comparison with selected aspects of the Kenyan and Tanzanian law**

**MT Tlale**



**<https://orcid.org/0000-0003-3590-845X>**

Thesis submitted in fulfilment of the requirements for the degree *Doctor of Philosophy* in *Private Law* at the North-West University

Promoter: Prof GJ Pienaar

Graduation May 2018

Student Number: 25754017



## **ACKNOWLEDGEMENTS**

This research is possible through the assistance of a number of people: In no particular order I would love to honour.

Professor Gerrit Pienaar, words are not enough to express my heartfelt and immeasurable gratitude. You have been nothing short of a father and a mentor to me. I am truly privileged to have worked under your supervision and I hope your immense expertise has rubbed off on me. For all the invaluable lessons, the headaches I caused you, the timeous feedbacks and for the overall succour and warmth, I thank you.

Professor Du Plessis thank you very much for your generous financial assistance. I hope this research shows you that you made a good investment.

The North-West University, I appreciate the financial and highly professional assistance that allowed me to pursue my lifelong dream. To me, postgraduate studies have always been a dream that only seemed impossible because of lack of resources, for this I am eternally grateful. It is also at this institution that I was introduced to Professor Willemien Du Plessis who has been a guardian angel, thank you Prof.

To the Pallangyo family in Tanzania, Arusha, I am very grateful and humbled that you welcomed me in your home. Being around your family made the homesickness much more bearable and for that I cannot thank you enough. Dr. Pallangyo I am looking forward to academic collaborations in the near future.

My parents, 'Mateboho Tlale and Buti Motlatsi Tlale, I could not have started and let alone finish this research without your support and prayers. Thank you for your sacrifices, you have been my rocks throughout the years. I promise to make you proud.

Last but definitely not least, I thank God for the strength, valour, and the never give-up attitude you have instilled in me, I have seen Your clemency during the course of this study.

## **ACADEMIC RESEARCH STEMMING FROM THIS RESEARCH**

Tlale MT "Women's Land Plight in South Africa: Is there Hope under the Communal Land Tenure Bill?" *Comparative and International Law Journal of Southern Africa* (forthcoming)

### **Conference presentation**

Tlale MT "Out of Sight, Out of Mind: Women and *CLARA*" Paper presented on Postgraduate Day at the *Property Law Teachers' Colloquium* (2-4 November 2016 University of Johannesburg)

## **LIST ABBREVIATIONS**

AA	African Affairs
AC	Acta Criminologica
ACHPR	African Charter on Human and Peoples' Rights
ADR	Alternative Dispute Resolution
AE	Agricultural Economics
AJ	Acta Juridica
AJIAI	Africa Journal of the International African Institute
AJCJS	African Journal of Criminology and Justice Studies
AJCR	African Journal on Conflict Resolution
AJCR	African Journal on Conflict Resolution
AHRLJ	African Human Rights Law Journal
AJDS	Austrian Journal of Development Studies
APSR	American Political Science Review
ARP	Annual Review Psychology
ARR	African Research Review
AS	African Studies
ASQ	African Studies Quarterly
BASIS	Broadening Access and Strengthening Input Market Systems
BPFA	Beijing Platform for Action
CALS	Centre for Applied Legal Studies
CIEDS	Centre for International Environment and Development Studies
COHRE	Centre on Housing Rights and Evictions
CLA	Community Land Act
CLARA	Communal Land Rights Act
CLTB	Communal Land Tenure Bill
CGE	Commission on Gender Equality
CLTP	Communal Land Tenure Policy
CASE	Community Agency for Social Enquiry
CDRT	Community Dispute Resolution Trust
CP	Comparative Politics

CSSAAME	Comparative Studies of South Asia, Africa and the Middle East
CCR	Constitutional Court Review
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CILJ	Cornell International Law Journal
CQ	Crime Quarterly
ICESCR	International Convention on the Economic, Social and Cultural Rights
DSA	Development Southern Africa
DPR	Development Policy Review
DRDLR	Department of Rural Development and Land Reform
DC	Development and Change
EDE	Environment and Development Economics
ESRR	Economic and Social Rights Review
FA	Feminist Africa
FE	Feminist Economics
FJHS	Fletcher Journal of Human Security
FAO	Food and Agricultural Organization
G&B	Gender and Behaviour
GC	Geography Compass
HBFSA	Heinrich Böll Foundation Southern Africa
HI	Habitat International
HRR	Human Rights Review
HSRC	Human Sciences Research Council
IDPR	International Development Planning Review
IJSSHR	International Journal of Social Sciences and Humanities Research
ILC	International Land Coalition
IPILRA	Interim Protection of Informal Land Rights Act
IJPGG	International Journal of Politics and Good Governance
IJC	International Journal of the Commons
ILO	International Labour Organization
INGOJ	International NGO Journal
JAAS	Journal of Asian and African Studies

JAL	Journal of African Law
JAC	Journal of Agrarian Change
JCP	Journal of Community Psychology
JCAS	Journal of Contemporary African Studies
JCAS	Journal of Contemporary African Studies
JDE	Journal of Development Economics
JDS	Journal of Development Studies
JECDSW	Journal of Ethnic, Cultural Diversity in Social Work
JHSS	Journal of Humanities and Social Sciences
JID	Journal of International Development
JIWS	Journal of International Women's Studies
JLPS	Journal of Law, Property and Society
JLPUL	Journal of Legal Pluralism and Unofficial Law
JMAS	Journal of Modern African Studies
JPS	Journal of Peace Research
JSAS	Journal of Southern African Studies
JPS	Journal of Peasant Studies
LDD	Law, Democracy and Development
LRA	Land Registration Act
LSR	Law and Society Review
MDG	Millennium Development Goals
NLP	National Land Policy
NP	Nomadic Peoples
ODS	Oxford Development Studies
PCILM	Presidential Commission Inquiry into Land Matters
PELJ	Potchefstroom Electronic Law Journal
PLAAS	Programme for Land and Agrarian Studies
RAPE	Review of African Political Economy
SAJHR	South African Journal on Human Rights
SLR	Strathmore Law Review
SLS	Social and Legal Studies
SD	Social Dynamics

SACQ	South African Crime Quarterly
SAJCJ	South African Journal of Criminal Justice
SALRC	South African Law Reform Commission
SLR	Stellenbosch Law Review
SIDA	Swedish International Development Cooperation Agency
TE	Thesis Eleven
TLFGA	Traditional Leadership Framework and Governance Act
TCB	Traditional Courts Bill
TWLS	Third World Legal Studies
TWQ	Third World Quarterly
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous People
UNLJ	University of Nairobi Law Journal
VLA	Village Land Act
WD	World Development
WILDAF	Women in Law and Development in Africa
WSIF	Women's Studies International Forum

## **ABSTRACT**

This research deals with communal land insofar as it relates to communal land tenure security, women's access to communal land and resolution of disputes. In this regard, lessons are drawn from the Tanzania and Kenyan communal land tenure legislation and policy frameworks. First and foremost, secure tenure in land is a necessity for all individuals of South Africa, Tanzania and Kenya. Yet, for some rural communities, this is only an ideal that seems far-fetched. For one to say their tenure in land is secure, they must not only be able to enjoy such property without interference from third parties but must also be able to enjoy the fruits of the labour and capital invested in the land.

Moreover, land access and control statistics reveal that women have access to far less land than men in South Africa, Tanzania and Kenya. The reason for this position has been attributed to the indigenous culture which promotes communal as opposed to individual control of land. The communal land tenure system highlights men's access to land at the expense of their female counterparts. Lately, evidence reveals that the struggle for women's land rights goes further than the household and village discrimination. In most cases the women in the communities suffer at the hands of land grabbers who are usually big companies, bankers and/or foreign governments through the assistance of local elites.

Furthermore, many conflicts in numerous parts of the developing world can be traced to disputes over land ownership, land use and land deprivation. The unique nature of land and its many uses has made it a highly essential commodity in every society and as such it has been a commodity of very high dispute. Conflicts and related disputes are even more common and regular on communal land. Nonetheless, an effective dispute resolution system guarantees that the rural community members live harmoniously.

The central enquiry in this study was whether land tenure is secure in the areas that practice communal landholding in South Africa, Tanzania and Kenya. Previous literature has established that the communal land tenure was insecure under the *Communal Land Rights Act*. Therefore, under its replacement, the Communal Land



Tenure Bill (hereinafter the CLTB) will address several issues that were belligerent. If promulgated, the CLTB will transfer ownership in communal land to rural communities of South Africa. Over and above this, individual communal landholding will be permissible. Although peculiar, individual landholding will be beneficial for community members hence, must be treated with caution. To this end, the CLTB will also register individual land interests and rights in communal land and this will give the landholders some sort of assurance in the land they hold and use. Nonetheless, communal property will continue to be used in commonage. Although access to communal land and resources is still lagging behind, the CLTB has advanced in women's control thereof. In terms of the CLTB, women will occupy at least half of the communal land administration institutions. This is clearly a commendable effort.

Over and above this, the CLTB espouses two broad categories of dispute resolution namely; the traditional and alternative dispute resolution. The traditional dispute resolution is to be carried out by the institution of the traditional leadership while some alternative dispute resolution will be carried out by the Department of Rural Development and Land Reform. Thus, based on the examination of the Tanzanian and Kenyan community land legislation, this study establishes that under the CLTB a degree of land tenure security will be achieved.

**Key words:**

**Communal, land, tenure, security, nature, management, registration, formalisation women, discrimination, resolution, dispute, traditional leadership, South Africa, Tanzania, Kenya, *Village Land Act*, Communal Land Tenure Bill, *Community Land Act***

## **OPSOMMING**

Hierdie navorsing handel oor gemeenskaplike grond in soverre dit betrekking het op die sekuriteit van gemeenskaplike grondbesit, vroue se toegang tot gemeenskaplike grond en beslegting van geskille. In hierdie verband sal 'n studie gemaak word van die Tanzaniese en Keniaanse gemeenskaplike grondbesitwetgewing en beleidsraamwerke. Eerstens, veilige verblyf op grond is 'n noodsaaklikheid vir alle individue van Suid-Afrika, Tanzanië en Kenia. Tog, vir sommige landelike gemeenskappe, is dit net 'n ideaal wat moeilik haalbaar blyk te wees. Vir veilige grondbesit is, die voordele van grondegebruik sonder die inmenging van derde\_partye, sowel as die vrug op arbeid en kapitaalbrengs vooreisies.

Daarbenewens toon grondtoegangs- en beheerstatistieke dat veel minder vroue as mans toegang tot grond in Suid-Afrika, Tanzanië en Kenia. Die rede hiervoor word toegeskryf aan die inheemse kultuur wat gemeenskaplike beheer van grond in teenstelling met individuele beheer van grond bevorder. Die gemeenskaplike grondbesitstelsel beklemtoon mans se toegang tot grond ten koste van hul vroulike eweknieë. Die afgelope tyd is bewys dat die stryd vir vroue se grondregte verder gaan as diskriminasie in huishoudings en stedelike verblyf. In die meeste gevalle ly die vroue in die tradisionale gemeenskappe onder die skadelike praktyke van grondgrypers, wat gewoonlik groot maatskappye, bankiers en/of buitelandse regerings is wat met die hulp en tot die voordeel van plaaslike elite optree.

Verder kan baie konflik in talle dele van die ontwikkelende wêreld toegeskryf word aan geskille oor grondbesit, grondegebruik en grondontneming. Die unieke aard van grond en sy vele gebruike het dit in elke samelewing 'n uiters noodsaaklike kommoditeit gemaak en as sodanig is dit 'n kommoditeit waarvoor baie geskille bestaan. Konflik en verwante geskille vind selfs meer algemeen en gereeld op gemeenskaplike grond plaas. Desondanks verseker doeltreffende oplossing van dispuute dat landelike gemeenskapslede in harmonie saamleef.

Die hoofteema van hierdie studie was die vraag of gemeenskaplike grondbesit veilig is in Suid-Afrika, Tanzanië en Kenia. Bestande literatuur het bevestig dat gemeenskaplike grondbesit onveilig was ingevolge die *Wet op Gemeenskaplike Grondregte*. Daarom sal die Wetsontwerp op Gemeenskaplike Grondbesit (hierna genoem die WGG) met sy inwerkingstelling verskeie kwessies in hierdie verband aanspreek. Indien gepromulgeer, sal die WGG eienaarskap in gemeenskaplike grond oordra na landelike gemeenskappe van Suid-Afrika. Boonop sal individuele regte in gemeenskaplike grond toelaatbaar wees. Alhoewel individuele grondbesit vir gemeenskapslede voordelig sal wees, moet dit met omsigtigheid hanteer word. Vir hierdie doel sal die WGG ook individuele grondbelange en -regte in gemeenskaplike grond registreer en dit sal aan die grondeienaars 'n soort sekuriteit gee in die grond wat hulle besit en gebruik. Nietemin sal gemeenskaplike eiendom steeds in landelike grond toegepas kan word. Alhoewel toegang tot gemeenskaplike grond en hulpbronne steeds sloer, het die WGG vroue se beheer daarvan bevorder. Volgens die WGG sal vroue minstens die helfte van die gemeenskaplike grondadministrasie-instellings uitmaak. Dit is duidelik 'n lofwaardige poging.

Bo en behalwe dit, onderskryf die WGG twee breë kategorieë geskilbeslegting, naamlik die tradisionele en alternatiewe geskilbeslegting. Die tradisionele geskilbeslegting moet uitgevoer word deur die instelling van tradisionele leierskap, terwyl 'n alternatiewe geskilbeslegting deur die Departement van Landelike Ontwikkeling en Grondhervorming toegepas sal word. Dus, gebaseer op die ondersoek van die Tanzaniese en Keniaanse gemeenskapsgrondwetgewing, bepaal hierdie studie dat 'n mate van grondbesit sekuriteit bereik sal word ingevolge die WGG.

### **Sleutelwoorde:**

**Gemeenskaplik, grond, amptenaar, sekuriteit, natuur, bestuur, registrasie, formalisering, vroue, diskriminasie, resoluëie, dispuut, tradisionele leierskap, Suid-Afrika, Tanzanië, Kenia, dorpsgrondwet, munisipale grondbesitwet, gemeenskapsgrondwet**

## TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	i
ACADEMIC RESEARCH STEMMING FROM THIS RESEARCH.....	ii
LIST ABBREVIATIONS .....	iii
ABSTRACT.....	vii
OOPSOMMING .....	ix
CHAPTER 1.....	1
BACKGROUND AND RESEARCH QUESTIONS.....	1
1.1    Background .....	1
1.2    Research problem.....	3
1.2.1    Tenure security .....	3
1.2.2    Women’s access to communal land.....	5
1.2.3    Resolution of land disputes.....	7
1.3    Research questions.....	9
1.3.1    Main research question .....	9
1.3.1.1    Subsidiary research questions .....	9
1.4    An introductory analysis of the South African communal land tenure system compared with Kenya and Tanzania .....	10
1.4.1    Tenure security .....	10
1.4.2    Women’s access to communal land.....	13
1.4.3    Dispute resolution.....	14
1.5    Hypothesis and assumptions .....	16
1.6    Aims and objectives .....	16
1.7    Research methodology .....	17
1.8    Chapter’s outline.....	17
CHAPTER TWO .....	21

AN OVERVIEW OF COMMUNAL LAND TENURE IN SOUTH AFRICA .....	21
2.1 Introduction .....	21
2.1.1 Nature of communal land rights.....	22
2.2 Communal land tenure.....	27
2.2.1 Introduction .....	27
2.2.1.1 The conceptual framework.....	30
2.3 Women's access to land .....	41
2.3.1 Introduction .....	41
2.3.2 The centrality of land .....	45
2.3.2.1 Causes of women's vulnerability .....	46
2.3.3 The international framework .....	53
2.3.3.1 The Convention on the Elimination on all forms of Discrimination against Women.....	53
2.3.3.2 The Universal Declaration of Human Rights.....	54
2.3.3.3 The International Covenant on Economic, Social and Cultural Rights 54	
2.3.3.4 The African Charter on Human and Peoples' Rights .....	54
2.3.3.5 The Istanbul Declaration on Human Settlements .....	55
2.3.3.6 The Beijing Platform for Action .....	55
2.3.3.7 The Protocol to the African Charter on Human and Peoples' Rights 55	
2.3.3.8 The Rome Declaration on World Food Security .....	56
2.3.3.9 The United Nations Commission on Human Rights Resolution.....	56
2.3.4 The regional framework .....	57
2.3.4.1 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.....	58
2.3.4.2 Women in Law and Development in Africa .....	58

2.3.4.3	The framework and guidelines on Land Policy in Africa .....	59
2.3.4.4	The African Union's Declaration on Land Issues and Challenges in Africa	59
2.3.4.5	The Solemn Declaration on Gender Equality in Africa .....	59
2.3.5	The South African legislative and policy framework.....	60
2.3.5.1	The White Paper.....	60
2.3.5.2	Promoting Women's Access to Land (hereinafter PWAL) .....	62
2.3.5.3	The Commission for Gender Equality (hereinafter CGE).....	62
2.3.6	Constitutional aspects of women's land insecurity .....	63
2.3.6.1	The human rights approach .....	63
2.4	Dispute resolution in the communal areas of South Africa .....	66
2.4.1	Introduction .....	66
2.4.2	Traditional leadership in South Africa .....	68
2.4.3	The traditional courts.....	75
2.4.3.1	Jurisdiction of traditional courts .....	80
2.4.3.2	The Traditional Courts Bill .....	81
2.4.4	The Traditional Leadership and Governance Framework Act .....	88
2.4.4.1	Leadership Structure under the <i>TLFGA</i> .....	90
2.5	Conclusion.....	92
2.5.1	Tenure security .....	92
2.5.2	Women's access to communal land.....	93
2.5.3	Dispute resolution.....	93
CHAPTER THREE .....		95
THE SOUTH AFRICAN COMMUNAL LAND TENURE LEGISLATION AND POLICIES AND ISSUES RAISED BY CASE LAW .....		95
3.1	Introduction .....	95

3.2	Tenure security in South Africa .....	97
3.2.1	The South African communal tenure legislative outline.....	99
3.2.1.1	The Land Rights Bill .....	99
3.3	Land administration under CLARA versus the CLTB .....	100
3.3.1	Procedure of the Land rights enquiry .....	107
3.3.1.1	Powers and functions of a land rights enquirer .....	109
3.3.2	Community rules .....	111
3.3.2.1	Drafting .....	113
3.3.2.2	Adoption .....	115
3.3.2.3	Registration.....	116
3.3.2.4	Determination phase.....	119
3.3.3	The communal land tenure policy framework .....	122
3.4	Management of communal land.....	124
3.4.1	Institutions of administration .....	127
3.4.1.1	The Communal Property Association .....	128
3.4.2	Case studies: Disputes within CPA's.....	132
3.4.2.1	Elandskloof CPA.....	132
3.4.2.2	The Richtersveld claims.....	134
3.4.3	Conflict between tribal authorities and CPA's .....	136
3.4.3.1	Bakgatla-Ba-Kgafela v CPA .....	138
3.4.3.2	Masakhane community .....	140
3.5	The South African communal land tenure system through case law .....	142
3.5.1	<i>Tongoane and Others v Minister for Agriculture and Land Affairs and Others</i> 142	
3.5.1.1	High Court Proceedings.....	142
3.5.1.2	Issues before the High Court.....	147

3.5.1.3	The High Court decision .....	148
3.5.1.4	Constitutional Court proceedings .....	149
3.5.2.1	Issues before the court .....	150
3.5.2.2	The Constitutional Court decision .....	154
3.6	Conclusion.....	155
CHAPTER FOUR .....		158
A COMPARATIVE ASSESSMENT OF THE COMMUNAL LAND TENURE IN SOUTH AFRICA, TANZANIA AND KENYA .....		158
4.1	Introduction.....	158
4.2	Tenure security .....	158
4.2.1	Legislative and policy framework .....	163
4.2.1.1	National land policies .....	163
4.2.2	Legislative protection of community land rights .....	166
4.2.2.1	South Africa .....	166
4.2.2.2	Kenya .....	168
4.2.2.3	Tanzania .....	170
4.2.3	Procedure for registration of a community.....	171
4.2.3.1	Kenya .....	171
4.2.3.2	South Africa .....	172
4.2.3.3	Tanzania .....	173
4.2.4	Community rules .....	175
4.2.4.1	South Africa .....	175
4.2.4.2	Tanzania .....	176
4.2.4.3	Kenya .....	177
4.2.5	Nature of the communal land rights.....	178
4.2.5.1	Kenya .....	179



4.2.5.2	Tanzania .....	180
4.2.5.3	South Africa .....	183
4.2.6	Administration and management of communal land .....	183
4.2.6.1	South Africa .....	184
4.2.6.2	Tanzania .....	186
4.2.6.3	Kenya .....	188
4.2.7	Conclusion .....	189
4.3	Women's access to communal land .....	193
4.3.1	Introduction .....	193
4.3.2	Conceptual background.....	195
4.3.2.1	Kenya .....	195
4.3.2.2	Tanzania .....	197
4.3.2.3	South Africa .....	199
4.3.3	The communal land tenure system: women and the law .....	199
4.3.3.1	Kenya .....	202
4.3.3.2	Tanzania .....	208
4.3.3.3	South Africa .....	215
4.3.4	Reasons behind the advocacy.....	219
4.3.5	Alternative approaches to women's marginalization .....	223
4.3.5.1	The feminist approach .....	223
4.3.5.2	The human rights approach .....	225
4.4	Dispute resolution.....	230
4.4.1	Introduction .....	230
4.4.2	Conflict management.....	232
4.4.3	Categories of dispute resolution methods .....	234
4.4.3.1	Traditional dispute resolution method .....	236

4.4.3.2. Alternative dispute resolution methods .....	245
4.4 Conclusion.....	259
4.5.1 Tenure security .....	259
4.5.2 Women's access to communal land.....	260
4.5.2.1 Inheritance .....	260
4.5.2.2 Gender parity .....	261
4.5.2.3 Female representation in decision-making bodies .....	261
CHAPTER FIVE.....	263
ALTERNATIVE APPROACHES USED TO SECURE COMMUNAL LAND TENURE IN SOUTH AFRICA, TANZANIA AND KENYA.....	263
5.1 Introduction .....	263
5.1.1 The foundations of secure property rights .....	265
5.2 Land formalisation through registration .....	267
5.2.1 Models of formalisation .....	269
5.2.1.1 The Plans Fanciers Ruraux model .....	269
5.2.1.2 The statutory or legislative model.....	271
5.2.1.3 The communal model .....	272
5.2.2 The deeds registration system.....	275
5.2.2.1 South Africa .....	275
5.2.2.2 The South African deeds registration process .....	285
5.2.3 Title registration .....	289
5.2.3.1 Types of title registration .....	290
5.2.3.2 Tanzania .....	295
5.2.3.3 Kenya .....	306
5.2.3.4 Consequences of titling .....	312
5.3 Conclusion.....	318

CHAPTER SIX .....	320
CONCLUSIONS AND RECOMMENDATIONS.....	320
6.1 Overview.....	320
6.2 Tenure security .....	322
6.2.1 South Africa .....	322
6.2.2 Tanzania .....	327
6.2.3 Kenya .....	330
6.2.4 Final analysis on communal land tenure security.....	332
6.3 Women's access to communal land .....	333
6.3.1 Background .....	333
6.3.2 South Africa .....	335
6.3.2.1 Gender parity .....	335
6.3.2.2 Inheritance .....	336
6.3.2.3 Female representation in decision-making bodies .....	337
6.3.3 Tanzania .....	337
6.3.4.1 Gender parity .....	337
6.3.4.2 Inheritance .....	338
6.3.4.3 Female representation in decision-making bodies .....	339
6.3.4 Kenya .....	340
6.3.4.1 Gender parity .....	340
6.3.4.2 Inheritance .....	340
6.3.4.3 Female representation in decision-making bodies .....	341
6.3.5 Final analysis on women's access to communal land .....	341
6.4 Dispute resolution.....	344
6.4.1 Overview.....	344
6.4.2 South Africa .....	345

6.4.3	Tanzania .....	348
6.4.4	Kenya .....	349
6.4.5	Final analysis on dispute resolution .....	351
6.4.6	Future research .....	353
6.5	Recommendations .....	354
6.5.1	Tenure security .....	354
6.5.2	Women's access to communal land.....	355
6.5.3	Dispute resolution.....	356
BIBLIOGRAPHY .....		358

## CHAPTER 1

### BACKGROUND AND RESEARCH QUESTIONS

#### ***1.1 Background***

The South African communal land tenure and rights have been severely and negatively influenced by not only colonialisation but also apartheid land measures.<sup>1</sup> Most of the discriminatory land practices were inherited from the Dutch and British colonialisation but were exacerbated by apartheid. Nevertheless, since 1994 the democratic government has promulgated a myriad of land legislation<sup>2</sup> in an effort to ward off the past injustices and make South Africa a harmonious country for all races residing therein. Furthermore, land scarcity and insecurity have been an issue since time immemorial, more so for people living in the rural areas of South Africa. Of these rural populations, women and the elderly are more vulnerable when it comes to land access since indigenous practices are patriarchal in nature.<sup>3</sup> Moreover, in these areas, access to land is usually at the core of a majority of conflicts that occur. This is because land is used as a principal source of livelihood where vegetables are grown and livestock fed.

Furthermore, in 2007, 144 countries including South Africa, committed to the protection of the rights of indigenous peoples rights as an integral part of promoting human rights, democracy and sustainable development. This was done through the ratification of the *United Nations Declaration on the Rights of Indigenous People* (hereinafter the UNDRIP) as well as the standards of

---

1 Claasens 2005 <https://www.plaas.org.za>; Cousins 2007 *JAC* 289; Manona "Informal Land Rights under Siege" 2-3; Fay 2009 *WD* 1425.

2 The post-apartheid legislation is discussed comprehensively in the chapter 2.

3 Byamugisha *Securing Securing Africa's Land* 70; Claasens 2005 <https://www.plaas.org.za>; Quan "Changes in Intra-Family Land Relations" in *Changes in Customary Land Tenure Systems in Africa* 54; Jacobs 2009 *GC* 1680; Dutt and Dworkin 2014 *JCP* 381; Dancer 2017 *SLS* 3.

the *International Labour Organization*<sup>4</sup> which correspondingly promote indigenous peoples' rights to lands, territories and resources under international law.<sup>5</sup> In an effort to conform not only to the international standards but to its land reform programmes, the Government of South Africa through the application of section 25(5) of the *Constitution* of the Republic of South Africa, 1996 (hereinafter the *South African Constitution*), promulgated the *Communal Land Rights Act*<sup>6</sup> (hereinafter *CLARA*). This was done as a means of giving effect to the constitutional mandate embodied in section 25(5), (6) and (9) of the *South African Constitution*.<sup>7</sup>

It was against this background that the *CLARA* was enacted. In terms of the preamble, its core objects in terms of section 4 included the strengthening of rural land rights. *CLARA* was never put into operation since the Constitutional Court's decision of 2010 rendered it invalid.<sup>8</sup> The Communal Land Tenure Bill (hereinafter the CLTB)<sup>9</sup> is therefore going to be discussed as the replacement legislation to determine whether the South African communal land tenure legislation effectively guards the rights of the rural communities. In this light, the study is confined to the three issues presented above namely, tenure security, women's access to communal land as well as dispute resolution.

---

4 169 of 1989; Larson and Springer 2016 <https://www.iucn.org>; Gastorn 2016 *JLPS* 200.

5 Anseeuw *et al.* 2012 <https://www.landcoalition.org>; Larson and Springer 2016 <https://www.iucn.org>. There are also other standards in terms of the Universal Declaration of Human Rights which establishes rights to property alone and in association with others. Rights to property are also guaranteed through the American Convention on Human Rights and the African Charter on Human and Peoples' Rights.

6 11 Of 2004.

7 It should be noted that the *CLARA* has been revoked by the Constitutional Court case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* (hereinafter the *Tongoane* case [2010 6 SA 214 (CC)] Thus, this study only highlights the principal provisions of the *CLARA*. This is to be done in the past tense since technically, the *CLARA* does not exist. Moreover, the Communal Land Tenure Bill was born in 2016 to replace the *CLARA* and it is discussed thoroughly in chapter 3. Ng'ong'ola "Constitutional Protection of Property" in Saruchechea *Securing Land and Resource Rights in Africa* 66.

8 The *Tongoane* case. The case is discussed in detail in chapter 4.

9 GN 2437 in GG 40965 of 7 July 2017.

## 1.2 *Research problem*

### 1.2.1 *Tenure security*

According to Cotula *et al.*<sup>10</sup> under customary systems, access to land and resources is an integral part of social relationships. Hence, the communal land tenure system is founded upon social relationships. There is no precise definition of land tenure security. In negative terms land tenure insecurity occurs when there is minimum security in land and the landholder has temporary, inclusive claim on such land together with its produce. Over and above this, the landholders' "right" to make decisions on that land is limited; consequently, he cannot alienate it.<sup>11</sup> Thus, land tenure security is achieved when individuals have rights in land

...on a continuous basis, free from imposition or interference from outside sources as well as the ability to reap the benefits of labour and capital invested in that land, either in use or upon the transfer to another holder.<sup>12</sup>

Over and above this, land tenure security is important because it not only provides a basis for local governance, the stewardship of land and other natural resources, but it also promotes the recognition of human rights. Accordingly, secure tenure in land determines a number of factors such as:

- who is allowed to use which resources and in what way;
- for how long and under what conditions; and
- who is entitled to transfer rights to others and how.

---

10 Cotula *et al.* "Changes in Customary Land Management Institutions" in *Changes in Customary Systems in Africa* 36; Kalabamu 2000 *LUP* 306. Kalabamu refers to land access by virtue of belonging to a particular community "the right of avail".

11 Brasselle *et al.* 2001 *JDE* 371; Kalabamu 2000 *LUP* 306.

12 Brasselle *et al.* 2001 *JDE* 371; Kalabamu 2000 *LUP* 306; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 88.

Communal tenure rights are often described as a “bundle of rights” which comprises of rights to access, use, manage, exclude others from and alienate land or its resources. Different rights in the bundle may be shared or divided in a number of ways and among stakeholders, along with the obligations and responsibilities associated with rights.<sup>13</sup>

Springer and Larson<sup>14</sup> opine that secure communal land tenure is important for the empowerment of indigenous communities. In addition to providing the basis for their livelihoods and cultures, indigenous peoples assert that rights to lands, territories and resources are fundamental to their ability to protect and maintain their environments.<sup>15</sup> The prominent recognition of land tenure rights as a critical element of good governance is therefore reflected in a range of international frameworks that have been adopted on rights to land and its resources.

This leads to the first research question: Is tenure security feasible for all citizens in the rural communities of South Africa? The research question on tenure security is two-tiered in that it seeks to determine whether tenure is secure for rural communities of South Africa as a whole as well as investigating whether women, as a collective are afforded equal rights in land as their male counterparts. In the next section the latter part of this enquiry is discussed.

---

13 Okoth-Ogendo “The Nature of Land Rights” 95-99; Cousins 2007 *JAC* 282; Isinika and Kikwa “Promoting Gender Equality” in Stahl (ed) *Looking Back, Looking Ahead* 88.

14 Larson and Springer 2016 <https://www.iucn.org>; Kalabamu 2000 *LUP* 306.

15 Larson and Springer 2016 <https://www.iucn.org>; Kalabamu 2000 *LUP* 306.



### *1.2.2 Women's access to communal land*

In 1995 the Government of South Africa formally undertook to treat its women citizens equally with their male counterparts in relation to rights in land; this was done through the ratification of the United Nations' Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW).<sup>16</sup> In particular, Article 14 of the Convention states:

State Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetarised [sic] sectors of the economy.

The *Constitution* of South Africa being the supreme law of the Republic also reinforced the protection of women in terms of section 9 (1) which provides that everyone is equal before the law and as such has the right to equal protection and benefit of the law. Sub-section 3 thereof specifically prohibits the discrimination on the basis of sex. In the same light, Mnisi-Weeks<sup>17</sup> is of the opinion that women and children make up for more than half of rural constituencies but every so often find themselves in vulnerable positions of landlessness as a result of male patriotism. Additionally, despite all the legislative measures in place, women in South Africa still acquire land through their relationships with male relatives:<sup>18</sup> As a girl child, the land belongs to the father until such child is married. When married, it belongs to the husband. In the case of widowed women, land is accessed through inheritance. Even then, preference is given to older widows who have

---

16 United Nations Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW, CEDAW in South Africa, National Institute for Public Interest Law and Research, Pretoria, 1995.

17 Mnisi-Weeks 2011 *SACQ* 5; Claasens 2005 <https://www.plaas.org.za>; Jacobs 2009 GC 1681.

18 Weideman *Women, Patriarchy and Land Reform* 371; Jacobs 2009 GC 1680; Dancer 2017 *SLS* 7.

children (especially boys).<sup>19</sup> All the same, in the event that a widow is younger and the probability of remarrying is greater, she loses her husband's land to the family or the chief, whatever the case may be.<sup>20</sup>

On the other hand, there have been a significant number of changes regarding single women's access to residential sites in former homeland areas since South Africa's transition to democracy in 1994. According to Claasens<sup>21</sup> this is contrary to official customary law inherited from apartheid, under which only married men were eligible for the allocation of residential sites. She<sup>22</sup> maintains that this change was not triggered by a new law or land reform measures but was an outcome of unplanned local negotiations between women and land authorities that began around 1994 and have since gathered momentum.<sup>23</sup> To effectively codify the practices as they happen within societies, Claasens<sup>24</sup> suggests that ordinary community members

---

19 Weideman *Women, Patriarchy and Land Reform* 371; Jacobs 2009 *GC* 1680; Dancer 2017 *SLS* 7.

20 Weideman *Women, Patriarchy and Land Reform* 384; Wisborg 2002 *CIEDS* 22; Claasens and Ngubane "Women, Land and Power" in *Putting Feminism on the Agenda* 4.

21 Claasens 2013 *JAC* 74. The scale and pace of single women obtaining residential sites varies between areas and from province to province, but is taking place throughout the "communal areas" of South Africa.

22 Claasens 2013 *JAC* 73; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 88.

23 Rural women's organizations went head-to-head with traditional leaders during the negotiation of the 1996 Constitution. The traditional leader lobby argued that the right to equality should be subject to customary law, the National Movement of Rural Women that customary law should be subject to the Bill of Rights, including equality. The women won that round, and won again when the Constitutional Court ruled against the chief's objections to the Constitution during the certification of the Constitution (*Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) at para 197). The majority of cases in the Constitutional Court concerning customary law have been about women's rights and case after case, the court has struck down "official" customary law provisions and precedents as discriminatory and a distortion of the true customary law ...which recognizes and acknowledges the changes which continually take place. [*Bhe and Others v Khayelitsha Magistrate and Others* 2005 1 SA 580 (CC) para 86].

24 Claasens 2013 *JAC* 74.

should be involved in the process defining and developing custom at the local level.<sup>25</sup> Nonetheless, she<sup>26</sup> warns that for rural people to be able to participate meaningfully in the legislative process, the terms of debate need to be based in the concrete realities of daily life and not concealed by the stereotypes of ahistorical customary law that claim that women are not allowed to hold land. In this light, the second research question reads: In what ways can women's access to land be improved?

### *1.2.3 Resolution of land disputes*

In 1997 the South African Law Reform Commission made an attempt to establish community courts as a means of adopting alternative dispute resolution mechanisms.<sup>27</sup> This was rejected by the Department of Justice and Constitutional Development. Subsequently, the Traditional Courts Bill was introduced and brought before Parliament only in 2008. Nothing remarkable happened with the bill until 2009 when the then Government discussed it. The Traditional Courts Bill, in terms of its preamble, was intended to affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation and to provide for the structure and functioning of traditional courts in line with constitutional imperatives and values and furthermore, to enhance customary law and the customs of communities observing a system of customary law. Even so, it seemed all the efforts to enact the TCB were futile since the 2011 version of the TCB

---

25 This practice of involving ordinary citizens has been re-emphasized in the Constitutional Court on a number of occasions including the cases of *Doctors for Life International v Speaker of the National Assembly and Others* 2006 6 (CC) 416; *Tongoane* case. Refer to footnote 8. It was decided that broadening the involvement of ordinary people in the national legislative process opens up processes of consultation which can have far-reaching impacts on the content of the new laws.

26 Claasens 2013 *JAC* 74; Claasens and Mnisi-Weeks 2009 *SAJHR* 493.

27 SALRC 1997 <https://www.salawreform.justice.gov.za>.

spawned resistance in rural provinces and within the legislative process.<sup>28</sup> The main contention was that this version of the TCB affected matters falling under the jurisdiction of provincial governments, and therefore had to be approved by a majority of the provinces in the National Council of Provinces.<sup>29</sup> In effect, the adoption of the TCB would imply that it substituted the remaining sections<sup>30</sup> of the *Black Administration Act*.<sup>31</sup> The period of the TCB has since lapsed, implying that it will no longer be passed.<sup>32</sup> This in turn implies that the resolution of disputes remains under the authority of the *Black Administration Act* and the *Traditional Leadership Framework and Governance Act* (hereinafter *TLFGA*).<sup>33</sup>

As the writing of the thesis progresses, alternative dispute resolution methods are discussed as espoused by the legislation relating to communal land in South Africa, Tanzania and Kenya. By doing this the discussion determines

---

28 The majority of provinces voted against the TCB in 2013. Although some political pressure was applied, the support of a majority of provinces was still not forthcoming by 2014. Thus, the TCB was allowed to "lapse" with the hope that it would be re-tabled in Parliament after the 2014 elections.

29 The proper tagging test was applied and in the case of *Ex Parte President of the Republic of South Africa: In Re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) at para 25 and referred to in the case of *Tongoane* case.

30 Namely, sections (hereinafter s) 12 and 20. These provisions empower chiefs and headmen to determine civil disputes and try certain offences in traditional courts. In terms of the *Repeal of the Black Administration Act* and the Amendment of Certain Laws Amendment Bill of 2012, "...these sections and the Schedule will remain in operation until substitute legislation regulating the role and functions of the institution of traditional leadership in the administration of justice is promulgated and implemented". There are currently nine Bills that affect the rights of the rural communities. Six of these have not been published yet and three have been published for public comment. Among these are the Traditional Leadership and Governance Framework Amendment Bill and the Traditional and Khoi-San Leadership Bill. They collectively echo and seek to entrench essential aspects of the *Bantu Authorities Act* that shaped apartheid. Claasens 2016 <https://www.historymatters.co.za>.

31 38 of 1927.

32 The last version of the TCB was rejected by Parliament in 2014. This version would have given authority to the traditional leaders to strip anyone customary rights (land rights) made it a criminal offence to ignore a summons from them. Claasens 2016 <https://www.historymatters.co.za>.

33 41 of 2003.

which technique is more suitable and why that is so. The third research question is: Does a proper resolution of disputes system guarantee land tenure security?

### **1.3    *Research questions***

#### **1.3.1    *Main research question***

Is land tenure secure in the areas that practice communal landholding in South Africa, Tanzania and Kenya?

##### **1.3.1.1        Subsidiary research questions**

- (a) Is land tenure security feasible for members of the rural communities of South Africa?
- (b) In what ways can women's access to land be improved?
- (c) Does a proper resolution of disputes system guarantee some level of land tenure security?

The next section contains a contextual discussion of the Tanzanian and Kenyan communal land tenure systems. In doing so, reasons are given for selecting the Kenyan and Tanzanian jurisdictions amongst all other African countries as comparisons against the South African communal land tenure system. A brief discussion then follows to show the similarities and differences of their communal land tenure systems. This comparison is done thematically as indicated above.

## **1.4 An introductory analysis of the South African communal land tenure system compared with Kenya and Tanzania**

### **1.4.1 Tenure security**

As stated earlier, the communal land tenure system of any country is an extensive subject, hence the selection of only particular aspects of communal land tenure. These are communal land tenure security, women's access to communal land and dispute resolution methods on communal land. These concepts are only discussed briefly below and protracted discussions then follow in the succeeding chapters. The Kenyan and Tanzanian jurisdictions were selected for the principal reason that they, to a certain extent, had similar communal land tenure difficulties as South Africa but are now progressively overcoming them.<sup>34</sup> Over and above this, Kenya has had land conflicts in the past including its 2007 post-election conflict, but is gradually overcoming them. Kenya has enacted relatively new land legislation that seeks to safeguard community land rights.<sup>35</sup> In the same light, Tanzania is one of the first few countries in Africa to promulgate an informative village land legislation, as such, important lessons can be drawn therefrom.

Likewise, Tanzania, Kenya and South Africa being British colonies (protectorates), share more in common than any other African countries. South Africa and Kenya were targeted mainly for their gold and other raw materials (ivory in Kenya), while Tanzania was colonized primarily for its vast native land. Additionally, Tanzania is often depicted as a "darling" of the international community for its good records in the promotion of peace,

---

34 The *ujamaa* project in Tanzania, apartheid in South Africa and the post-election in Kenya.

35 Klaus and Mitchell 2015 *JPR* 627; Verma 2014 *FE* 52; Onyango 2014 *Sociology and Anthropology* 306.

stability, gender equality, as well as good governance.<sup>36</sup> Finally, the communal land tenure insecurities in these three countries are reportedly a direct result of the colonisation.<sup>37</sup> Thus, South Africa, Tanzania and Kenya have in common a land tenure history which left their citizens land impoverished but are well on their way to resolving these issues. The history of land tenure insecurity in each of these countries is analysed in the next section.

The communal land tenure issues are not unique to South Africa. The post-colonial Kenya as well as Tanzania have been experiencing similar tenure politics in the past, up until the promulgation of the *Community Land Act*<sup>38</sup> and the *Village Land Act*<sup>39</sup> (hereinafter the *CLA* and the *VLA*) in Kenya and Tanzania respectively. Therefore, the communal land tenure reform legislation in South Africa, Tanzania as well as Kenya aims to strengthen communal land rights of the rural community members. In South Africa, and Kenya, the legislation provides for the transfer of communal land to communities and the conversion into ownership of land rights in communal land to communities that own or occupy such land.<sup>40</sup> Tanzanian communities, on the other hand, hold a customary right of occupancy while the President holds all the land in trust for them.<sup>41</sup>

---

36 Ghana and Tanzania are highly commended for their respect for human rights especially in land matters, although this is commendable, this issue is moot as is shown in the upcoming discussions. The 2013 report repeatedly cites Ghana and Tanzania as models of land law reform in Africa.

37 Klaus and Mitchell 2015 *JPR* 627; Verma 2014 *FE* 52; Heck 2009 <https://www.hj2009per1tanzania.weebly.com>.

38 27 of 2016.

39 5 of 1999.

40 S 5(b) of the CLTB and s 4 of the *CLA*.

41 S 3 of the *VLA*.

The Government of Tanzania enacted the *VLA* to fend off the effects of the *ujamma* programme<sup>42</sup> which left the citizens land deprived. In terms of its preamble the primary objective is to provide for the management and administration of land in villages and for all matters related thereto. It is important to note that under the Tanzanian *Land Act*<sup>43</sup> there are two types of land acquisition, namely customary rights of occupancy and granted rights of occupancy.<sup>44</sup> In turn, section 18(1) of the *VLA* makes it overtly clear that "a customary right of occupancy is in every respect of equal occupancy status and effect to a granted right of occupancy".

Similarly, the Kenyan Government responded to the needs of rural communities by promulgating the *CLA*. Its principal objects are to provide for the recognition, protection and registration of community land rights as well as to manage and administer community land.<sup>45</sup> In terms of section 2 thereof, customary land rights are defined as rights conferred by or derived from African customary law, customs or practices that are in line with the Kenyan *Constitution*. Likewise, the community tenure system refers to the unwritten land ownership practices in certain communities in which land is owned or controlled by a family, clan or a designated community leader. Moreover, the *CLA* provides for registration of community land in a

---

42 *Ujamaa* is a policy set by Tanzania's first President Julius Nyerere after her independence as a British colony. *Ujamaa* translates as "African socialism". Through this system chiefdoms and freehold title in land were abolished. Wily on the other hand believes that the absence of such a definition in *VLA* 1999 is exactly 'what' customary law is: She believes that this omission leaves "...plenty of scope for a disgruntled sector in the village to use customary practice to dictate a land claim, against the more general or more modern decision-making of the community as a whole". According to FAO (FAO <https://www.un.org>) there is a confusion of whether "customary law" is the *ujamaa* as set by President Nyerere or the custom that was in operation before the introduction of the *ujamaa* programme.

43 4 of 1999.

44 S 61 *LA*; Wily "Customary Tenure" in Graziadei and Smith (eds) *Comparative Property Law* 460; Heck 2009 <https://www.hj2009per1tanzania.weebly.com>.

45 *CLA* Preamble.



community land register that has been established under the *Land Registration Act*.<sup>46</sup> Hence, this relates to the first research question namely, whether tenure security is feasible for all rural communities of South Africa, Tanzania and Kenya.

#### 1.4.2 Women's access to communal land

The Tanzanian *VLA*, Kenyan *CLA* and the South African CLTB have all recognised the marginalisation that women face when it comes to communal land and have thus taken it upon themselves to explicitly provide that men and women are all equal especially in land matters.<sup>47</sup> At the apex of women's discrimination lies issues of inheritance, gender parity as well as representation in the decision-making bodies. More often than not, inheritance issues are administered in terms of customary law but its very nature is discriminative against women.<sup>48</sup> The Tanzanian, Kenyan and South African legislation all provide for equal access to land and other natural resources, however, this is not always the case in the communities since most customary practices are patriarchal in nature.<sup>49</sup> Also, representation in the decision-making bodies does not guarantee better treatment of women but will definitely be a step in the right direction. When women feel empowered and entitled to the land they use, greater yields can be expected.

Yngstrom<sup>50</sup> caveats that the problem of women's land insecurity is not one to be solved by institutional reform, but by repealing and replacing discriminatory laws. It has also been claimed that these institutions do not

---

46 S 8 of the *Land Registration Act* 3 of 2012.

47 S 14(c) (i) *CLA*, s 20 (2) *VLA*.

48 Njoh *et al.* 2016 *JAAS* 761; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 89.

49 Claasens 2013 *JAC* 73; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 89.

50 Yngstrom 2002 *ODS* 25; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 90.

vest any real power and as such, they are toothless bulldogs.<sup>51</sup> The succeeding chapters therefore deal with these issues and ultimately suggest how they can best be overcome. Additionally, different approaches to this marginalisation are discussed, to determine the atrocities being committed against women by failing to safeguard their rights in communal land; the feminist and human rights approaches are focused on in this regard. These discussions ultimately lead to the second research question which scrutinizes the different ways in which women's access to communal land can be improved.

#### *1.4.3 Dispute resolution*

In Tanzania there are not only dispute resolution measures in terms of section 60 of the *VLA*, but the *VLA* also sets out how each village may declare its village.<sup>52</sup> The land does not have to be surveyed; the critical criterion is simply an agreement with neighbours after which the land is registered in the name of the village.<sup>53</sup> Furthermore, in the event that there is confusion of what laws are to be applied in a particular village, section 20(2) of the *VLA* 1999 provides that the customary law to be applied to land held under customary tenure shall have regard to the customs, the traditions as well as the practices of the community concerned insofar as they conform to the principles of the Tanzanian National Land Policy and of any other written laws.

---

51 Shivji "The Land Acts 1999"; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 90.

52 S 7 *VLA*.

53 In terms of s 22 of the *Local Government (District Authorities) Act* 7 of 1982 (s 7 (1) (a) *VLA*.

Equally, the alternative dispute resolution methods have become the preferred method of solving disputes in rural communities; the legislative pronouncements are proof of this fact. Negotiation as a method of traditional dispute resolution method has been used in the rural communities of Africa since time immemorial and has since gained traction through statutory enactments.<sup>54</sup> It is encouraging to note that it is widely acknowledged in South Africa, Tanzania and Kenya. In this light, the CLTB recognises negotiation,<sup>55</sup> mediation<sup>56</sup> and adjudication.<sup>57</sup> The *VLA* in turn mainly endorses mediation<sup>58</sup> while the *CLA* promotes arbitration<sup>59</sup> as the main techniques of community dispute resolution.

Arbitration is a procedure in which a dispute is submitted by agreement of the disputants to one or more arbitrators who make a binding decision on the disputants. In this instance, the disputants have to both agree on the arbitrator(s) who will help them resolve their dispute.<sup>60</sup> On the contrary, mediation is a voluntary party-centred and structured negotiation process where a “neutral third party” assists the parties in amicably resolving their dispute.<sup>61</sup> Finally, negotiation occurs when people cannot achieve their own goals without the cooperation of others in the dispute resolution process.<sup>62</sup> Through these discussions, it is determined if a proper dispute resolution system can advance the communal land tenure security; this directly addresses research question three.

---

54 Mashamba *ADR in Tanzania* 5; Kalabamu 2000 *LUP* 305; Kalabamu 2000 *LUP* 307.

55 S 45(1).

56 S 45(3).

57 S 45(4)(a) and (b).

58 Ss 60-62.

59 Ss 39- 42.

60 Mashamba *ADR in Tanzania* 77.

61 Mashamba *ADR in Tanzania* 63.

62 Mashamba *ADR in Tanzania* 53; Thompson *et al.* 2010 *ARP* 491.

### ***1.5 Hypothesis and assumptions***

The following hypotheses are made regarding this study:

- (a) Land tenure is insecure in the rural communities of South Africa.
- (b) Women are treated as second class citizens with little to no rights in communal land.
- (c) An effective and proper dispute resolution system is necessary for land tenure security.

For purposes of this study, the following assumptions are made:

- (a) Communal land tenure security is realizable in the rural areas also for women.
- (b) Suitable alternative dispute resolution techniques are available for rural communities.

### ***1.6 Aims and objectives***

- (a) to scrutinise the history of the South African communal land tenure insecurity, women's access to land and the dispute resolution;
- (b) to determine if the communal land tenure system of South Africa is secure for the rural poor;
- (c) to analyse the communal land tenure policies, legislation and case law in relation to land tenure security, women's access to communal land and resolution of disputes;
- (d) to compare the communal land tenure systems in South Africa, Tanzania and Kenya relating to communal land tenure security, women's access to land as well as dispute resolution; and
- (e) to distinguish between the communal land tenure formalisation approaches adopted in South Africa, Tanzania and Kenya.

### ***1.7 Research methodology***

The study is principally aligned with the literature perusal and analysis of germane academic literature and journals, legislation, case law and internet sources relating to the communal land tenure. An in-depth study of the three research questions was conducted to determine if the legislature through the CLTB had dealt with the improprieties of *CLARA* as pronounced by the courts through case law. Selected aspects of the communal land tenure system in South Africa, namely land tenure security, women's access to land and dispute resolution are compared with Kenyan and Tanzania law.

### ***1.8 Chapter's outline***

Chapter 1: Background and research questions

Chapter one gives a brief background to the communal land tenure system in South Africa in comparison to those in Tanzania and Kenya. In these discussions, it is shown that there are a number of discrepancies in aspects of tenure security, injustices towards women's access to communal land and unsatisfactory dispute resolution methods. Definitions are also given to illustrate what is meant by insecure tenure, lack of access to communal land by rural women as well as resolution of conflicts.

Chapter 2: An overview of the communal land tenure in South Africa

A brief overview of the communal tenure system in South Africa is deliberated upon, since numerous studies have shown thorough evaluations of land-holding in the rural areas where land is communally owned. This chapter begins by discussing the precise nature of communal land rights and also includes definitions of the terminology that is used throughout the study. The study is confined to only three issues namely, tenure security, women's access to communal land and dispute resolution. These three themes are

selected amongst a broad spectrum for the reason that they are the most contemporary and most contested issues in South Africa at the time of engaging in this study.

### Chapter 3: The South African communal land tenure legislation and policies as well as issues raised by case law

Chapter three assesses and determines the legislation that was meant to govern the communal tenure to discover whether the inconsistencies that were embodied therein have been dealt with in an appropriate manner. The main issues in *CLARA* as discussed by case law touched mainly on the revocations of the secure landholdings that were already in place before its promulgation and the unequal access of land between rural men and women which was clearly inconsistent with the South African *Constitution*. In this regard, many commentators were in agreement that *CLARA* erroneously gave extensive administrative powers to the institution of traditional leadership. This would have in turn led to abuse of those very powers entrusted to traditional leaders. Therefore, the CLTB is analysed to determine whether these concerns have been addressed.

### Chapter 4: A comparative assessment of the communal land tenure systems in South Africa, Tanzania and Kenya

In this chapter, the current South African communal land tenure system is analysed to scrutinise whether rural community's rights are safe from exploitation by different stakeholders; this is to be done by comparing positions in Kenya and Tanzania. Women's rights or lack thereof in communal land is also discussed to highlight their discrimination. This is done by first showing the position in South Africa and then matched against the Kenyan and Tanzanian positions. Ultimately, an efficient dispute resolution system is

said to be essential to the management of any land; this is tested in the final segment of the chapter.

## Chapter 5: Alternative approaches used to secure communal land tenure in South Africa, Tanzania and Kenya

There are numerous ways of ensuring secure tenure in land, even in relation to communal land. These methods have been strongly advocated for by the World Bank through the years. However futile its efforts have proved to be, there are a number of ways that the World Bank has introduced in an effort to secure communal land tenure. These approaches have changed over the years and will continue to change because no one technique will be a one-size-fits-all. The 1980's policy debate focused on the individualisation of tenure focused on economic development, while in the 1990's, the focus turned to the sustainable use of land resources.

By the late 1990s, the World Bank analysts concurred that formal individual land titling may not be the most desirable way to secure tenure rights and facilitate land transfers. In 2003 the Policy Research Report asserted that group land rights have short-term advantages. The 2013 World Bank position has veered from the original standpoint by endorsing legal pluralism and advocating for a leading role for Africa's customary authorities and practices in the governance of land. This chapter therefore, sheds light on the various benefits and weaknesses of each system to determine how to secure communal land tenure.

## Chapter 6: Conclusion and recommendations

In this chapter suggestions are made regarding the way forward for the South African communal land tenure system as a whole relying heavily on the critical literature discussed in the previous chapters. Lessons that can possibly

be learnt from the comparative jurisdictions are drawn and subsequently analysed to determine if they can be adopted in the South African sphere.



## **CHAPTER TWO**

### **AN OVERVIEW OF COMMUNAL LAND TENURE IN SOUTH AFRICA**

#### ***2.1 Introduction***

In this section, a brief history the South African communal land tenure is conferred. Numerous studies have shown thorough evaluations of land-holding in the rural areas where land is communally owned. The chapter begins by discussing the precise nature of communal land rights and then defines the terminology used throughout the study. As cautioned, communal land tenure is a vast subject on its own hence, only three issues concerning communal land tenure are concentrated upon *viz.* tenure security, women's access to communal land and dispute resolution. These themes were selected amongst a broad spectrum for the sole reason that they are the most contemporary and the most contested in South Africa at the time of engaging in this study.

In addition, aspects of constitutional and land information law are dealt with as supplementary subjects to this study. The latter aspect is very contentious in most jurisdictions as a result of the misconceptions about the exact nature of rights in communally owned land (property); this section sheds light in this respect. In terms of the former aspect, most national constitutions are said to protect the rights of their subjects and/or their property. This notion is tested in this chapter. Do communal land rights enjoy the same constitutional protection as their private property right counterparts? It should be forewarned at this stage that the words "traditional," "customary," "communal," "indigenous," and "African" land tenure systems all mean the non-urban land tenure that persists in many rural areas. From time to time, they may be used synonymously in this study.

### 2.1.1 Nature of communal land rights

Studies in South Africa have demonstrated an increasing breakdown of customary management arrangements and the often dysfunctional mixture of old and new institutions and practices.<sup>1</sup> In the midst of all this, Adams<sup>2</sup> forewarns that people are often left uncertain about the precise nature of their rights. This in turn confuses them about the extent to which institutions and laws affect them. This is true for most African countries.<sup>3</sup> Yet, for the most part, the World Bank<sup>4</sup> has been putting pressure on most African countries to formalise their communal land tenure systems.

According to Adams *et al.*<sup>5</sup> around the 1980s the policy debate on the individualisation of tenure focused on economic development, while in the 1990s the focus turned to the sustainable use of land resources. Both these arguments underrated the importance of customary land tenure systems, which are an integral part of the social, political and economic framework. In particular, these arguments overlook the inadvertent effects of undermining communal land tenure systems, which usually protect poor and vulnerable members of the communities.<sup>6</sup> They also tend to disregard the empirical evidence that “traditional tenure systems” can be flexible and responsive to

---

1 A comprehensive discussion on this issue follows in the next chapter. These dysfunctional communities were a consequence of the apartheid policies that forced many women to take over the running of rural property while their husbands and sons were forced into wage labour on the mines and in the cities.

2 Adams *et al.* 1999 <https://www.odi.org>; Bennett *et al.* 2013 *LUP* 27.

3 Typical example to illustrate this concept include the South African Communal Land Rights Act when it sought to introduce the *Land Administration Committees versa vis* the traditional authorities. This introduction of the new institutions could create confusion as to which institution is responsible for what, more so for rural people. Collins and Mitchell 2017 *JAC* 13.

4 Byamugisha *Securing Africa's Land for Shared Prosperity* 55. Deininger and Binswanger *The evolution of the World Bank's land policy* 14.

5 Adams *et al.* 1999 <https://www.odi.org>; Collins and Mitchell 2017 *JAC* 5.

6 Adams *et al.* 1999 <https://www.odi.org>; Collins and Mitchell 2017 *JAC* 5; Toulmin and Quan *Evolving Land Rights* 126. Knight *Statutory Recognition of Customary Land Rights* 109.

changing economic circumstances.<sup>7</sup> By the late 1990s the World Bank analysts concurred that formal individual land titling may not be the most desirable way to secure tenure rights and facilitate land transfers.<sup>8</sup> Thus, the 2003 Policy Research Report asserted that group land rights may have short-term advantages, though the expectation is that such systems will still “evolve” towards formal titling as developments occurred.

The 2013 World Bank report by Byamugisha<sup>9</sup> on the other hand, veered from the original standpoint from the 1990’s by endorsing legal pluralism and advocating for a leading role for Africa’s customary authorities and practices in the governance of land. This view has also been criticized for its failure to recognize that most existing customary land tenure systems embody considerable inequalities and intra/inter group conflicts.<sup>10</sup> Two central issues in the 2013 report lie at the apex of the discussions namely:

(a) land law reform as a tool for resolving land conflicts; and

(b) the role of land law reform in addressing gender inequalities.

While the 2013 World Bank report provides insights for improving land governance in Africa, Collins and Mitchell<sup>11</sup> have contended that its eagerness to strengthen the role of both customary authorities and customary practices in the communal land tenure territory perpetuates a distorted view of local land governance and an idealized view of community practices. What it fails to consider is that in promoting customary authorities and practices, it does

---

7 Collins and Mitchell 2017 *JAC* 4.

8 Deininger and Binswanger *The evolution of the World Bank’s land policy* 14.

9 Although the Byamugisha report itself is not a “game-changing” policy document, it nonetheless reconfirms the World Bank’s commitment to devolved land governance and contributes to a simplified view of land governance in global policy circles. At a time when land rights and security routinely grab global headlines, there is much room for improvement in such recommendations.

10 Peters 2009 *JSAS* 1312; Collins and Mitchell 2017 *JAC* 2.

11 Collins and Mitchell 2017 *JAC* 2.

not recognize the exploitative and contentious politics embodied within the “customary land tenure systems” as well as the local power dynamics that undermine the ability of marginalized to secure land rights.

On the contrary, Okoth-Ogendo<sup>12</sup> outlines that “...a ‘right’ signifies a power that society allocates to its members to execute a range of functions in respect of any given subject matter”. In Africa<sup>13</sup> land rights tend to be attached to membership of some unit of production and are maintained through active participation in the processes of production and reproduction at particular levels of social organization. Furthermore, despite the general misconception that customary property rights are inferior to private property rights, the courts have emphasised time and again that these rights are on the same footing as their private property rights counterparts and are all subject to the Constitution.<sup>14</sup>

In the *Alexkor Ltd and Another v Richtersveld Community and others*<sup>15</sup> (hereinafter the *Alexkor* case) the court held that the South African *Constitution* acknowledges the originality and distinctiveness of indigenous law (customary law) as an independent source of norms within the legal system.<sup>16</sup> At the same time the South African *Constitution* while giving force to indigenous law, makes it clear that such law is subject to the *Constitution* and has to be interpreted in the light of its values. Courts are obliged, therefore, to apply customary law when it is applicable, subject to the *Constitution* and any legislation that deals with customary law.

---

12 Okoth-Ogendo 1989 *Africa* 6.

13 Okoth-Ogendo 1989 *Africa* 8.

14 108 of 1996.

15 2004 5 SA 460 (CC) para 51.

16 By inference, rights that accrue from the customary law system should be recognized as equal to their private property rights counterparts.

Pienaar<sup>17</sup> concurs that western property rights have been given superiority out of context. She<sup>18</sup> maintains that it is fallacious to argue that land tenure is insecure in the rural areas for the mere reason that the state owns the land in question. The South African communal areas involve land where the state is the owner and land is used and exploited by individuals of that community daily.<sup>19</sup> These use rights are in line with customary law principles and customs or statutory amendments. Thus, when communal land rights are recognized as valid tenurial arrangements, this indicates that traditional authorities are also recognized and their recognition in turn implies legitimisation of community membership both in legal status and political identity that is needed in communal areas.<sup>20</sup> Pienaar<sup>21</sup> and Boone<sup>22</sup> share the same sentiments where the latter asserts that

...state recognition of these communities as natural units confers upon them the kind of sovereignty (as least in the moral sense) that the individual holds in liberal constitutional philosophy. It also constructs local political jurisdictions whose political legitimacy pre-dates the founding of the modern African republics.

In a capricious turn of events, Boone<sup>23</sup> argues on the constitutional aspects of this unrelenting debate. According to her, there is nothing wrong with

...the debate pitting those who advocate growth-promoting individualization and transferability of property rights against those who want to use land tenure policy to protect the use rights and subsistence rights of farmers.

---

17 Pienaar *Land Reform* 464.

18 Pienaar *Land Reform* 464.

19 Pienaar *Land Reform* 464; This is the principle of trust that was first codified in South Africa through s 3 of the *Mineral and Petroleum Resources Development Act* 28 of 2002 and the *National Water Act* 36 of 1998. Claasens 2014 *JSAS* 772.

20 Pienaar *Land Reform* 464.

21 Pienaar *Land Reform* 464.

22 Boone 2007 *AA* 578.

23 See Boone 2007 *AA* 557. Boone's discussions have centered on how best to formalise existing land rights into systems that can be operated through a market economy, with many policy oriented analysts becoming more concerned with market access, fairness and regulation than with older debates about the pros and cons of markets *per se*.

In the midst of all these debates people are blind to the implications on rights of the community members involved. It is articulated that the prospect of "...land law reform also raises a complex bundle of constitutional issues".<sup>24</sup> Over and above this, in terms of section 11 (1) and (2) of the Communal Land Tenure Bill (hereinafter the CLTB), the nature of rights include ownership where land is owned or occupied by or transferred to a community as well as the right to use, lease or any other right relating to property as may exist in law.

In the subsequent section a systematic analysis of the communal tenure system is to determine what it entails and what different commentators have written about it, more especially in the South African context. An outline of the South African communal land legislative framework is also given to illustrate its origins. Nonetheless, the legislative developments are only discussed from the promulgation of the *Constitution*, 1996, up to the last Act preceding the *Communal Land Rights Act* (hereinafter *CLARA*) which is scrutinised chapter 3.

---

24 Boone 2007 44 578.

## **2.2 Communal land tenure**

### *2.2.1 Introduction*

Land has a sentimental, spiritual and cultural connection to most rural African communities; it is more than a simple asset of economic value.<sup>25</sup> It is also an important symbolic resource that heavily influences status, rites of passage, and identity.<sup>26</sup> Hence, it is this unique and special cultural and spiritual connection between Africans and their lands "...that poses serious challenges and complexities when it comes to the regulation of land issues, including land holding and security of tenure".<sup>27</sup> So, as hard as it may be to discuss and describe land tenure issues, the study, at most, attempts to shed light in this respect. Bennett<sup>28</sup> claims that this difficulty is brought about by the propensity to interpret customary systems of tenure in terms of common law; the researcher is mindful not to fall into this trap.

Communal land tenure on the other hand is said to be a concept that was applied throughout the centuries which persisted nations to hold their land in common.<sup>29</sup> Far as it may have its roots, Bennett<sup>30</sup> expounds that this ideology still serves the same function which is to suggest that groups of people, who are closely bound together by common interests and values, could share land. Wily<sup>31</sup> also streamlines the communal tenure system concept by stating that since "...tenure means landholding," communal or customary land tenure therefore refers to the system that is used to denote "ownership" possession

---

25 Moagi 2008 *INGOJ* 214; Moyo *et al.* 2013 *G&B* 5393.

26 For example, before the Korekore people of Zimbabwe touch their land, they go to the spirits, which are said to be linked to certain animals or trees. Verma 2007 <https://www.landcoalition.org>; Moagi 2008 *INGOJ* 214.

27 Mailula 2011 *CCR* 75.

28 Bennett *Customary Law in South Africa* 374.

29 Bennett *Customary Law in South Africa* 377.

30 Bennett *Customary Law in South Africa* 378.

31 Wily 2000 [http:// www.odi.org](http://www.odi.org); Cotula (ed) *Changes in Customary Systems in Africa* 10; Galaty 2016 *IJC* 709.

and access. Thus, Cousins<sup>32</sup> cautions against the idea that the language of “ownership” is universal. In the customary law context, different entitlements and interests are located in different persons while various entitlements or interests may simultaneously be centered or grouped in a community. It should be noted that:

- access to and control over land “cannot” be equated to common law ownership;
- land rights embody a balance of access, use rights, control and management; and
- tenure security prevails as long as rights are asserted by individuals and managed and controlled effectively by structures.

Essentially, under customary resource tenure systems, land is held by clans or families on the basis of diverse blends of group to individual rights, accessed on the basis of group membership and social status and used through complex systems of multiple rights.<sup>33</sup> Cotula<sup>34</sup> adds on that resource tenure systems are the bodies of rules and institutions that govern how land and natural resources are held, managed, used and transacted. In a nutshell, tenure is important for natural resource governance as it provides a foundation for local governance, the stewardship of land and natural resources and local livelihoods including benefit-sharing and empowerment.<sup>35</sup> In concurring with Okoth-Ogendo<sup>36</sup> on the nature of communal land, Cousins<sup>37</sup> formulates some principles and characteristics similar to most communal land tenure systems:

---

32 Cousins 2007 *JAC* 289.

33 Cotula (ed) *Changes in Customary Systems in Africa* 10.

34 Cotula (ed) *Changes in Customary Systems in Africa* 10; Kabia 2014 *CILJ* 718; Adams 2001 <https://www.sarpn.org>.

35 Larson and Springer 2016 <https://www.sida.org>.

36 Okoth-Ogendo 1989 *Africa* 6; Cotula (ed) *Changes in Customary Systems in Africa* 10-11.

37 Cousins 2007 *JAC* 293; Okoth-Ogendo, “The Nature of Land Rights under Indigenous Law in Africa” in *Land, Power and Custom* 99.



1. Land and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character (e.g. individual rights within households, households within kinship networks, kinship networks within wider 'communities').
2. Rights are derived primarily from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including gifts, loans and purchases).
3. Land and resource rights include both strong individual and family rights to residential and arable land and access to a range of common property resources such as grazing, forests and water. They are thus both 'communal' and 'individual' in character.
4. Access to land (through defined rights) is distinct from control of land (through systems of authority and administration). Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access and resolving disputes over claims to land. It is often located within a hierarchy of nested systems of authority, with many functions located at local or 'lower' levels.
5. Social, political and resource boundaries, while often relatively stable are also flexible and negotiable to an important extent; this flows in part from the nested character of social identities, rights and authority structures.<sup>38</sup>

In effect, from the abovementioned characteristics, it is apparent that the rights conferred by the communal land tenure system on the rural community members are in a class of their own and should not, under any circumstances be described in terms of Common or Western law concepts. The social nestedness thereof is what sets them apart and should be appreciated as such.

---

38 Cousins warns that the list is neither exhaustive nor all- embracing since, in some communities these characteristics are absent while in others the list is not enough to describe the system. Alternatively this formulation of principles may seem too idealistic and may not be a true reflection of the practices that take place in the communities. It may safely be inferred that the communities that still live in terms of the abovementioned principles are the exception and not the general rule. Cotula (ed) *Changes in Customary Systems in Africa* 10.

### 2.2.1.1 The conceptual framework

#### 2.2.1.1.1 The pre constitutional era

In a brief background, customary law tenure has been traced to as far back as the 1800's in South Africa. Around 1905 land could not be registered in the name of a native in the former Transvaal in terms of the *Volksraad Resolution* of 1884<sup>39</sup> and the *Pretoria Convention* of 1881.<sup>40</sup> Moreover, things took a turn for the better after the case of *Tsewu v Register of Deeds*<sup>41</sup> was decided. The court held that the abovementioned instruments had no force of law thereby implying that natives could register title in property in their own names. Nevertheless, it was not long after this judgement was passed when the *Natives Land Act*<sup>42</sup> was promulgated in 1913. This Act, together with the *Native Trust and Land Act*,<sup>43</sup> determined where black people could live by selecting areas where only blacks could occupy land (black spots),<sup>44</sup> thereby making it illegal for the sale of land outside of those areas.

Kloppers and Pienaar<sup>45</sup> confirm that this piece of legislation laid a foundation for apartheid and territorial segregation and actually formalized limitation on

---

39 *Volksraad Resolution* of 14 August 1884.

40 Article 13 of the *Pretoria Convention* 1881.

41 1905 TS 130 at 135.

42 27 of 1913.

43 18 of 1936. In terms of this Act individual land ownership by black people was abolished and replaced by trust tenure through the creation of the South African Development Trust, which was a Government body responsible for purchasing land in "released areas" for black settlement.

44 The Black spots as the name suggests, were only small patches of land in South Africa, thereby precluding black people from owning any other land in South Africa. If necessary land sales to black people needed to be approved by the Governor-General (President) in terms of the *Native Administration Act* of 1927, which applications were rejected in most cases. In the event that the application was approved, black people had to forfeit the "right" of having their land registered in their own names, instead, it was said to be held in trust on their behalf by the Minister of Native affairs, while the owners only enjoyed permanent use rights and occupation of the land.

45 Kloppers and Pienaar 2014 *PELJ* 681; Adams 2001 <https://www.sarpn.org>; Hoffman 2014 *JSAS* 707; Claasens 2014 *JSAS* 762.

black land ownership. They<sup>46</sup> rightly state that the drafters were under a misguided conviction that the differentiation based on ethnic differences was appropriate.

Furthermore, in those “spots,” two forms of tenure were recognized, namely occupation of land under permission to occupy and quitrent tenure. The latter was described as “title deed relation to land” despite the fact that it did not confer full ownership on the holder, while the former explicitly conferred use rights on the holder. Use rights and occupation of land were common to both tenure systems, but with permission to occupy, it was clearly stated that permission to occupy an allotment did not convey ownership.<sup>47</sup> In terms of the Regulations of the *Development Trust and Land Act*,<sup>48</sup> tenure in land was clearly not secure since the Governor-General was vested with tremendous powers over Black peoples and their land.<sup>49</sup> These vast powers and many other powers were later transferred to the President under the authority of the *Black Authorities Act*.<sup>50</sup>

In 1950 with the enactment of the *Black Authorities Act*, evictions instigated by the National Party Government took place. This also served to forcibly

---

46 Klopers and Pienaar 2014 *PELJ* 681; Hoffman 2014 *JSAS* 707.

47 *Tongoane* case para 18.

48 18 of 1936. This Act was later named the *Bantu Trust and Land Act*.

49 The *Black Administration Act* made the Governor-General (later the state President) the “supreme chief of all Natives in the Provinces of Natal, Transvaal and Orange Free State” (later extended to the Cape Province), and vested in him the legislative, executive and judicial authority over African people. Specifically, it gave him the power to govern African people by proclamation, to establish tribes, and to “order the removal of any tribe or portion thereof or any Native from any place to any other place”. It dealt with, among other matters, the organisation and control of African people, land administration and tenure, and the establishment of separate courts for African people which had the authority to apply indigenous law. It proclaimed the “Code of Zulu Law” to be the “Law for Blacks in Natal”.

50 68 of 1951. The aim of the *Act* was to provide for the establishment of group areas and for the control of the acquisition of immovable property and the occupation of land and premises.

remove black people (including Indians and coloureds)<sup>51</sup> from the “white spots”. In terms of this Act, one of the many powers given to the President was the authority “to establish ‘with due regard to native law and custom’ tribal authorities for African ‘tribes’ as the basic unit of administration...” These tribal authorities are what are now called the tribal authorities in terms of the *Traditional Leadership and Governance Framework Act*.<sup>52</sup> In the same way, in 1966 the *Group Areas Act*<sup>53</sup> was introduced to reinforce the discrimination introduced in the previous legislation. It was mainly meant to consolidate all the laws relating to the creation of group areas, as well as to standardise the control of immovable property and the occupation of land sites.<sup>54</sup> In a nutshell, Ncgobo’s<sup>55</sup> short but conspicuous ruling runs through the land dispossession chronicle as we know it:

The forced removals of African people from the land which they occupied to the limited amount of land reserved for them by the apartheid state resulted in the majority of African people being dispossessed of their land. It also left a majority of them without legally secure tenure in land.

Pienaar<sup>56</sup> opines that one cannot talk about land tenure reform in South Africa and not mention the injustices brought about by the apartheid regime. In 1991 the first phase of land reform took place and that this process was “...excruciatingly complex”. This complexity was not only owing to the racial disparities but the network of tenure forms was location specific, fragmented and diverse in nature.<sup>57</sup> To accommodate these diversities, different tenure

---

51 The *Act* introduced three classes of people namely, the natives, the coloureds and whites, thus there was a separate area for each group.

52 41 of 2003.

53 36 of 1966.

54 Kloppers and Pienaar 2014 *PELJ* 686.

55 *Tongoane* case para 25.

56 Pienaar *Land Reform* 379; Benett 2013 *LUP* 28; Claasens 2014 *JSAS* 772; Pienaar 2015 *Scriptura* 8.

57 Pienaar *Land Reform* 379; Pienaar 2015 *Scriptura* 8.

forms had to be adopted.<sup>58</sup> It especially became more perplexing where land was inextricably linked between two or more locations,<sup>59</sup> as this implied that thousands of subordinate legislation was issued on authority of the principal legislation.<sup>60</sup> Moreover in a large part of South Africa tenure was insecure because in these locations the rights in land were not only personal in nature but also permit based.<sup>61</sup>

It was only around 1991 that the *Abolition of Racially Based Land Measures Act*<sup>62</sup> was introduced in an effort to put an end to the racially based land laws as the name suggests.<sup>63</sup> Specifically related to the abovementioned legislation, is the repeal of *Natives Land Act* in terms of section 1 of the Act while the *Natives Trust Land Act* is repealed by section 11 of same.<sup>64</sup> Similarly, section 48 of this Act repealed the infamous *Group Areas Act*.

In effect these revocations meant that all South Africans, regardless of race, would be allowed to occupy and own land in any part of the country without

---

58 According to Pienaar there were 11 different land control and tenure systems; the four national states (Transkei, Ciskei, Venda and Bophuthatswana), the self-governing territories (Kwazulu, QwaQwa, KwaNdebele, Gazakulu, KaNgwane and Lebowa) and the rest of South Africa (also known as the independent states. Tenure forms available in these states were statutory leaseholds, certificates of use, lodger permits, building permits, trading permits as well as ownership units for which deeds of grant were issued. But in these areas ownership was specifically provided for. See Pienaar *Land Reform* 146 and 379.

59 For example where land located within the national states and self-governing territories formed part of the SADT Trust land and where land was earmarked for rural or urban purposes respectively.

60 This meant that with all the subordinate legislative measures deriving their authority from the principal legislation, there was bound to be clashes, for, they were all legitimate.

61 Pienaar *Land Reform* 379. The national states, self-governing territories and the black spots within the "white" South Africa.

62 108 of 1991.

63 A number of objectives as enshrined in the long title include to; repeal or amend certain laws so as to abolish certain restrictions based on race or membership of a specific population group on the acquisition and utilization of rights to land; to provide for the rationalization or phasing out of certain racially based institutions and statutory and regulatory systems repealed the majority of discriminatory land laws...

64 Kloppers and Pienaar 2014 *PELJ* 688; Pienaar 2015 *Scriptura* 8.

fear of prosecution. The *Interim Constitution*, 1993<sup>65</sup> introduced section 28 dealing with property rights (land); this section is now in section 25 of the *Constitution*, 1996. Similarly, section 19 was a welcome declaration which confirmed that "...every person in South Africa shall have the right to freely choose his/her place of residence anywhere in the national territory".

#### 2.2.1.1.2 The constitutional era

Pienaar <sup>66</sup> asserts that a new dispensation was accepted in April 1994 and ever since, South Africa has been in the process of "untangling, re-organising and deconstructing the existent web of measures". Accordingly, the prejudices in respect of land tenure were formally addressed in a new democratic South Africa in the *Constitution* 1996, through the promulgation of section 25 (6) read with (9). These sections, when read together, provide that anyone whose tenure in land is insecure as a consequence of apartheid practices is entitled to secure tenure or comparable redress and that the Parliament should actively enact legislation to effect such a mandate. To this end, various statutes have been promulgated nationwide; a few of these are discussed in the next section.

##### (a) *Interim Protection of Informal Land Rights Act*

In the same year as the promulgation of the South African *Constitution*, the *Interim Protection of Informal Land Rights Act*<sup>67</sup> (hereinafter *IPILRA*) was passed as a temporary measure to protect people with informal rights and interests from eviction, until more comprehensive land tenure legislation was

---

65 *Constitution of the Republic of South Africa* 200 of 1993 (hereinafter the Interim Constitution).

66 Pienaar 2014 *PELJ* 642; Cousins 2017 *Transformation: Critical Perspectives on Southern Africa* 34; Claasens 2014 <https://www.cls.uct.ac.za>; Pienaar 2015 *Scriptura* 12; Ng'ong'ola "Constitutional Protection of Property" in Saruchechea (ed) *Securing Land and Resource Rights in Africa* 66; Claasens and Cousins "Communal Land Rights" in Saruchechea (ed) *Securing Land and Resource Rights*.

67 31 of 1996.

in place. According to section 2 (1) of the *IPILRA*, holders of informal rights may not be deprived of their right to land except with their consent or by expropriation. To achieve this goal, the Minister responsible is authorised to make regulations regarding all matters which are necessary or expedient.<sup>68</sup> Nonetheless, the regulations as envisaged by the *IPILRA* have never been promulgated, hence, one wonders, whether the purported protection be afforded in the absence of such regulations?<sup>69</sup> Manona<sup>70</sup> questions if these informal rights can be protected *post facto* and if they can, can someone who has been deprived of his/her rights without his/her consent claim restoration if the right was taken away without due consideration? In the event that they do, this might open floodgates for the Government, as it would open up a new window for *IPILRA* land claims.<sup>71</sup>

To solve this dilemma, Manona<sup>72</sup> proposes three possible solutions.

- Firstly, he is of the opinion that amending the *IPILRA* to focus on providing for clear mechanisms to effect protection, would clear all confusion.
- Secondly, he suggests that the Government do away with the requirement that the Act be renewed every year as this wastes the much needed resources.
- Thirdly, according to him, drawing up regulations to provide for mechanisms for enforcement of the Act have an advantage of being

---

68 Section (hereinafter s) 4 (i) of the *Interim Protection of Informal Land Rights Act*.

69 The Interim procedures only deal with bits and pieces of protection and measures to be followed if deprivations arise out of development decisions.

70 Manona "Informal' Land Rights Under Siege" 7.

71 Manona "Informal' Land Rights Under Siege" 7.

72 Manona "Informal' Land Rights Under Siege" 8.

developed and introduced quicker than the process required for amending and introducing new legislation.<sup>73</sup>

- Finally that these regulations, if drawn up would form the basis and experience which would inform future tenure legislation.

(b) *The Communal Property Associations Act*

Furthermore, the *Communal Property Associations Act*<sup>74</sup> (hereinafter *CPA Act*) was published on 22 May 1996 and was established to enable communities to form juristic persons and to be known as communal property associations in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution. The *CPA Act* is specifically aimed at disadvantaged communities wishing to establish group rights to property with management in general, of legal institutions in a democratic, equitable, and non-discriminatory manner.<sup>75</sup>

(c) *Communal Land Rights Act vis-a-vis Communal Property Associations Act*

In case of confusion about the application of *CLARA*<sup>76</sup> and *Communal Property Associations Act* (hereinafter the *CPA Act*), it may be necessary to clarify that the *CPA Act* is intended to take effect after a successful claim of land is made in terms of the *Restitution of Land Rights Act*<sup>77</sup> (which operated mainly on urban land or agricultural land). The *CLARA* on the other hand was meant to provide for secure land tenure in the rural areas. It covers a broad spectrum of communal land or "...any other land, including land which

---

73 Manona "Informal' Land Rights Under Siege" 4.

74 28 of 1996.

75 Preamble to the *Communal Property Associations Act*.

76 11 of 2004.

77 22 of 1994.



provides equitable access to land to a community".<sup>78</sup> Mostert and Pienaar<sup>79</sup> rightly assert that in terms of this provision there is no influence whatsoever on the continued operation of the *CPA Act*. Section 5(2) (iii) further supports that

...despite any other law, when making the determination by the Minister in terms of section 18, the ownership of communal land which is not State[sic] land, but which is registered in the name of a communal property association as contemplated in the Communal Property Association Act, vests in the community on whose behalf such land is held or in whose interest such registration was affected, and such land remains subject to limitations and restrictions in relation to and rights or entitlements to such land.

Similarly, Pienaar and Mostert<sup>80</sup> opine that, because the *CLARA* also applies to communal property associations the community in question will for all intents and purposes be the successor of a Communal Property Association (hereinafter CPA). This means that communities that have organised themselves into CPA's already have secure tenure in urban and agricultural areas (but not in communal areas), but they were obliged to undergo the process for acquiring land in terms of the *CLARA*.<sup>81</sup>

On the other hand, the *CLARA* was equivocal and nonsensical insofar as the continued operation of CPA's was concerned.<sup>82</sup> It was blurry what procedure had to be followed if the community that was originally embedded in a CPA

---

78 S 2(1) (d).

79 Pienaar & Mostert "Formalisation" in *Modern Studies* 22.

80 Pienaar & Mostert "Formalisation" in *Modern Studies* 22.

81 Johnson *Communal Land and Tenure Security* 44. In 2013, the Minister of Rural Development and Land Reform Gugile Nkwinti's exclaimed at the Land Divided Conference that CPAs were seen as "communal areas within communal areas" and said he had a legal team looking into dismantling CPAs that already exist. It was at this same colloquial that the Government stated that there will no longer be establishment of new CPAs on existing communal land.

82 Pienaar & Mostert "Formalisation" in *Modern Studies* 24.

wanted to amend their original constitution.<sup>83</sup> What remains clear at this point is that the *CPA Act* seems pertinent only where land is being restored to a community in terms of the *Restitution of Land Rights Act* subject to the formation of a CPA. Ultimately, in the *status quo* report on traditional leadership and institutions the Department of Constitutional Development recommended that CPA's should not be operational in the former Bantustans and that future legislation must afford the chiefs to obtain the title deeds of "tribal" land. This is essentially what the *CLARA* was designed to achieve.

(d) The Green Paper on Land Reform

The Green Paper<sup>84</sup> places at the pinnacle the principle that "land is a national asset" and that the current land tenure system has to be fundamentally reviewed.<sup>85</sup> It is surprising, therefore, that as one of the tiers in the "single four-tier tenure system"<sup>86</sup> communal land is addressed so frivolously. Similarly, Pienaar<sup>87</sup> notes in disappointment that communally owned land is specifically excluded from the Green Paper and is not addressed in detail, yet communal land is specifically highlighted as one of the major challenges on land reform in South Africa. One of the most criticised parts of the draft Green Paper on land reform has been its silence on the issue of communal

---

83 In terms of s 8(10) the amendment procedure as set out in the *Communal Property Associations Act* is not available over and above the provisions of s 20 of *CLARA* relating to the amendment of the community rules.

84 GN 34656 of 16 September 2011.

85 GN 34656 of 16 September 2011.

86 The "single four-tier tenure system" refers to:

- state and public land: leasehold;
- privately owned land: freehold, with limited extent;
- land owned by foreigners: freehold, but precarious tenure, with obligations and conditions to comply with; and
- *communally owned land: communal tenure, with institutionalized use rights.*

87 Pienaar 2014 *PELJ* 670.

land and the role of traditional leaders.<sup>88</sup> Hence, this is a matter of concern that should be tackled if land reform in the rural areas is to succeed.

(e) The Communal Land Tenure Policy

The Communal Land Tenure Policy is a result of the Government's undertaking to review all land reform policies as enunciated by the 2011 Green Paper on Land Reform. This was done with a view to address issues relating to historical exclusion, equitable access to land and participation in the optimal utilisation of land.<sup>89</sup> Soon after the case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* (hereinafter the *Tongoane* case)<sup>90</sup> declared the *CLARA* unconstitutional, the Department of Rural Development and Land Reform (hereinafter the DRDLR) introduced its new Communal Land Tenure Policy (hereinafter the CLTP) at a workshop hosted by the DRDLR's parliamentary portfolio committee.<sup>91</sup> To get a clearer picture of the CLTP, the Centre for Law and Society recommends that one must read it together with the Rural Development Framework and the State Land Lease and Disposal Policy.<sup>92</sup>

Some of the objectives of this policy take cognisance of the "four tier system" and include:

---

88 Legalbrief (05 February 2016) <https://www.legalbrief.co.za>. Accordingly, opposition parties, NGOs working in rural development, and representatives of farm workers are all concerned that the Green Paper does not describe how communal land is to be managed. The Legal Resources Centre (LRC) says the paper does not give priority to the rural poor... The report notes the LRC also expresses grave concern about the Green Paper's inability to suggest steps to grant women and youth land ownership rights in areas controlled by traditional leaders.

89 Introductory remarks to the Communal Land Tenure Policy 2013.

90 *Tongoane* case para 25.

91 Centre for Law and Society 2013 [https:// www.lrg.uct.ac.za](https://www.lrg.uct.ac.za).

92 In particular, the State Land Lease & Disposal Policy applies to most of the same land as the CLTP but says different things. It seems the two policies were written independently of each other, which causes a lot of confusion.

- strengthening the security of tenure of communal area households under traditional leaders, CPAs or trusts;
- securing the rights and interests of more vulnerable citizens and enable household members to bequeath land to their children;
- placing ultimate authority in communal area land in the state with traditional leadership institutions holding the responsibility of local administration over state land in their respective areas; and
- establishing institutional arrangements that seek to enhance, clarify and promote effective local administrative structures.

In adhering to these objectives, the DRDLR presumes the following outcomes:<sup>93</sup>

Regarding tenure security, the Department supposes to attain clear, effective as well as democratic land governance in which the state will hold authority over land rights and land use while elected authorities take responsibility for fair and equitable management of land and land-based resources. In terms of solving societal disputes, the department promises an active promotion of informed and facilitated social solutions to social problems and the provision of enabling legislation and other institutions to affirm and codify these consensual solutions. In relation to marginalized groups, land rights are anticipated to be strengthened for all communal area households and residents, especially those more vulnerable to tenure insecurity including women, youth and the poorest members of society.

#### (f) The Communal Land Tenure Bill

One of the core objectives of the CLTB is to provide for land rights that are legally secure in relation to communal land.<sup>94</sup> Upon satisfaction that all the

---

93 There are a number of outcomes enlisted in the policy, but only those relevant to this study are analyzed.

94 S 2(a).

prerequisites of the CLTB have been followed, the Minister is authorised to determine the location and extent of land in respect of which land rights must be converted into ownership in instances where communities own or occupy such land. In this regard, ownership of the land thereof has to be transferred to a community and thereafter, the right to use land owned by the state shall have been granted to the community in question.<sup>95</sup>

The next section gets into a comprehensive enquiry of women's access to communal land as well as dispute resolution. After this discussion, a comparative discussion is made of tenure security in Tanzania, Zimbabwe and Kenya to determine the similarities and differences between these jurisdictions. It must be noted that the discussion that follows examines theoretical aspects of these three issues before the enactment of the *CLARA* as well as the changes that were meant to be brought upon by the *CLARA*.

## **2.3 Women's access to land**

### *2.3.1 Introduction*

According to Moyo,<sup>96</sup> land is a socio-economic resource that is critical in the livelihoods of rural people. Despite this reality, rural women in South Africa continue to be marginalised not only in policy formulation but in the implementation because of processes owing to patriarchal dictates, cultural norms and values that preserve the *status quo*. Similarly, Mandela rightly asserted that "freedom cannot be achieved unless women have been emancipated from all forms of oppression".<sup>97</sup> In the 2013 World Bank report,

---

95 S 5 (a) -(c).

96 Moyo *et al.* 2013 *G&B* 5393; Baldwin 2014 *CP* 254; Kameri-Mbote 2013 <https://www.za.boell.org>.

97 State of the Nation Address, 1994.

Byamugisha<sup>98</sup> also noted that customary practices keep women “locked out” of “landownership”.

By the same token, the United Nations under the Food and Agriculture Organisation<sup>99</sup> has emphasised that women are responsible for between 60 and 80 per cent of food production in developing countries. Yet they neither own the land they work on nor have secure land tenure or control over the land. This, in turn, leads to limited decision-making powers and control over how to use the land or its outputs. According to Larson and Springer,<sup>100</sup> land tenure security is extremely important from a gender perspective. This is because women and families depend on tenure security for secure livelihoods and resilience. In most African customs, it is felt that generally women alone cannot hold land and a man must somehow be in charge.<sup>101</sup> This is in spite of the position that access to land in South Africa is under protection by the South African *Constitution*.

Accordingly, women’s insecure land tenure and property rights in Africa can be linked to a mix of economic and social pressures that have profoundly transformed social structures and land tenure systems.<sup>102</sup> In the main, women’s land rights are more insecure than those of men<sup>103</sup> and are often

---

98 Byamugisha *Securing Africa’s Land* 1. This study deals with communal land and ownership in this regard is regarded as “access”. This is quite inexcusable since his report to the WB is mainly on rural African land tenure where land is mostly used communally.

99 Food and Agricultural Organisation 2009 <https://www.un.org>; Jacobs 2009 *GC* 1680; Swedish International Development Agency (SIDA) 2014 <https://www.sida.se>.

100 Larson and Springer 2016 <https://www.iucn.org>

101 Hoffman 2014 *JSAS* 707; Doss *et al.* 2014 *AE* 403; Claasens 2013 *JAC* 71; Walker 2013 *TE* 85.

102 Springer 2016 <http://www.usaidlandtenure.net>.

103 According to Adams *et al.* assert that 21.5 million people in South Africa live in communal areas) and virtually all these people are African (black), this is the group that was most severely discriminated against in terms of land access. In terms of the 2001 census 58.9% of the people living in areas categorized as “tribal settlements”

seen as “secondary” in character, given that women’s access to land is obtained only via their husbands or other male relatives. Likewise, within the rural communities there are different classes of women in terms of land access and secure tenure: In these groups, there are unmarried girls,<sup>104</sup> married women, divorced women, widows as well as the elderly women. It is in this instance where it becomes evident that some communities discriminate against one group of women in favour of the other.<sup>105</sup> At a conference co-hosted by the Programme for Land and Agrarian Studies and the National Land Committee,<sup>106</sup> the consultations involved therein highlighted the following problems faced by rural women:

- Women are often evicted when their marriages break down or end. In particular, widows are often evicted from their married homes by their husbands’ families.
- Divorced or widowed women who return to their natal homes upon dissolution of marriage are often made unwelcome and are evicted by their brothers.
- Unmarried sisters are often evicted from their natal homes by their married brothers after their parents die. This occurs because sons assert that they alone inherit the land, even where the

---

are female. See Adams *et al.* 1999 <https://www.odi.org>. Cousins 2007 *JAC* 295; Walker 2013 *TE* 85.

104 After a serious backlash from civil societies of THE *CLARA*’s failure to promote women’s rights in land, the Government amended the preamble to provide for the registration of joint land rights by married spouses significantly, ignoring the rights of single and divorced women.

105 Claasens and Smythe “What’s Law Got to do With It” in Claasens and Smythe (eds) *Marriage, Land and Custom* 13; Walker 2003 *JAC* 171; Whitehead and Tsikata 2003 *JAC* 72; Walker 2013 *TE* 85; Claasens 2005 <https://www.plaas.org>; Claasens and Ngubane “Women, Land and Power” in *Putting Feminism on the Agenda* 5. Berge 2013 <https://www.umb.no>. Berge terms these women “lineage daughters” to imply that women only get land through their relations with men: Through their husbands, their fathers as well as their sons.

106 Jacobs and Kes 2014 *FE* 25; Onyango 2014 *Sociology and Anthropology* 304.

father may have chosen his daughter to be responsible for the family home.

- Married women are not treated as people who have rights in the land. The land is treated as the property of the husband and his natal family. Wives are often not consulted in relation to decisions about the land.

Conversely, it is not always the case that women are marginalised more than men in accessing land, some women have access to more land than men. Some women are not poor and landless, thus poverty and landlessness are not confined to women only.<sup>107</sup> Yet, advocates against women accessing land claim that “allocation of land rights to women would result in women gaining autonomy and independent citizenship rights thus reducing male power within households and the community”.<sup>108</sup>

In many societies demands that women should have land rights equivalent to men’s in whatever form of land tenure, is seen as outrageous and as inviting conflict.<sup>109</sup> Jacobs<sup>110</sup> expounds that in such contexts, women may be unlikely to envisage outcomes, which lie outside the realm of possibility. Studies have shown that the patterns are recently changing and that unmarried women are not refused allocation of land as they were before.<sup>111</sup> Studies have also

---

107 Author unknown *Land Reform and Gender* 15; Jacobs and Kes 2014 *FE* 25; Claassens and Ngubane “Women, Land and Power” in *Putting Feminism on the Agenda* 10; Isinika and Kikwa “Promoting Gender Equality” in Stahl (ed) *Looking Back, Looking Ahead* 91.

108 Walker 2013 *TE* 86; Cross and Hornby *Opportunities and Obstacles* 8. There is clear evidence of a backlash from some men (from interviews conducted in six provinces of South Africa), who supposedly angered by “the usurpation of their formerly unquestioned domestic authority”.

109 Jacobs 2004 *JWS* 4.

110 Jacobs 2004 *JWS* 4.

111 Claasens and Smythe “What’s Law Got to do With It” in Claasens and Smythe (eds) *Marriage, Land and Custom* 13; Meer 2013 <https://www.za.boell.org>.



shown that there is still some favouritism in the allocation of land between women who have male children and those that have female children.<sup>112</sup>

### 2.3.2 *The centrality of land*

Security of tenure can simply be described as access to land with the protection against forced eviction, with the right to enjoy the land as well the possibility of transferring rights.<sup>113</sup> This, however, is not the position for most Africans, specifically not for women. Besides, this failure to access land perpetuates women's dependency on men for their upkeep which often exacerbates their problems. Moyo<sup>114</sup> opines that "land is central to rural livelihoods". Hence, it is an important economic asset that is critical in the sustenance of human life. It is more so in Africa, especially among rural women. Land is a fundamental resource for improving living conditions and economic empowerment, the lack of land rights for women undermines efforts to promote gender equity and equality within a patriarchal society.<sup>115</sup> Machethe<sup>116</sup> also emphasizes that access to land for production purposes is a critical requisite that enables the poor members of society to benefit from agricultural growth. For this reason, rural women need land for their

---

112 Claassens and Ngubane "Women, Land and Power" in *Putting Feminism on the Agenda* 5. Claasens and Smythe "What's Law Got to do With It" in Claasens and Smythe (eds) *Marriage, Land and Custom* 18; Claasens and Smythe reported that in the North West and KwaZulu Natal Province, younger women (unmarried and with no children) were being allocated land.

113 Springer 2016 <https://www.usaidlandtenure.net.>; Jacobs 2009 *GC* 1680; Larson and Springer 2016 <https://www.iucn.org>; Mohamed *Access to Land Justice* 2; Moyo 2013 *G&B* 5396.

114 Moyo *et al.* 2013 *G&B* 5396; Mohamed *Access to Land Justice* 2; Mutopo 2012 [https:// www.plaas.org.za](https://www.plaas.org.za).

115 Kameri-Mbote 2013 *HBFS* 6; Larson and Springer 2016 <https://www.iucn.org>; Mutopo 2012 [https:// www.plaas.org.za](https://www.plaas.org.za).

116 Machethe "Agriculture and poverty in South Africa" 1-14.

vegetable gardens, to build their houses, for subsistence farming, and other income generating initiatives.<sup>117</sup>

Conversely, Jacobs<sup>118</sup> believes that even if rural women were to have secure access to land it would not be a panacea to most, since landlessness and economic insecurity are only one set of risks among many. She<sup>119</sup> posits that these are important gains but women's lives in many respects are framed by customary law, especially for rural women. Claasens and Ngubane<sup>120</sup> also believe that because unequal property relations make women vulnerable, interventions to assert women's rights to land are needed urgently. This should be tackled seriously and not by last minute amendments that are meant to silence the community grievances. Furthermore, in a survey of Law and Practice related to women's inheritance rights,<sup>121</sup> it was stated that evidence denoted that women's land rights reduce domestic violence in that women who own land are more capable of exiting violent relationships. Hence, agricultural production and food security also increase when women have secure land tenure.<sup>122</sup>

#### 2.3.2.1 Causes of women's vulnerability

Alongside the increasing consideration given to customary land tenure, much of it has also been drawn to women's land rights. In view of that, the most recent land governance reforms have been praised as a key component in

---

117 Rights to land in the rural areas are the productive base of the community and therefore residential rights, access to arable land, ability to use common resources (e.g. wood, water, communal grazing land, etc.), and a person's overall political, social, and economic power are entangled within the property rights discourse. See Moyo 2013 *G&B* 5394.

118 Jacobs 2004 *JISW* 3; Kameri-Mbote 2013 <https://www.za.boell.org>.

119 Jacobs 2004 *JISW* 3; Kameri-Mbote 2013 <https://www.za.boell.org>.

120 Claasens and Ngubane "Women, Land and Power" in *Putting Feminism on the Agenda* 14.

121 Centre On Housing Rights And Evictions (COHRE) 2006 <https://www.gewamed.net>.

122 Larson and Springer 2016 <https://www.iucn.org>.

efforts to guarantee gender equality with respect to land rights. Aid agencies have particularly been instrumental in promoting this attention to gender equality.<sup>123</sup> Below are a few of the possible reasons for women's vulnerability in communal land access. The list is in no way exhaustive and may not be uniformly relevant across all rural communities.

#### 2.3.2.1.1 Lack of knowledge

Moyo<sup>124</sup> rightly declares that women, predominantly those in rural areas lack the requisite information about what land reform processes involve. This includes the processes and procedures to be followed in the acquisition of land.<sup>125</sup> Despondently, this failure by women to acquire such knowledge leaves them at the mercy of their husbands, male members of the family, land administrators and traditional leaders to do the work on their behalf.<sup>126</sup> Because of this naivety they are unable to participate in more productive and remunerative work, to hold managerial and leadership positions as well as to participate fully in the development of their communities.<sup>127</sup>

Williams,<sup>128</sup> on the other hand, expounds that rural women are most likely not to benefit from policy grant land programmes since they are incapable of analysing the laws and procedures to be taken. As a consequence, the development of women's access to land and ownership should be based on

---

123 Ravnborg *et al.* 2016 *JID* 413; Larson and Springer 2016 <https://www.iucn.org>.

124 Moyo *et al.* 2013 *G&B* 5397; Jacobs 2009 *GC* 1680.

125 Moagi 2008 *INGOJ* 215; Moyo 2013 *G&B* 5397.

126 Moyo *et al.* 2013 *G&B* 5397. Moyo *et al.* are of the opinion that ...allowing women to be able to become providers for their families including being educated could be as solution or a development in availing land rights to rural women. They assert that traditional customs also have an impact where many women are faced with the challenge of property ownership within a marriage and the limited rights they have because of the embedded cultural norms that limits their positions. Thus the vision of land reform needs to incorporate empowerment objectives and the building of social movement, so that disposed groupings may be active agents in process of democratization and development. See also Jacobs 2009 *GC* 1680.

127 See Williams *A Piece of Land* 14.

128 Williams *A Piece of Land* 17.

the institutions to be created and implemented by the South African Government. These institutions, therefore, will have to look at the approaches of the land reform policies and gender equality regarding the access to land either for tenure security or agricultural purposes. In this light, what is more at stake for South African women is the lack of skills regarding their empowerment to facilitate the tackle within society. Thus, one ponders on the issue whether women's land education would automatically "empower" them or improve their social and material conditions.<sup>129</sup> If experience is anything to go by, information alone is not enough to secure women's access to land. Therefore, effectiveness of information depends on awareness about it as well as the abilities to invoke the knowledge.

Moyo<sup>130</sup> concurs and advises that "...the government can condone programmes and put land policy plans in place but should also realise the potential of investing in women organisations and land based associations". According to SIDA,<sup>131</sup> women's participation in the process of developing land policies is fundamental to increasing their access to land. It has been shown that women gain greater access to land through land reform in countries where the participation of rural women is a well-defined state policy.<sup>132</sup> Consequently, for a land policy to be able to ensure women's equal access to land, it needs to be based on the principle of gender equality in access to land, as well as have clear objectives or goals on equal access to land.

---

129 Jacobs 2009 *GC* 1680; Kameri-Mbote 2013 <https://www.za.boell.org>.

130 Moyo 2013 *G&B* 5399; Kameri-Mbote 2013 <https://www.za.boell.org>.

131 Swedish International Development Agency (SIDA) 2014 <https://www.sida.se>.

132 For example, in Rwanda's state institutions and civil society organizations work together to secure women's land rights. In particular, Rwanda reformed its inheritance and land tenure legislation and currently has some of the best legal conditions for gender equity on these issues. Promulgation of the new laws was supported by the participation of women in local Government as the 2003 Constitution mandated that 30 percent of all decision-making representatives must be women.

#### 2.3.2.1.2 Unequal ownership and control of land

According to statistics, less than 2 percent of the world's land is owned by women who make up less than approximately 15 percent in sub-Saharan Africa.<sup>133</sup> Nonetheless, Doss *et al.*<sup>134</sup> believe that the widespread use of these statistics might lead to a myth regarding the extent to which women are disadvantaged with respect to landownership. On the contrary, lack of access and control of land is a challenge besetting rural women in most African societies. This inequality in land access is mostly brought about by customary laws and practices. Furthermore, there is evidence that in the last decade women's access to land and land tenure security in South Africa have declined.<sup>135</sup> Nonetheless, Cross and Hornby<sup>136</sup> assert that women's control of land may as well be deemed insignificant since they cannot make important decisions without the consent of a male figure of that household as customary law dictates.

#### 2.3.2.1.3 The role of customary law

Blom<sup>137</sup> orates that land is viewed as a symbol of power and wealth among African people, which is why women are denied their right to land. Thus, women's insecure position in land transactions leads to manipulation by men

---

133 Doss *et al.* 2014 *AE* 403; Jacobs and Kes 2014 *FE* 25; Claassens and Ngubane "Women, Land and Power" in *Putting Feminism on the Agenda* 4. Larson and Springer 2016 <https://www.sida.org>.

134 Doss *et al.* 2014 *AE* 403; Claassens and Ngubane "Women, Land and Power" in *Putting Feminism on the Agenda* 17.

135 Author unknown 2012 <http://www.un.org>; Claasens 2013 *JAC* 78. Walker 2013 *TE* 84.

136 Cross and Hornby *Opportunities and Obstacles* 7; Jacobs 2009 *GC* 1680; Larson and Springer 2016 <https://www.iucn.org>; Claassens and Ngubane "Women, Land and Power" in *Putting Feminism on the Agenda* 17.

137 Blom *Land Reform and Gender Equality* 4; Jacobs and Kes 2014 *FE* 25; Claassens and Ngubane "Women, Land and Power" in *Putting Feminism on the Agenda* 11; Kameri-Mbote 2013 <https://www.za.boell.org>.

and affects all other land related activities. Budlender *et al.*<sup>138</sup> also advance the view that women have been treated as minors for centuries and continue to be, both within the family and the community level. In expounding this issue the following pointers are used to illustrate this point:

- (a) Women, particularly single women, struggle to access residential land because “traditionally” residential sites are allocated only to men in patrilineal communities.
- (b) Women are often excluded from traditional institutions such as tribal and village council meetings where key decisions about land rights are taken. The problems cited include women not being represented in tribal councils and courts, not being allowed to address meetings and being denigrated or ignored when they try to speak.
- (c) Tribal courts that decide family and land disputes are generally dominated by elderly men and are perceived to favour men over women. This has serious consequences because disputes may result in women being evicted from their homes and being denied redress when they complain that their land rights have been abrogated.<sup>139</sup>

Over and above these, social institutions together with cultural beliefs and norms very often act as a hindrance to women’s liberation.<sup>140</sup> Mokgope<sup>141</sup>

---

138 Budlender *et al.* “Women, Land and Customary Law” 10. Jacobs 2009 *GC* 1682; Claasens 2013 *JAC* 71; Claasens 2005 <https://www.plaas.org>.

139 Blom *Land Reform and Gender Equality* 4 too, buttresses that “...in arguing for women’s independent land rights, the role of culture including tradition and religion in the continued denial of women’s inheritance rights should not be ignored”.

140 Claasens 2005 <https://www.plaas.org>; Traditional land tenure systems have often been transformed in ways not beneficial to women, while positive changes in statutory law to protect women’s rights may have a limited effect due to the lack of enforcement and cultural and social norms that may limit women’s willingness to exercise their rights under the law. If enforced, statutory law can support women’s secure rights to land despite the difficulties of enforcement, this is because the justice system is often inaccessible and costly, and high land values provide an incentive for illegal land grabbing.

believes that customary and social practices which are a common feature in most rural areas generally act as an obstacle to women's advancement. Blom<sup>142</sup> buttresses this position by arguing that despite the South African *Constitution* being against the discrimination of women, patriarchal structures and customs prevail and dictate how men and women should live. This is because these structures continue to be under the control of traditional chiefs as custodians of culture in their communities and authorities responsible for the distribution of land.<sup>143</sup> Likewise, Walker<sup>144</sup> concedes that there is a struggle for gender equality and for cultural rights in the particular form championed by traditionalists; while both sets of rights are recognized by the South African *Constitution*, the right to equality takes precedence. Conversely, the traditionalists have unsuccessfully argued that the right to equality, more particularly gender equality, has to be subject to customary law.

In a nutshell, Jacobs<sup>145</sup> propounds that

...were women's rights not to be mediated through husbands, fathers, brothers and sons, outcomes of land reforms would be more favourable for most groups of women.

---

141 Mokgope 2000 *PLAAS* 18; Jacobs 2009 *GC* 1682; Claasens 2005 <https://www.plaas.org>; Claasens and Ngubane "Women, Land and Power" in *Putting Feminism on the Agenda* 15.

142 Blom *Land Reform and Gender Equality in South Africa* 19; Jacobs 2009 *GC* 1682; Kameri-Mbote 2013 <https://www.za.boell.org>.

143 This is a common trend in African countries where the formal legal systems have constitutions or land laws that grant gender equality in access to land but where laws for marriage, divorce and inheritance contradict these laws by discriminating against women and daughters. Claasens and Ngubane "Women, Land and Power" in *Putting Feminism on the Agenda* 15.

144 Walker 2013 *TE* 77. The Bill of Rights of the South African *Constitution* provides for equality before the law for all and the right of "everyone to participate in the cultural life of their choice insofar as it is not inconsistent with any provision in the Bill of Rights". In the same light, the Constitution also provides for the right of people to enjoy their culture, practice their religion and use their language but not in a manner inconsistent with the Bill of Rights.

145 Jacobs 2004 *JWS* 2; Jacobs 2009 *GC* 1682; Claasens 2005 <https://www.plaas.org>.

Contrary to the provisions of the *CLARA* on women which allocated only 30 per cent composition in leadership positions of the traditional institutions, the CLTB has advanced women in that half (50 per cent) of all leadership positions are now available to women. It remains to be seen how the communities will react to these changes. Further discussions on this subject follow in chapter four.



### 2.3.3 The international framework

There are a myriad of international policies and instruments that promote women's access to land. Collins and Mitchell<sup>146</sup> warn that global policy-makers advance a gender-equality agenda but also simultaneously promote an agenda of embracing local customary practices, which they often fail to consider that gender-equality measures and customary practices often conflict. These international standards among others set the background of expectations for all relevant state actors in their actions that affect tenure rights. This section briefly assesses such instruments to determine if women are afforded the much needed protection in their land interests. The approach in this regard is to be done by the top- bottom approach, that is, the international framework, regional framework and finally the South African framework on women's access to land. The South African *Constitution* explicitly refers to international law as one of the sources of law in South Africa.<sup>147</sup>

#### 2.3.3.1 The Convention on the Elimination on all forms of Discrimination against Women

In terms of the United Nations Convention on the Elimination on all forms of Discrimination against Women<sup>148</sup> "state parties should establish equal property rights for women in relation to marriage, divorce and death". It also defines what constitutes discrimination against women and sets up an

---

146 Collins and Mitchell 2017 *JAC* 11; The Gender Equality goals include targets on reforms to give women equal rights to economic resources and access to ownership and control over land and other forms of property.

147 S 233 of the South African *Constitution*.

148 Adopted in 1979 by the UN General Assembly, in terms of A 16 (1) (h) and 14 (2) (g) of CEDAW. According to the United Nations 2011 statistics, "at least 115 countries specifically recognize women's property rights on equal terms with men, nevertheless, the implementation of these measures has been very weak.

agenda for national action to end such discrimination. In the same light, South Africa has ratified the Optional Protocol to CEDAW.<sup>149</sup>

#### 2.3.3.2 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights preamble provides that state parties should promote equal rights among men and women. Furthermore, Article 17 goes on to provide the following:

- (1) Everyone has the right to own property alone as well as in association with others; and
- (2) No one shall be arbitrarily deprived of his property.

#### 2.3.3.3 The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights, 1966 Article 2 (2), The states Parties to the present Covenant, undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### 2.3.3.4 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights<sup>150</sup> commits to non-discrimination against women, while acknowledging the right of local communities to follow customary rules and norms. This Protocol also seeks to address the gap in existing international human rights instruments when it came to addressing human rights from an African perspective.

---

149 The Protocol was adopted by resolution A/RES/54/4 of 6 October 1999. The case of *ES and SC v. United Republic of Tanzania* (48/2013 (60th session held 16 February–6 March 2015) gave an opportunity for CEDAW to find application in Tanzania. A thorough discussion of this case follows in chapter four.

150 Adopted in June 27, 1981 and enforced in October 21, 1986.

#### 2.3.3.5 The Istanbul Declaration on Human Settlements

The Istanbul Declaration on Human Settlements<sup>151</sup> commits to promote gender equality providing legal security of tenure and equal access to land to all people, including women and undertaking reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land.

#### 2.3.3.6 The Beijing Platform for Action

South Africa has also ratified the Beijing Platform for Action (BPFA)<sup>152</sup> which provides in its preamble that it recognises that women face barriers to full equality and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability, because they are indigenous women or because of other statuses.<sup>153</sup> Subsequently, state parties must ensure that all barriers are being removed with regard to access and that special measures are put in place in order to meet the needs of women, especially those living in poverty, and female headed households.

#### 2.3.3.7 The Protocol to the African Charter on Human and Peoples' Rights

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa pays particular attention to land and environmental resources. Article 15 links the right to land to food security, while Article 19, dealing with sustainable development, exhorts states to promote "women's

---

151 Particularly paragraph 7 on the III Commitments D.

152 Adopted in September 1995 by the Fourth World Conference on Women (A/CONF.177/20, chap. I). According to Wisborg's critique on the human rights approach, he states that a contextualized reading emphasizing rights to land-resources has increasing support in "soft law" which includes the likes of Agenda 21 and Beijing Platform of Action. See Wisborg 2002 *CIEDS* 22.

153 Article 165 (e) and 166 (c).

access to and control over productive resources such as land and guarantee their right to property”.

#### 2.3.3.8 The Rome Declaration on World Food Security

The Rome Declaration on World Food Security (1996), particularly article 16 objective 1.3 (a)-(c), ensures gender equality and empowerment of women. In this regard, the Governments undertake to:

- (a) support and implement commitments made at the Fourth World Conference on Women, Beijing 1995, that a gender perspective is mainstreamed in all policies;
- (b) promote women's full and equal participation in the economy, and for this purpose introduce and enforce gender-sensitive legislation providing women with secure and equal access to and control over productive resources including credit, land and water; and
- (c) ensure that institutions provide equal access for women.

#### 2.3.3.9 The United Nations Commission on Human Rights Resolution

The United Nations Commission on Human Rights Resolution<sup>154</sup> stresses that the impact of gender-based discrimination and violence against women on women's equal ownership of, *access to and control over land* and the equal rights to own property and to adequate housing is acute, particularly during complex emergency situations, reconstruction and rehabilitation.

#### 2.3.3.10 The Economic and Social Council Commission

For the Economic and Social Council Commission on the Status of Women Resolution<sup>155</sup> in its preamble, it is of grave concern that in many countries the treatment accorded to women, whether in terms of property rights, land rights, rights of inheritance, laws related to marriage and divorce or the rights

---

154 Women's equal ownership, access to and control over land and the equal rights to own property and to adequate housing Commission on *Human Rights Resolution* 2002/49.

155 Commission established by *Council Resolution* 11(II) of 21 June 1946.

to acquire nationality and manage property or seek employment, reflects the inequality between women and men.

Thus, it has been shown that South Africa has subscribed to different international standards that mutually aim to improve the quality of women's land relations. As such, the state must be seen to be taking reasonable positive steps towards bettering rural women, who in most cases are more naïve and susceptible to discrimination. Domestication of the said standards could be the first step, because in that way, it is easier for not only citizens to access the rules/law at a nation level, but also beneficial and easy for that state to monitor compliance.

#### *2.3.4 The regional framework*

According to Banda,<sup>156</sup> over 70 per cent of women in Africa are rural dwellers. Banda asserts that despite this recognition that they are the ones who work the land and produce food for their families, women are still not allowed to own land. This denial comes in many forms; either as a direct sanction or through the invocation of cultural norms or traditions. This section like the previous one, focuses on the regional standards, i.e. the continental as well as the Southern African Development Community rules that safeguard women's interests. It is important to note that some of the norms mentioned herein are those adopted by different Non-Governmental Organizations and may not be as popular as the rest on a continental level.

---

156 Banda 2006 *JAL* 83.

#### 2.3.4.1 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

This protocol was created to supplement the provisions of the African Charter. In terms of article 15 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* of 2003 rural women have a right to food security which directs states to provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food.<sup>157</sup> The Protocol rightly pays attention to the economic, social and cultural rights issues that most directly affect them.<sup>158</sup> In the same light, article 19(c) buttresses this issue and obliges states to "promote women's access to and control over productive resources such as land and guarantee their right to property".<sup>159</sup>

#### 2.3.4.2 Women in Law and Development in Africa

South Africa is also a state party to the Women in Law and Development in Africa (WILDAF)<sup>160</sup> which is a multinational African Non-Governmental Organizations (NGO) formed in 1990. Its core objective is to promote the development of strategies that link law and development to empower

---

157 A 15 (a).

158 A 17 is clear in its injunction that women have the right to live in a positive cultural context and to be involved in the determination of cultural policies.

159 Banda 2006 *JAL* 83. Banda is of the opinion that this is recognition that despite them being the ones who work the land and produce the food that feeds families; women are not allowed to own land. This denial comes in many forms, either as a direct sanction or through the invocation of cultural norms and traditions. Banda believes that given the resistance to women acquiring land, it was necessary for the Protocol to specify that member states have a duty to ensure that women have equal access to land to male counterparts.

160 For states in the East and Southern African region. Other movements include Women and Law in Southern Africa (hereinafter WLSA). These movements have been spurred by mounting land pressures in some countries that are placing undue restrictions on women. Mostly these are women who do not have sufficient access to and control over land. While the focus of the women's movements has been on customary land practices, they have also been concerned with the negative effects of the privatization of land and land grabbing.

women. Thus, it is at the forefront of using women's rights as human rights movement to inform women all the way through the continent about their legal rights, lobby for national legislative reforms, extend the scope of state accountability, and mobilize international support.<sup>161</sup>

#### 2.3.4.3 The framework and guidelines on Land Policy in Africa

In terms of these guidelines,<sup>162</sup> African states have undertaken to strengthen security of land tenure for women who require special attention.

#### 2.3.4.4 The African Union's Declaration on Land Issues and Challenges in Africa

This declaration highlights the centrality of land to sustainable socio-economic growth, development and the security of the social, economic and cultural livelihoods of the people. The member states have also vowed to strengthen security of land tenure for women.

#### 2.3.4.5 The Solemn Declaration on Gender Equality in Africa

This declaration<sup>163</sup> is a commitment from the state members to the Constitutive Act of the African Union on the principle of gender equality. It reinforces all other regional and universal instruments<sup>164</sup> that protect the land and property rights of women. In terms of this declaration the members agree to accelerate the implementation of gender specific economic, social and legal measures aimed at improving the health of African women. Their objectives also include an active promotion on the implementation of legislation that guarantees women's land, property and inheritance rights.

---

161 Hodgson *Land and water: The Rights Interface* 24.

162 Framework and Guidelines on Land Policy in Africa 2009, Assembly /AU/Declaration 1(XIII) Rev.1.

163 Solemn Declaration on Gender Equality in Africa of 2004, signed on July 6th.

164 BPA 1995, CEDAW 1979, UN Resolution 1325 on Women 2000, PACHPRRW 2003 etc.

### *2.3.5 The South African legislative and policy framework*

According to Claasens,<sup>165</sup> the post-apartheid laws are built on and underpin the stereotype of dictatorial male power and chiefly control inherent in customary law and practices. The South African post-apartheid legislative pronouncements have been criticized as asserting an unchanging version of custom that is dislocated from, and impervious to, current realities.<sup>166</sup> Therefore, women's organizations have been at the forefront of arguing that the new laws relegate the 17 million South Africans living in the former homelands, to a separate and authoritarian legal regime and to second-class citizenship. Mamdani<sup>167</sup> fears that the "historic compromise" through which apartheid ended in 1994 introduced political democracy while leaving the inherited structures of economic and social power largely intact.

Below is the discussion of some of South Africa's statutes and policies that relate to women and their access to rural land.

#### **2.3.5.1 The White Paper**

Before 1997, the Department of Land Affairs engaged in a land reform process that was meant to rectify the injustices of forced removals and the denial of access to land, to afford residential and productive land to the impoverished rural population and to provide tenure for rural dwellers. From this commitment, the White Paper on South African Land Policy (hereinafter the White Paper on Land Policy)<sup>168</sup> was born. Through it, the Government aimed to grow the economy and also to alleviate poverty in South Africa. The South African Government's land reform process was to be implemented in

---

165 Claasens 2013 *JAC* 89; O'Laughlin *et al.* 2013 *JAC* 7; Aliber and Cousins 2013 *JAC* 144; Collins and Mitchell 2017 *JAC* 11; Claasens 2013 *JAC* 89.

166 Collins and Mitchell 2017 *JAC* 11.

167 Mamdani *Citizen and Subject* 67; O'Laughlin *et al.* 2013 *JAC* 8.

168 GN 2103 in GG 23984 of 29 October 2002.



three phases namely land restitution, land redistribution and land tenure reform. The White Paper on Land Policy identified as one of its core issues as “the need to remove the practices which discriminate against women acquiring land”. It states further that

...equality includes the full and equal enjoyment of all rights and freedoms. In relation to land reform, this requires positive action by Government. Specific strategies and procedures must be devised to ensure that women are enabled to participate fully in the planning and implementation of land reform projects.<sup>169</sup>

Thus, the White Paper on Land Policy places considerable importance on gender equity in land access and effective participation of women in decision-making procedures.<sup>170</sup> Ultimately, the different categorisations of women’s marginalisation in land matters are discussed briefly below, but are dealt with comprehensively in chapter four. It is in that chapter too where it is illustrated why women’s land rights are essential and as such should be at the helm of every governments’ land reform policy considerations.

---

169 In this light, the Government undertook to uphold the provisions of the Constitution which outlaws discrimination against women. Within the redistribution programme, this required the removal of legal restrictions on women’s access to land, the use of procedures which promote women’s active participation in decision-making, and the registration of land assets in the names of beneficiary household members, not solely in the name of the household head.

170 She posits that there has been a shift in the policy programme from White paper on land policy and the parallel between the new policy directions. She further elaborates that the recent formulation of policy, women and in particular the rural poor women stand to lose. Women’s interest and rights in land in the communal areas according to her are also threatened by new proposals on tenure reform. See Walker “Agrarian Change, Gender and Land Reform”.

#### 2.3.5.2 Promoting Women's Access to Land (hereinafter PWAL)

The objectives of this program are to recognize and respond to land reform's challenges in accomplishing gender equity goals.<sup>171</sup> The program also seeks to assess the ways in which land reform processes in South Africa refuse to meet the needs of the poor and landless and how women in particular have been neglected. This programme works for the betterment of women by identifying and responding to the challenges faced by rural women so as to promote their access to land. It is composed of a number of sub-programmes including formal research, training of planners, facilitators and community members, the facilitation of a significant number of grassroots case studies using participatory methods and a national conference.<sup>172</sup>

#### 2.3.5.3 The Commission for Gender Equality (hereinafter CGE)

The object of the CGE is to promote democracy and a culture of human rights in the country. It is one of the six state institutions set up in terms of the South African *Constitution*.<sup>173</sup> Although it directs the CGE's mandate, the powers and functions of the CGE are enshrined in the *Commission for Gender Equality Act*.<sup>174</sup> Furthermore, the *CGE Act* stipulates that the object of the Commission is "to promote gender equality and to advise and make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation that affects gender equality and the status of women". In their 2006 and 2008/9 report,<sup>175</sup> the CGE took cognisance of the

---

171 Promoting Women's Access to Land is a cooperative project of the Department of Land Affairs, the National Land Committee and other NGOs and CBOs engaged in land reform that recognizes that the various land reform programmes, projects and processes undertaken since 1994 and have encountered specific problems and challenges to achieving gender equity goals. Cross and Hornby *Opportunities and Obstacles* 5.

172 Cross and Hornby *Opportunities and Obstacles* 8.

173 S 187 of Chapter 9 of the Constitution of South Africa.

174 39 of 1996.

175 Author unknown 2006 –2008/09 <https://www.cge.org.za>.

unequal access to land which remains one of the most important forms of economic inequality and has dire consequences for women, both as social and political actors in society. In this report, the task was to assess the extent to which land reform policy and implementation programmes have incorporated gender consideration at policy and implementation levels between 2006 and 2008/2009.

The subsequent 2010 report revealed that the women's rights regarding land are not firmly entrenched in the legislation. The CGE noted with concern that the *Restitution of Land Rights Act*<sup>176</sup> does not recognise women's rights in so far as it does not recognise women who held land before 1993. Similarly, the *CLARA* attempted to recognise gender equality but was severely criticized for giving too much discretionary powers to the Minister and the traditional leaders.

### *2.3.6 Constitutional aspects of women's land insecurity*

#### *2.3.6.1 The human rights approach*

As has been mentioned beforehand, women like all individuals of South Africa are protected by the *Constitution* which provides that as fellow citizens, they should not be discriminated against and should be treated on an equal footing with their male counterparts.<sup>177</sup> Furthermore, equal treatment is all encompassing and includes the right to access, participate, and make decisions among many other freedoms. On a larger spectrum of protection is the humanity perspective. In this regard, many organizations and states alike advocate for the reverence of women's human rights to own property

---

176 22 of 1994.

177 S 9 of the South African *Constitution*; Quan "Changes in Intra-Family Land Relations" in *Changes in Customary Land Tenure Systems in Africa* 54.

including land.<sup>178</sup> CEDAW, BDPA and many other instruments seek to promote and protect the human rights of women, through the full implementation of all human rights instruments. The United Nations too, refers to "...women's access to and control over land as an irrefutable asset to the fulfilment of human rights".<sup>179</sup>

In the same vein, there has been an eruption of women's movements that have adopted a rights-based approach which puts customary land and other practices to task.<sup>180</sup> In doing so, they have contradicted a new consensus among policymakers regarding the view that sees land tenure policy as building on customary systems and giving them legal recognition. According to Mutangadura,<sup>181</sup> a human rights approach requires an analysis of why women are still experiencing discrimination within the society in obtaining land rights and those land rights of women specifically should be protected by the government and there should be steps taken to ensure their legal protection. This argument is based on the fact that the government should respect the procedures in redistribution and tenure reform. He<sup>182</sup> adds that the South African Government has accepted and sharpened such obligations in its *Constitution* which carries wide obligations of allocation, protection, provision, procedure and development. Mutangadura<sup>183</sup> relies on the concentration that the traditional exclusion of women from property and land

---

178 For instance, movements such as the Landless People Movements, the African Union Commission's Land policy Initiative etc.

179 UN Charter [date unknown] <https://www.un.org>.

180 The movements or organisations adapted to enhance women land tenure security focus more on a rights-based approach to challenge the customary law and its practices.

181 Mutangadura "Women and Land Tenure Rights in Southern Africa" 1-16; Collins and Mitchell 2017 *JAC* 11.

182 Mutangadura "Women and Land Tenure Rights in Southern Africa" 1-16; Wisborg 2002 *CIEDS* 22.

183 Mutangadura "Women and Land Tenure Rights in Southern Africa" 1-16.

ownership on gender grounds is the most damaging global human rights violation.

Opponents, on the other hand, argue that land is not essentially linked to human dignity and that it is only a means as an asset and not a “freedom”. In a nutshell, Wisborg<sup>184</sup> formulates his view point by asserting that in actual fact, land is not essentially linked to human dignity since it is not;

- mentioned *explicitly* in human rights instruments;
- a necessary means of individual welfare;
- a freedom, but a means/asset, among many; and
- applicable to every socio-economic context.

He<sup>185</sup> becomes technical in his approach and continues that land is a “human rights issue” and not a “human right” *per se*. To support this argument, he<sup>186</sup> states that land as a “human right” is too diplomatic and is biased against rural people. Hence human rights issues include, but are not limited to

- the conflict between the protection of established property rights and the livelihood and development rights;
- the tension between the demands for (rapid) change versus the respect for the procedural rights provided by human rights;
- principles of democratic participation and management versus local leadership, and their possible human rights protection;
- non-discrimination and real equality of women; and
- defining the rights and duties of public, civil sector, and international provision.

---

184 Wisborg 2002 *CIEDS* 13.

185 Wisborg 2002 *CIEDS* 15.

186 Wisborg 2002 *CIEDS* 15.

Ultimately, Wisborg<sup>187</sup> concludes that human rights violations occur when the Governments or member states to international instruments make *conscious decisions* not to take appropriate steps to enhance land based livelihoods and welfare as enunciated by those instruments. Moagi<sup>188</sup> augments further that the rights based approach on women's rights to land and ownership in Southern Africa, does not effectively address the women's access to communal land. Instead, these women are a marginalised group and (mostly those in rural areas) have a lack of process in their communities.

In the next section the concept of resolution of disputes that occur on communal land is evaluated. Although not an exhaustive assessment, the methods and institutions of such resolution are focused upon.

## ***2.4 Dispute resolution in the communal areas of South Africa***

### ***2.4.1 Introduction***

According to Lund and Boone<sup>189</sup> land issues are not about land only, instead they invoke issues of property more broadly implicating social and political relationships in the widest sense. Thus, struggles over property may be as much about the scope and structure of authority as they are about access to resources. Land claims are usually firmly enveloped in questions of authority, citizenship and the politics of jurisdiction.<sup>190</sup> It is these inter-relationships between property and citizenship rights as well as the authorities which define and adjudicate these issues that Lund and Boone<sup>191</sup> believe lie central.

---

187 Wisborg 2002 *CIEDS* 16.

188 Moagi 2008 *INGOJ* 214.

189 Lund and Boone 2013 *Africa* 1.

190 Lund and Boone 2013 *Africa* 1.

191 Lund and Boone 2013 *Africa* 1.

In as much conflicts or disputes may exist whenever or wherever incompatible events occur and may result in win or lose character, Ajayi and Buhari<sup>192</sup> believe that their resolution, transformation and management can produce a win-win situation too. They<sup>193</sup> believe that this is achievable through traditional methods of dispute resolution. These traditional mechanisms of dispute resolution have for a long time acknowledged the mediation, reconciliation and arbitration as modes of resolving disputes. With this in mind, this section deals with dispute resolution in the rural communities where land is communally owned. This is done by attempting to respond to the “who (traditional leaders), what (the institution of traditional leadership) and the how (procedural aspects of dispute resolution)” questions.<sup>194</sup>

In most states traditional leadership is hereditary and not subject to the universal adult suffrage electoral process.<sup>195</sup> Traditional leaders exercise wide functions ranging from the preservation of law and order, allocating tribal land held in trust. In South Africa, the institution of traditional leadership is obliged to ensure full compliance with the constitutional values and other relevant national and provincial legislation.<sup>196</sup> Similarly, Jo Beall *et al.*<sup>197</sup> opine that traditional leaders should be benevolent overseers of local disputes, adjudicators of traditions and customs and facilitators on matters of

---

192 Ajayi and Buhari 2014 *ARR* 139.

193 Ajayi and Buhari 2014 *ARR* 139. A thorough discussion of the different types of dispute resolution methods follows in chapter four.

194 Further discussions on the procedure in terms of the CLTB will follow in chapter four. The techniques employed such as mediation, arbitration and reconciliation will also be discussed in that chapter.

195 Baldwin 2014 *CP* 254.

196 S 3 of the Traditional Courts Bill; Baldwin 2014 *CP* 254.

197 Jo Beall *et al.* 2005 *JSAS* 763: Ray “Rural Local Governance” in Ray and Reddy (eds) *Grassroots Governance* 26.

development. Oomen<sup>198</sup> asserts that the resurgence of the institution of traditional leadership in the sub-Saharan Africa is a consequence of two scenarios, namely:

- Firstly, that traditional leadership took over when Government institutions in weak or collapsed states had ceased to function.<sup>199</sup>
- Secondly, as in South Africa, strong states, in a reaction to the global forces, sought to attain “validation”<sup>200</sup> by recognizing traditional structures of leadership.

#### 2.4.2 *Traditional leadership in South Africa*

Traditional leadership in South Africa was a product of a myriad of apartheid laws, regulations and bye-laws:<sup>201</sup> Oomen<sup>202</sup> expounds that these laws were retrogressive in nature since the Government only started the installation of state-appointed chiefs long after the communal life had been eroded. Oomen<sup>203</sup> reinforces Mamdani’s<sup>204</sup> argument that chieftainship was crucially linked up to the mode of domination in the apartheid state. Thus, traditional leadership stamped its authority through recognition in legislation, privileged attention in the state system as well as the perpetuation and strengthening of the assumptions on which the institution rested.

---

198 Oomen *Chiefs in South Africa* 11; Ray “Rural Local Governance” in Ray and Reddy (eds) *Grassroots Governance* 5.

199 Oomen *Chiefs in South Africa* 11; Claasens 2016 <https://www.historymatters.co.za>.

200 Conversely, Thabo Mbeki (during his Presidency) was of the view that “if Africans have had chiefs, it was because all human societies have had them at one stage or another. But when a people have developed to a stage which discards chieftainship... then to force it on them is not liberation but enslavement”.

201 *Black Administration Act* 38 of 1927, the *Black Authorities Act* 68 of 1951, Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen of 1957. This legislation introduced tribal, territorial and regional authorities by firmly linking communal land tenure to chiefly authority.

202 Oomen *Chiefs in South Africa* 16; Rugege 2003 *LDD* 172.

203 Oomen *Chiefs in South Africa* 19; Ray “Rural Local Governance” in Ray and Reddy (eds) *Grassroots Governance* 11; Rugege 2003 *LDD* 174.

204 Mamdani *Citizen and Subject* 67; Rugege *LDD* 174.



In the post-apartheid period the South African Department of Native Affairs was renamed to Department of Cooperative Governance and Traditional Affairs. The Interim Constitution, in 1993 subsequently provided that a traditional authority observing a system of indigenous law and recognized by law immediately before the commencement of the *Constitution* could continue to function as such and to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs subject to their amendment or repeal.<sup>205</sup> The institution of traditional leadership should, thus, play a role closest to the people.<sup>206</sup> The South African *Constitution* also laid a basis for traditional leadership institutions in chapter 11, section 211 thereof. Accordingly, section 212 thereof mandated the then Department of Provincial and Local Government<sup>207</sup> to create comprehensive legislation. It is against this background that the White Paper was born.

This section deals with the “who/what” of the dispute resolution phenomenon. This clearly goes into the finer details of the institution responsible for the resolution of dispute in the communal areas of South

---

205 S 181(1) of the Interim *Constitution*. Similarly, s 183 provided for the establishment of the provincial houses of traditional leaders consisting of the representatives elected or nominated by traditional authorities. While s 184 provided for the establishment of the Council of Traditional Leaders (now known as the National House of Traditional Leaders).

206 GN 2103 of GN 23984 29 October 2002; Rugege 2003 *LDD* 177.

207 Now known as the Department of Co-operative Governance and Traditional Affairs (hereinafter CoGTA). According to Chapter 12 of the South African *Constitution*, traditional leadership is a recognized institution ‘according to customary law’, but this provision has been critiqued as being vague on their actual role since it just states that national legislation *may* define these roles further and provide for the establishment of national and provincial structures to represent their views. This absence of an unambiguous requirement was criticized by CONTRALESA as an implication that their campaign to strengthen the role of traditional leaders had lost ground. Some commentators have even gone as far as saying that the 1996 *Constitution* is a downgrade of the 1993 *Constitution* in the issue of traditional leadership. *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC).

Africa. Regarding the “how question,” as in the procedure, chapter four, section three makes an in-depth analysis. Similarly, chapter four also deals with the “why question” and show why an effective dispute resolution system is necessary for the overall administration of communal land.

(a) White Paper on Traditional Leadership and Governance<sup>208</sup>

Like many other white papers, the White Paper on Traditional Leadership is a culmination of countless processes and dialogues between different stakeholders. This shows just how closely South Africa as a state values traditional leadership as an institution.<sup>209</sup> The view that the institution deepens and enriches democratic governance is expressed over and over again in the paper. The fundamental goal of this White Paper is to set out an outline that informs legislation intended to do the following:

- (i) define the place and role of the institution within the new system of democratic governance;
- (ii) transform the institution in accordance with constitutional imperatives;and
- (iii) restore the integrity and legitimacy of the institution of traditional leadership in accordance with customary law and practices.

Khonou<sup>210</sup> believes that the key objects of the White Paper revolve on the principle of crafting an institution which is democratic, representative, transparent and accountable to the traditional communities. In a nutshell, Sithole and Mbele<sup>211</sup> believe that in the drafting of the White Paper, it was the Department’s considered view that the institution of traditional leadership had a place in the democracy and also had a potential

---

208 GN 2103 of GN 23984 29 October 2002.

209 GN 2103 of GN 23984 29 October 2002.

210 Khonou 2009 *PELJ* 114; Rugege 2003 *LDD* 184.

211 Sithole and Mbele 2008 <https://www.hsrc.ac.za>; Rugege 2003 *LDD* 184.

transforming and contributing immensely towards the restoration of the moral fiber of the South African society and in the reconstruction and development of South Africa.

It was also proposed that there should be conditions for democratic governance and stability in rural areas. With these conditions, it is believed that service delivery and sustainable development in the rural areas will be accelerated.<sup>212</sup> This will only be possible if measures are taken to safeguard that people in the rural areas shape the character and form of the institution of traditional leadership at a local level.

(b) The role of traditional leaders in a constitutional state

The continuing importance of traditional leaders in the social and political life of their communities, whether perceived as positive or negative is virtually indisputable.<sup>213</sup> In many places they still play a major role in managing land tenure, adjudicating local disputes, managing property inheritance, implementing customary law and resolving conflicts. And they are often perceived as the guardians of their communities' culture, playing an important role in cultural events and rituals.<sup>214</sup>

To mention but a few roles entrusted on the institution of traditional leadership by the White paper:

---

212 Sithole and Mbele 2008 <https://www.hsrc.ac.za>; Rugege 2003 *LDD* 184.

213 GN 2103 of GN 23984 29 October 2002; Rugege 2003 *Law, Democracy and Development* (hereinafter *LDD*) 175.

214 This position was reaffirmed in the case of *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 774 (CC). It was in this case that the Constitutional Court confirmed that the New Text complies with Constitutional principle XIII by giving express guarantees on the continued existence of traditional leadership and the survival of an evolving customary law. The institution, status and role of traditional leadership are thereby protected by means of entrenchment in the NT and any attempt at interference would be subject to constitutional scrutiny.

- the promotion of peace and stability amongst the community members;
- the promotion of social cohesiveness of communities;
- the promotion of the preservation of the moral fibre and regeneration of society; and
- the promotion of and preservation of the culture and tradition of communities.

Thus, in 2008 the Government tasked the Human Sciences Research Council to assess whether the transformations that were aimed at integrating institutions of traditional leadership into the democratic system of governance had been successful.<sup>215</sup> In their report, Sithole and Mbele<sup>216</sup> were still uncertain whether the Government is superior or at parallel with the institution of traditional leadership. It was also determined that South African academics are still at loggerheads regarding the relevance of traditional leadership in the South African political system.<sup>217</sup> In an answer to a query whether there is still a place for traditional leaders in a democratic state like South Africa, Bennett<sup>218</sup> retorts that traditional leadership is a creature of custom and generally carries out customary functions. It complements the role of Government in the rural areas. Therefore, he<sup>219</sup> believes that there

---

215 Sithole and Mbele 2008 <https://www.hsrc.ac.za>.

216 Sithole and Mbele 2008 <https://www.hsrc.ac.za>.

217 Some are adamant that there is no place for the institution of traditional leadership in the democratic state while some truly believe that leaders must be given administrative support and a flexible, mutually agreed, policy environment in which to operate. It is in this regard that the review recommended that "municipalities must formulate institutional arrangements to work with traditional leaders on land use management, integrated development planning and other service delivery issues.

218 Bennett *Customary Law in South Africa* 114; Ray "Rural Local Governance" in Ray and Reddy (eds) *Grassroots Governance* 22.

219 Bennett *Customary Law in South Africa* 114; Ray "Rural Local Governance" in Ray and Reddy (eds) *Grassroots Governance* 22; Rugege 2003 *LDD* 177.

cannot be contestation of authority between the institution of traditional leadership and the state.

Seemingly, Biyela and Reddy<sup>220</sup> opine that in South Africa the Government recognizes and acknowledges traditional leaders, but the nature of their role in the advancement of democracy and social equality among other common goods is still largely unclear and in fact underestimated. Likewise, they<sup>221</sup> argue that the South African *Constitution* was deliberately vague on the powers and functions of chieftaincy, because of ambivalence within the then ruling party itself (African National Congress) over the future of traditional structures. Efforts by the post-apartheid Government to confine traditional leaders to an advisory role or to matters of customary law are constantly contested.<sup>222</sup>

Conversely, Ntsebeza<sup>223</sup> is of the opinion that there is no separation of powers in the institution of traditional leadership. He<sup>224</sup> buttresses this view

---

220 Biyela and Reddy "Rural Local Government and Development" in Ray and Reddy (eds) *Grassroots Governance* 264.

221 Biyela and Reddy "Rural Local Government and Development" in Ray and Reddy (eds) *Grassroots Governance* 264.

222 More so in the KwaZulu Natal Province. Claasens 2016 <https://www.historymatters.co.za>. For example, the Traditional and Khoi-San Leadership Bill seeks to replace the *TLFGA* which connects communal land with traditional courts by superimposing apartheid tribal identities on those living in former homeland areas.

223 Ntsebeza 2003 *Development Update* 33; Baldwin 2014 *CP* 254. Ray "Rural Local Governance" in Ray and Reddy (eds) *Grassroots Governance* 11. S 11 (2) (c), together with clauses 8, 9, 10 and 11, effectively enables traditional leaders to determine unilaterally the content of customary law throughout the former homelands. What is even more disturbing is that it allows traditional leaders to strip those before them of customary entitlements, such as land rights and community membership.

224 Ntsebeza 2003 *Development Update* 33; Crothers "Social Characteristics of Traditional Leaders" in Ray and Reddy (eds) *Grassroots Governance* 70; Claasens(2016 <https://www.historymatters.co.za>) opines that the experience of the Bakgatla-ba-Kgafela with platinum mining exemplifies what can happen when the powers of traditional leaders are elevated and the land and ownership rights of ordinary people denied. In the case of *Bakgatla-ba-Kgafela Tribal Authority and Others v Bakgatla-ba-Kgafela CPA* [939/2013] the community brought a successful

by stating that traditional leaders have control over political functions, and safety and security, governance and development.<sup>225</sup> In the same light, their political functions include the overall protection of the local people as well as relations with people from the outside. Over and above these roles, traditional leaders have control over the economy as they distribute land and collect taxes. In the penultimate, the decision making role is also left to the traditional leaders. Finally, traditional leaders have control over cultural functions, which include the sacred and spiritual, custom and tradition, and general cultural matters.<sup>226</sup>

Critics like LiPuma and Koelble<sup>227</sup> on the other hand, suggest that traditional leaders are far from being authentic democrats for they are power-hungry patriarchs and authoritarians attempting to both reinvent their political, social

---

land claim over different pieces of land in the North West Province. As such, they had to form a legal entity eligible to receive the land, the majority of the community members opted to create a CPA in this regard. This decision was contested by their traditional leader and council who found it more fitting to create a trust instead. This contestation elevated to a point where the then Minister Xingwane advised the community to register a provisional CPA which they did, effectively this would be valid only for 12 months. After the validity period had lapsed, the traditional council authorised for the construction of a shopping centre and the CPA contested this decision in the land claims court but the council objected claiming that the CPA was no longer valid hence not eligible for land ownership. The issue before court was whether the CPA had *locu standi* to block the construction of the shopping centre. The community won in the court *a quo* holding that the CPA was still in ownership of the land in question since its application for registration were those of a permanent CPA and not a provisional one. The council appealed to the Supreme Court of appeal which held in the council's favour on technical grounds that the CPA was provisional. Upon appeal by the community, the Constitutional Court set aside the decision of the SCA holding that reference to the 12 month period under the Land Restitution Act was in relation to the exercise of the right to the land occupation and use and not the lifespan of the CPA.

225 Ntsebeza 2003 *Development Update* 33. This was in terms of the *Bantu Authorities Act* of 1951.

226 Ntsebeza 2003 *Development Update* 33; Ray "Rural Local Governance" in Ray and Reddy (eds) *Grassroots Governance* 22; Rugege 2003 *LDD* 181.

227 LiPuma and Koelble 2009 *JCAS* 201.

and economic power<sup>228</sup> and re-assert their control over local level resources at the expense of the larger community.<sup>229</sup> The CLTB has also undertaken to provide access to justice and redress where there is a land dispute.<sup>230</sup> As it relates to the “who question,” section 29(1) (e) of the CLTB provides that an institution that is responsible for the management and administration of communal land has to perform the function of resolution of disputes among community members. In terms of the CLTB, the traditional council, communal property association and the community household forum are recognised as institutions that can administer communal land in South Africa.<sup>231</sup> Regarding the procedure, section 45 gives an account of the techniques that should be employed when resolving conflict but fails to show a clear cart procedure that should be followed when a dispute arises. This procedure is discussed in detail in the next chapter.

#### *2.4.3 The traditional courts*

In the latter part of the 1970's the peoples' courts were generally known as “makgotla” and must be distinguished from the politicized peoples' courts that could be found in the mid-1980's.<sup>232</sup> Around 1989 new structured people's courts emerged. These courts are today successfully functioning as

---

228 Power acquired under colonial and apartheid rule under the *Black Authorities Act* of 1927. In terms of *Bantu Authorities Act* of 1951, the institution of traditional leadership had far-reaching administrative and judicial powers. Their functions included the allocation of land held in trust, preservation of law and order, provision and administration of services at local Government level etc.

229 LiPuma and Koelble 2009 *JCAS* 201; Crothers “Social Characteristics of Traditional Leaders” in Ray and Reddy (eds) *Grassroots Governance* 74.

230 S 3(e).

231 S 42 (1) enjoins the Department to provide a board, traditional council, communal property association, community, households forum, institution or person performing functions in terms of The CLTB with financial , administrative and any other support that may be required to perform such functions.

232 Frueh *Political Identity and Social Change* 136; Rugege 2003 *LDD* 172.

community courts.<sup>233</sup> In 1997 the South African Law Reform Commission (hereinafter the SALRC) was tasked with the object of determining the issue whether, and if so, to what extent the state should administer and regulate traditional courts.<sup>234</sup> Oomen<sup>235</sup> too, is of the view that these community courts were considered as an alternative to the overburdened state system.

According to Oomen<sup>236</sup> traditional forms of dispute resolution have long existed in rural South Africa. Skelton<sup>237</sup> also argues that South Africa's indigenous basis of knowledge of traditional justice practices is an enormous benefit in the explanation and promotion of restorative justice in South Africa. She<sup>238</sup> further expounds that most South Africans are familiar with the principles of restorative justice, although they do not consciously associate it with the "relatively new and novel concept" devised as "restorative justice".

In this light, restorative justice according to Claasens,<sup>239</sup> is when the settlement of a dispute is concentrated on finding a solution that the complainants can live with. The primary purpose of this resolution method is therefore not to punish offenders, but to arrive at an understanding between the parties about a way forward.<sup>240</sup> Thus, the principles of restorative justice are not new and it can be safely argued that the restorative justice concept is simply a recent return to traditional African justice methods.<sup>241</sup> Fortunately, South Africa is no stranger in the sphere of restorative justice since it gained

---

233 Frueh *Political Identity and Social Change* 136. Traditional and community courts are going to be used synonymously throughout the text since these courts are found within the community and they use traditional means to run various functions entrusted with the institution of traditional leadership.

234 SALRC 1997 <https://www.salrc.justice.gov>.

235 Oomen *Chiefs in South Africa* 112.

236 Oomen *Chiefs in South Africa* 112.

237 Skelton 2007 *AJ* 232; Van Wyk *Restorative Justice in South Africa* 8.

238 Skelton 2007 *AJ* 232; Van Wyk *Restorative Justice in South Africa* 8.

239 Claasens 2009 *Agenda* 14.

240 Van Wyk *Restorative justice in South Africa* 6; Claasens 2009 *Agenda* 14.

241 Bennett *Customary Law in South Africa* 157.



popularity on a global level.<sup>242</sup> Equally, Choudre<sup>243</sup> is of the opinion that tribal resolution of disputes is integrative in that it preserves and even strengthens relationships between community members. He<sup>244</sup> goes on to assert that modernizing courts will lead to one forum for tribal litigation being removed.

Converse to the Western legal system based on retributive justice, where the object is usually to establish blame and administer punishment, the traditional courts identify responsibilities to meet needs and to promote healing and enforce values by using social pressure.<sup>245</sup> Similarly, Omale<sup>246</sup> believes that despite enforced foreign justice practices, traditional modes of dispute resolution have remained relevant among Africans. The following reasons are advanced for this position:

- Firstly, most Africans have very limited access to the formal justice system as many of them live in rural areas.
- Secondly, due to a very limited infrastructure in most African countries, there are not sufficient resources to deal with all disputes.
- Finally the processes employed by the formal courts are often inappropriate for settling disputes between people living in close-knit communities in rural areas, where breaking social relationships may cause conflict in the whole community.<sup>247</sup>

---

242 Van Wyk *Restorative justice in South Africa* 43. In South Africa, the biggest socio-legal project embracing the restorative justice principle was the Truth and Reconciliation Commission.

243 Choudree 1999 *AJCR* 15.

244 Choudree 1999 *AJCR* 15.

245 SALRC 1997 <https://www.salrc.justice.gov>.

246 Omale 2006 *AJCJS* 39.

247 Omale 2006 *AJCJS* 32.

As traditional conflict resolution is still practiced in South African rural communities, Ovens<sup>248</sup> opines that this may be indicative of openness by communities for alternative ways of doing justice. This demonstrates the inclination of communities to partake in the process of justice. Consequently, as several of the central principles of restorative justice are consistent with the African world-view, it seems that it is ideally suited to the South African context. Furthermore, a number of African scholars<sup>249</sup> are of the view that the traditional methods of doing justice are very similar, if not exactly the same as restorative justice. This view is further buttressed by Skelton<sup>250</sup> who points out the characteristics common in both traditional justice and restorative justice:

- both processes aim for reconciliation and restoring peace in the community;
- both approaches promote social norms which emphasize community duty as well as individual rights;
- dignity and respect are considered to be central values;
- both processes share the view that a crime is a harm done to the individual and the broader community;
- simplicity and informality of procedure is a common feature of each of the two approaches;
- the law of precedent does not apply to the outcomes of either process;
- community participation is actively encouraged in both processes; and
- restitution and compensation are highly valued by both traditional African justice and restorative justice.

---

248 Ovens 2003 *AC* 68.

249 Kgosimore 2002 *AC* 7 1; Tshehla 2004 *SAJCJ* 4.

250 Skelton 2007 *AJ* 230; Van Wyk *Restorative Justice in South Africa* 8.

Although in different words, Omale<sup>251</sup> put forward a few explanations for the preference to resort to traditional method of justice and these include the following:

- limited access to the formal criminal justice system by people living in rural areas;
- inadequate justice methods offered by the formal justice system to resolve disputes between individuals where close relationships and interactions characterise the relations between rural community members;
- minor disputes in rural communities not being accommodated due to limited resources of the criminal justice systems in most African countries;
- the tendency among rural community members to avoid the involvement of “outsiders” (such as the urban police and criminal justice officials) in disputes in the community; and finally, reluctance of rural communities to rely on the formal justice system could be related to the mistrust of “settlers” or colonial justice.

Furthermore, traditional courts have a major advantage in comparison with other types of courts in that their processes are substantially informal and less daunting, with the rural communities which utilize these courts being more at ease in an environment that is not foreboding.<sup>252</sup> Moreover, the advantages of a community courts system are

- it depends on voluntary participation;
- it is cheap and accessible;
- language is used which is understood within the community;

---

251 Omale 2006 *AJCS* 39.

252 Choudre 1999 *AJCR* 13.

- there is an absence of legalese;
- it creates the opportunity of relieving the criminal justice system of certain disputes it is based on restorative justice with its holistic approach to problem-solving;
- it is sensitive to local community values and background conditions there are fewer delays; and
- therefore swift and less formal justice which helps in the knitting of the social fabric.<sup>253</sup>

Inversely, the disadvantages are that the courts are vulnerable to political pressure, as is the case in South Africa.<sup>254</sup> Secondly, there is a lack of investigative capacity and representation.<sup>255</sup> Thirdly, youth and gender inclusivity is still an issue, particularly in most rural settings. Finally, methods of dispute and conflict resolution as extant in traditional courts of South Africa do not follow precedent.<sup>256</sup>

#### 2.4.3.1 Jurisdiction of traditional courts

According to Bennett,<sup>257</sup> the jurisdiction exercised by traditional courts is strictly territorial and is confined to people resident within a chiefdom, regardless of their tribal affiliation. The South African Law Commission<sup>258</sup> recommended that the jurisdiction of a traditional court in respect of persons should no longer be based on race or colour but on such matters as residence, proximity, nature of transaction or subject matter and the law applicable. Thus, jurisdiction is automatically conferred by reason of the defendant being resident within the area in question. Since traditional courts

---

253 Choudre 1999 *AJCR* 13.

254 Ntsebeza 2003 *Development Update* 34.

255 Van Wyk *Restorative justice in South Africa* 38.

256 Van Wyk *Restorative justice in South Africa* 38.

257 Bennett *A source Book of African Customary Law* 67.

258 SALC Issue Paper 8 Project 94 viii.

exist in almost every area of jurisdiction of a traditional leader, this implies that every village has a court within reach of most inhabitants.<sup>259</sup>

Moreover, traditional courts are accessible and people do not have to take extensive journeys to attend the civil courts. Traditional courts are also relatable to community members because the presiding chief or his headmen are not very different in terms of social standing, wealth or education, therefore, disputants do not feel as intimidated by the chief's court as they would in a westernized (civil) court.<sup>260</sup> The SALC therefore warns that the role of traditional courts and bringing them into the mainstream of a unified legal system is bedeviled by the political question with regard to the status of traditional leaders.

The next section gives a thorough account of the jurisdictional issue in terms of the Traditional Courts Bill.

#### 2.4.3.2 The Traditional Courts Bill

The Traditional Courts Bill<sup>261</sup> (hereinafter the TCB) was an effort on the part of the Government to regularize or formalize the previously "informal" traditional courts as they operated in the rural areas of South Africa. The core objective of the TCB was to affirm the recognition of the traditional justice system, in line with the constitutional imperatives and values through the recognition of traditional courts as part of the country's legal system. Its wording has reinforced the principle of restorative justice even further; in terms of section 7 the traditional courts are distinct from the courts referred to in section 166 of the South African Constitution and operate in accordance with the principles of customary law which seeks to promote restorative

---

259 Oomen *Chiefs in South Africa* 43.

260 SALC Issue Paper 8 Project 94 2.

261 B1-2012 Formerly the Traditional Courts Bill B15-2008.

justice and reconciliation. These courts operate in accordance with a system of customary law and custom that seeks to:

- prevent conflict;
- maintain harmony; and
- resolve disputes in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the *Constitution*.

Claasens<sup>262</sup> argued that instead of affirming the traditional justice systems, the TCB essentially reworks customary law by centralizing power in the hands of senior traditional leaders and adding powers that they did not traditionally hold under custom.<sup>263</sup> She<sup>264</sup> is of the opinion that this centralization of power in the hands of individual traditional leaders augments their ability to interpret and define customary law. This is said to undermine “the development of a ‘living’ customary law that reflects all the different voices currently involved in dispute resolution” together with the debates about the content and interpretation of changing customs and practices.<sup>265</sup> The SALC also believes that vesting sole authority in the chief as presiding officer disregards and undercuts the input of other community members in the development of “living” customary law. Thus, Oomen<sup>266</sup> maintains that the

---

262 Claasens 2009 *Agenda* 10; Walker 2013 *TE* 89; Claasens 2014 *JSAS* 762.

263 According to the Centre and Law for Society this centralisation of power ignores and disempowers the complex layers of governance that exist below senior traditional leaders, where dispute resolution is most often handled before it is escalated to the senior traditional leader. Claasens 2014 *JSAS* 762.

264 Claasens 2009 *Agenda* 9; Oomen *Chiefs in South Africa* 70; Baldwin 2014 *CP* 256; Claasens 2014 *JSAS* 762.

265 Other concerns have focused on the extent of the powers vested in traditional leaders as presiding officers, the absence of provisions allowing rural people to opt out of the traditional court system as well as the TCB’s failure to recognize the disadvantages that women face in these institutions. Walker 2013 *TE* 89.

266 Oomen *Chiefs in South Africa* 70; Claasens 2009 *Agenda* 9.

TCB entrenches the principle of centralization of statutory authority as did its predecessor, the *Black Authorities Act*.<sup>267</sup>

Accordingly, Van der Merwe and Mbebe<sup>268</sup> opine that taking on criminal cases essentially means taking on the responsibility of determining guilt and innocence, an otherwise adjudicatory function which would imply extensive coercive control that requires extensive training. Consequently, the TCB takes cognizance of this position and provides that all the traditional leaders nominated in terms of section 4 (1)-(4) of the TCB save for the exemptions, must attend a prescribed training programme or course in the circumstances prescribed in regulation 21(1)(c).<sup>269</sup> Furthermore, the jurisdiction of traditional courts is determined by section 5(1), which provides that a traditional court may hear and determine civil disputes arising out of customary law and custom. Section 5(2) excludes a range of issues from the civil jurisdiction of traditional courts. The list of exclusions includes any constitutional matter, divorce and separation, the custody and guardianship of children, wills and claims above an amount or value determined by the Minister from time to time and published in the Gazette. Since the civil and criminal aspects of dispute resolution in traditional courts are so completely intertwined, it would not seem possible to discuss one aspect without the other.

---

267 In terms of s12 of the *BAA* "only" appointed chiefs and headmen could hear and determine civil disputes. The SALC (SALC Issue Paper 8 Project 94 35) warned about this even before the TCB was drafted in their 1999 report. The Commission stated that "...it may be said that the framers of the Constitution intended the continued existence of traditional courts. This does not mean that they have to remain unchanged in the same form as provided for under the Black Administration Act of 1927". Claasens 2014 *JSAS* 763.

268 Mbebe and Van der Merwe *Informal Justice* 14.

269 This regulation provides that "the Minister must make regulations regarding the circumstances in which a traditional leader may be exempted from attending a training programme or course.

Akin to the spirit of *Traditional Leadership Framework and Governance Act*<sup>270</sup> in section 25(3), is the provision of the TCB in section 9 which buttresses that the procedure at any proceedings of a traditional court as well as the manner of execution of any sanction imposed by a traditional court “must be in accordance with customary law and custom”. On the contrary, the TCB exacerbates existing challenges to access to justice. It denies the right to legal presentation in terms of section 9(3) (a). This provision affects more women than men as in many traditional courts they are not allowed to speak or represent themselves, but instead have to rely on male relatives to represent them.<sup>271</sup> It further puts women at a disadvantage, particularly in cases arising from disputes with their male relatives.

It is for this reason that a myriad of women’s movements in particular have argued that traditional courts should not be allowed to hear and determine a range of matters affecting women because their composition and patriarchal character favours male interests, thereby rendering women vulnerable.<sup>272</sup> Besides, this section ignores the very constitutional principles it seeks to protect: Section 35(3) of the South African *Constitution* confers a right to a fair trial<sup>273</sup> on every accused person, including the right to representation by a legal practitioner.<sup>274</sup> It was for this reason that different stakeholders made submissions to the Justice Portfolio Committee of the TCB’s unconstitutionality.

---

270 41 of 2003.

271 Bentley 2005 *HRR* 51. In some areas, for instance in terms of the case of *Shilubana and Others v N Wamitwa* 2008 9 BCLR 1914 (CC), under the new constitutional dispensation women can become traditional leaders in their traditional communities, which is contrary to the old and long observed African customary rule of male intestate succession, which excluded women from succession to the position of traditional leadership.

272 These include the Commission for Gender Equality, the Centre for Applied Legal Studies etc. Claasens A 2009 *Agenda* 11.

273 S 35(3) (c).

274 S 35(3) (f).



Opponents,<sup>275</sup> on the other hand, contend that including lawyers in the traditional courts would be a futile exercise since other complainants cannot afford their services. It is also argued that lawyers would only complicate the otherwise straightforward process by using complex and technical legal jargon they are known for.<sup>276</sup> Bennett<sup>277</sup> rightly argues that in the face of penalties that are likely to be imposed, such as banishment or dispossession of land, there ought to be a right of representation although sound reasons exist for the exclusion of legal practitioners from traditional courts. One such reason is the aim to preserve procedural “informality” and to ensure that neither litigant is given an unfair advantage by being allowed to engage counsel to argue the case.<sup>278</sup>

Notwithstanding the traditional courts decrees being equivalent in weight to those passed by magistrates,<sup>279</sup> chiefs still have a junior status in relation to magistrates and matters can be taken on appeal to the latter, despite not reaching finality in the chiefs’ courts.<sup>280</sup> This is a clear inconsistency within the Bill. Bennett<sup>281</sup> is also of the opinion that this overlap in jurisdiction could lead to forum-shopping and actions being removed from a wrong court to the correct forum, with consequent loss of time and money. In conclusion, other factors affecting the jurisdiction of the traditional courts include the monetary ceilings,<sup>282</sup> gravity of the offence<sup>283</sup> and the nature of the dispute.<sup>284</sup> In terms

---

275 Mnisi Weeks 2011 *CQ* 35.

276 Claasens 2009 *Agenda* 10; Iyi 2016 *JLPUL* 128.

277 Bennett *Customary Law in South Africa* 144.

278 Bennett *A source Book of African Customary Law* 70.

279 In terms of s 11(2)(d). An order made by a traditional court has the effect of a civil judgment of the magistrate’s court having jurisdiction and is enforceable in terms of the provisions of the *Magistrates’ Courts Act*. Claasens 2014 *JSAS* 769.

280 S 13(1) provides that a party to a civil or criminal dispute in a traditional court may, in the prescribed manner and period, appeal to the magistrate’s court having jurisdiction against an order of a traditional court.

281 Bennett *A source Book of African Customary Law* 70.

282 S 5(2) (e) enjoins the Minister to determine the monetary ceilings from time to time.

of section 1 of the TCB a traditional court should be presided over by a king, queen, senior traditional leader, headman, headwoman or a member of a royal family who has been designated as a presiding officer of a traditional court by the Minister. This also includes a forum of community elders who meet to resolve any disputes that have arisen.

#### 2.4.3.2.1 Procedural aspects under the TCB

Section 9(1) provides that the procedure at any proceedings of a traditional court and the execution of sanctions imposed therefrom must be in accordance with customary law and custom, excluding special cases in which the Minister makes concessions in terms of the regulations enlisted in section 21(2)(a). Likewise, section 9(2)(a) of the TCB read with section 19 of *TLGFA*, require a presiding officer in a dispute to ensure that the rights contained in the Bill of Rights in chapter 2 of the Constitution are observed and respected, and that customary law of the area is applied. Moreover, the traditional courts are enjoined to observe the following rules of natural justice:

- (a) the *audi alteram partem* rule, which means that persons affected by a decision must be given a fair hearing by the decision-maker before the decision is made; and
- (b) the *nemo iudex in propria causa* rule, which means that any decision making must be, and must be reasonably perceived to be, impartial.

---

283 The SALC (at 41) recommended that only relatively minor offences should be within the jurisdiction of the traditional courts while the more serious are left to be dealt with by magistrates' courts or higher courts.

284 The SALC (see p 43) also cautioned that matters relating to nullity, divorce and separation with regard to civil marriages should not be included from the jurisdiction of traditional courts and that such cases should be taken to a family court.

#### 2.4.3.2.2 Enforcement of sanctions

The role of the traditional courts is to hear the court proceedings brought before it and to make pronouncements about what is reasonable and fitting in the circumstances of each proceeding.<sup>285</sup> Thus, the job of the presiding officer is to manage the trial, listen to the parties and their evidence, and then make a pronouncement of what a fair and appropriate result is. The decision of the court is binding on the parties who stand the risk being held in contempt in the event of default.<sup>286</sup> According to an African proverb, “when the lions fight, even the cows can win” this means that those in authority must be left to make decisions, others must not quibble. These decisions have to be taken by the lions and they have to be followed rather than endlessly disputed.<sup>287</sup>

The TCB makes provision for enforcement of sanctions of traditional courts in terms of section 11. Section 11(1) of the TCB provides that if it comes to the attention of a traditional court that a person upon whom the traditional court has imposed a sanction, fails to comply or pay a fine, the traditional court must recall that person to appear before court. Nevertheless, because the traditional courts system is not punitive in nature, when a person defaults in complying with the court’s order, the court must first look into the reasons of such failure to conform and then determine if the non-compliance was due to the fault of that person.<sup>288</sup>

Section 10(2), in turn, empowers a traditional court to order and impose a range of orders and sanctions. For instance sub section (2) (a) provides for an order for the payment of a fine which must be determined by a Minister

---

285 S 10 (2), TCB.

286 S 12 TCB.

287 LiPuma and Koelble 2009 *JCAS* 214.

288 S 11(2) (a).

and published in a gazette from time to time. Alternatively, section 10(1) confines the sanctions that a traditional court can impose in criminal cases. It emphasizes that punishment by traditional courts cannot be inhumane, cruel or degrading.<sup>289</sup> It provides further that the punishment should not involve any form of detention, imprisonment,<sup>290</sup> banishment,<sup>291</sup> excessive fines<sup>292</sup> and corporal punishment.<sup>293</sup>

#### *2.4.4 The Traditional Leadership and Governance Framework Act*

In 1998 the Department of Co-operative Governance and Traditional Affairs engaged in several processes in an effort to bring about policies and legislation on traditional leadership. It is in this context that the *Traditional Leadership and Governance Framework Act*<sup>294</sup> (hereinafter *TLFGA*) was born. *TLFGA* validated the role of chieftaincy in local Government through their leadership of traditional councils in the rural areas. Claasens<sup>295</sup> believes that the *TLFGA* does not in itself give traditional leaders extensible statutory powers but it gives leeway to far-reaching powers where it specifies that the national or provincial governments can enact laws that give a role for traditional councils on a broad spectrum of issues that include administration of land and its welfare, the administration of justice, safety and security, economic development and the management of natural resources.<sup>296</sup>

On the other hand, the thrust of President Thabo Mbeki's policy that is replicated in the *TLFGA* was to empower traditional leaders and augment

---

289 S 10(1) (a).

290 S 10(1) (a).

291 S 10(1) (b).

292 S 10(1) (c).

293 S 10(1) (d).

294 41 of 2003.

295 Claasens 2014 *JSAS* 767; Bennett *et al.* 2013 *LUP* 23; Rugege 2003 *LDD* 185.

296 S 20.

their authority.<sup>297</sup> Hence, to officially recognize traditional leaders, it was deemed necessary to rid the institution off its colonial accretions.<sup>298</sup> *TLFGA* therefore provides a national framework for provincial laws dealing with traditional leadership. Some of the principal objectives of the *TLFGA* are as follows:

- to provide for the recognition of traditional communities;
- to provide for the establishment and recognition of traditional councils; and
- to provide a statutory framework for leadership positions within the institution of traditional leadership.

Traditional leaders therefore, are obliged to perform their functions based on customary law, customs of the traditional community concerned, as well as applicable legislation.<sup>299</sup> Similarly, section 20 of the *TLFGA* provides that the national Government may provide a role for traditional leaders and traditional councils in respect of a range of issues including land administration, agriculture, health, welfare, safety and security, and the administration of justice. One of these roles, as relates to the current study, is the dispute resolution task.

Despite the provisions in section 3 of *TLFGA* which provides for the hierarchy of traditional leadership institutions, section 21(1) (a) of same provides that, in case of disputes concerning customary law or customs within a traditional community or between traditional communities or other customary institutions regarding the implementation of *TLFGA*, members of that community and its traditional leaders must seek to resolve the dispute internally and in accordance with customs. This implies that *TLFGA*

---

297 Rugege 2003 *LDD* 189.

298 Walker 2013 *TE* 86.

299 S 19 of *Traditional Leadership Framework and Governance Act*.

recognizes dispute resolution at lower, family heads levels (also known as negotiation, a traditional method of dispute resolution).

#### 2.4.4.1 Leadership Structure under the *TLFGA*

A wise chief listens to all voices, consults with the elders, then makes a decision but only one that will satisfy all parties concerned, otherwise the decision is left until another day and another round of deliberation.<sup>300</sup>

LiPuma and Koelble<sup>301</sup> assert that the above quotation is most certainly not what happens in practice. According to a study they conducted in the Eastern Cape and KwaZulu Natal regions, several chiefs offered thoughtful descriptions of how they operated when decisions had to be made. The chiefs claimed to rely on a council of elders made up of representatives from each village. In none of the cases observed was the choice of elders based on a democratic vote, but on a system of patriarchy and kinship relations. Accordingly, section 3 of the *TLFGA* provides that “traditional communities” must establish these councils, which in turn must comprise of traditional leaders and members of the traditional community selected by the principal traditional leader concerned in terms of custom. Thus, the leadership structure as enshrined by chapter 3, section 8 of *TLFGA* is as follows:

- (a) kingship;
- (b) senior traditional leadership; and
- (c) headmanship.

Traditional councils, on the other hand, are established by the traditional communities in line with the principles of the provincial legislation. These councils comprise of 30 members, a third of which, “must” be women.<sup>302</sup> Over and above these, other council members should include traditional leaders as well as members of traditional communities as selected by senior

---

300 Mandela *A long walk to freedom* 614.

301 LiPuma and Koelble 2009 *JCAS* 214; Claasens 2014 *JSAS* 769.

302 S 3(2) (a)-(b). The *TLFGA* has still not jumped on the “equality wagon”.

traditional leaders. An element of democracy is also included in the composition of council members since at least 40 per cent of them have to be elected into office for a period of five years.<sup>303</sup> Furthermore, rural communities are only recognized in terms of the *TLFGA* if they are subject to a system of traditional leadership in their customs and they observe a system of customary law.<sup>304</sup> Many rural communities in South Africa still marginalize women in leadership positions despite the provision of section 2(3) of the *TLFGA*. In terms of this provision, communities must submit to the *TLFGA* by transforming and adapting customary law and customs that inhibit them to observe the principle enshrined in the Bill of Rights.<sup>305</sup>

The principles include, but are not limited to, prevention of unfair discrimination, promotion of equality as well as seeking to progressively advance gender representation in the succession to traditional leadership positions. Nonetheless, to compensate, section 3(2) (d) of *TLFGA* vests the Premier with the authority to determine a lower threshold for the particular traditional council than the prescribed number of 30 in cases where there is an insufficient number of women participating.

---

303 S 3(2) (c) (i) - (ii).

304 S 2(1) (a)-(b).

305 In 2008, the Constitutional Court settled this matter in the case of *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) 933. The case raises issues about a traditional community's authority (Valoyi traditional authority) to develop their customs and traditions to accommodate and promote gender equality in the succession of traditional leadership, in accordance with the South African *Constitution*. In this case a woman (Ms Shilubana) was appointed to a chieftainship position for which she was previously disqualified because of her gender. The issue before the court was whether the community had the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination, despite the discrimination occurring before the coming into operation of the *Constitution*. The Court held that the Valoyi traditional authority had authority to act on constitutional considerations in fulfilling their role in matters of traditional leadership and that their actions reflected in the appointment of Ms Shilubana represented a development of customary law. Thus, the traditional authority intended to act to affirm constitutional values in traditional leadership in its community.

## **2.5 Conclusion**

### *2.5.1 Tenure security*

Secure tenure in land is a necessity for all individuals in the rural communities of South Africa, for the rural communities; this is only an ideal that seems far-fetched. For one to say their tenure in land is secure, they must not only be able to enjoy such property without interference from third parties but also be able to enjoy the fruits of the labour and capital invested in the land. Despite the numerous precedents that have been set by the South African courts to proclaim that customary law enjoys the same status as all other sources of law in South Africa, customary land rights are still treated as inferior to private land rights. Dealing with the communal land tenure requires of the Parliament to fully appreciate that they are very different from the common law landholding. Communal land and resource rights are embedded in a range of social relationships. Consequently, rights and access to the land and other resources is derived from an accepted membership of a community.

The Government of South Africa has been on a mission to secure rural land rights through its various land reform policies and legislation. Despite the provisions of the *Constitution* to this end, these efforts have proved futile thus far; the very first attempt to secure communal land tenure was aborted before it could even be put into operation (the *CLARA*). By the same token, since the *CLARA*'s revocation the DRDLR has been working on policies that purportedly gave life to the CLTB (has been published to allow public commentary). Consequently, the CLTB, despite its own shortcomings, is the only hope that the South African rural communities have to have their land rights protected.



### *2.5.2 Women's access to communal land*

It has been shown that land is central to rural livelihoods and, as such, women being majority caretakers of the homesteads need their tenure in land to be secure. It is these same women who are ostracized when it comes to rural land dealings, either against their male counterparts or *inter se* (between their different categories namely, married and unmarried, widowed and children or no children; male children or female children). The international, continental and regional standards collectively strive for societies that do not discriminate against women in land matters. To conform to the standards set by these instruments, the South African *Constitution* has also embodied those equality principles. Further, the CLTB has remedied the contentious non-equality clauses under *CLARA* by giving half of the leadership positions in communal land administration to women. Nonetheless, the patriarchal communities still inhibit women's autonomy to deal with land in ways they deem fit because they are seen as "minors" despite being the tillers of the land. Thus, if women's communal land rights continue to be ignored as they are, perhaps there is no point in pretending that land rights are actually "communal" when over half the communities face marginalisation and secondary rights.

### *2.5.3 Dispute resolution*

The object of every dispute resolution mechanism is to mend the social relationships that are likely to go sour when people live together. The mechanisms employed therein should work in a way that allows the disputants to still live together amicably after such conflict has been resolved. It has been shown that the institution of traditional leadership has reemerged in South Africa, whether from its oppressive roots of apartheid or as a new creature is dubious. The primary role of traditional leaders has and will

always be maintenance of peace and order in the communities; this role is at times tainted by petty Government politics. The promulgation of the TCB and the *TLFGA* was seen as a preservation of custom by many, with a few exceptions who see it as a redundant institution in a democratic and constitutional state. If there is to be any future for these institutions, the principle of separation of powers must be observed. In attempting to solve land disputes, various techniques are used and they are often employed as a means of restoring peace between disputants. These techniques have regressed from winner-loser mentality in that both parties to the dispute must both be satisfied by the outcome arrived at.

The succeeding chapter analyses the South African land tenure legislation and policies as well as communal land tenure issues raised by case law.

## **CHAPTER THREE**

### **THE SOUTH AFRICAN COMMUNAL LAND TENURE LEGISLATION AND POLICIES AND ISSUES RAISED BY CASE LAW**

#### ***3.1 Introduction***

The foregoing chapter gave an account of the communal land tenure in South Africa; this was to show where the discrepancies under the communal land tenure emanated. The nature of these rights was discussed to indicate that they are in a class of their own, hence must not be forced into the western concepts of property. This was done in conformity with the chosen themes, tenure security as well as dispute resolution in communal land. The current chapter discusses the legislation that governs the communal land tenure and landholding in South Africa.

The extrication of communal land tenure in rural South Africa has proven to be an extremely daunting task; this lesson is to be learnt from the recent debates on the issue. Like all other tenure reform legislation, the Communal Land Rights Act (hereinafter *CLARA*) was enacted to address the inequalities relating to insecure tenure in rural communities. First and foremost, it must be cautioned that *CLARA* has been revoked and will, for that reason, be analysed in the past tense. As indicated in the preceding chapters, the study is confined to three themes namely, tenure security, women's access to communal land and dispute resolution on communal land. It is against this background that the communal land tenure legislation and policies are deliberated.

Nonetheless, legislation preceding *CLARA* is discussed to show how tenure security, or lack thereof, has evolved over time. The Communal Land Tenure Bill (hereinafter the CLTB) will also be scrutinized in comparison with the

provisions of *CLARA* to determine if there have been any developments in the rural tenure legislation.<sup>1</sup> In the context of secure tenure, *CLARA* transferred title of communal land from the state to a “community,” which had to register its rules before being recognized as a “juristic person” legally capable of owning land.<sup>2</sup> The CLTB will, in an effort to provide land tenure that is legally secure, undertake to convert all existing rights to ownership in respect of communal land as well as transferring such ownership to the communities where it was previously owned by the state.<sup>3</sup> In terms of women’s access, *CLARA* provided that women were entitled to the same tenure rights as their male counterparts and that no law, rules or practices could differentiate on the grounds of gender.<sup>4</sup> In terms of the core principles governing the CLTB, women and men are equal and as such, the regulation of communal land must promote the rule of law, good governance and accountability.<sup>5</sup> Finally, in case of disputes, *CLARA* provided that the Land Administration Committee would be entrusted with a myriad of responsibilities amongst which dispute resolution fell.<sup>6</sup>

Furthermore, it must also be borne in mind that the rural communities are governed by traditional authorities hence the *Traditional Leadership Framework and Governance Act* (hereinafter the *TLFGA*) also finds application.<sup>7</sup> In this light, the CLTB provides that in the regulation, management and administration of land, the relevant stakeholders must

---

1 The CLTB is also analysed as a prospective statute since it has not been enacted as an Act of Parliament, hence subject to change. The researcher has used the 2016 CLTB version.

2 Section (hereinafter s) 3(1) *CLARA*.

3 S 2(a) (i) (ii) and Preamble to the CLTB.

4 S 4(3).

5 S 3(f).

6 S 24(3) (b).

7 *CLARA* read together with the *TLFGA* which deemed existing tribal authorities to be traditional councils, if they met composition requirements within a prescribed period. Thus, *CLARA* provided that where traditional councils exist, they had to be land administration committees.

provide access to justice and redress in cases where land rights are in dispute.<sup>8</sup> In this light, the CLTB leaves the dispute resolution function to whichever institution that the community will choose as the land administration body.

This chapter deals with all three issues concomitantly to avoid duplication of information with other chapters. The selected themes cannot be divorced since in the discussions on tenure security, the institution of traditional leadership is investigated and through these deliberations it is shown that the institution is patriarchal in nature. Hence, since the institution solves community disputes on a regular basis, it goes without saying that good land policies, laws and regulations as well as respect for them can go a long way towards the improvement and management of conflict.

### **3.2 Tenure security in South Africa**

Carey-Miller and Pope<sup>9</sup> define tenure reform as “the reform of the legal basis of landholding that is often directed towards the implementation of social change”. Put differently, tenure reform refers to the process of changing the basis on which control is held over land to strengthen and enhance landholding against interference.<sup>10</sup> It has been shown to be the most complicated and difficult of all three legs of land reform in South Africa. Thus, to succeed it needs to concede and accommodate the fundamental dynamics of embedded constructs of family, relative rights and fairness.<sup>11</sup> Claasens<sup>12</sup>

---

8 S 3(e); s 8(1) and (2).

9 Carey-Miller and Pope *Land Title* 456; Mostert and Pienaar “Formalisation” in Cooke (ed) *Modern Studies* 320.

10 Pienaar 2015 *Scriptura* 13; See Pope 2010 *LDD* 1; Cousins 2017 *Transformation: Critical Perspectives on Southern Africa* 31.

11 Claasens 2014 <https://www.cls.uct.ac.za>. It has also been warned that developing any tenure legislation in South Africa is a very daunting job, more so with the legacy of obstinate problems of both colonialisation and apartheid.

sturdily believes that the issue of tenure reform in the communal areas has always been politically divisive, because strong vested interests are at stake.

Pope<sup>13</sup> illustrates that the basis for the commentary in the book *Land, Power and Custom* is to provide context to and evidence of the intricacies brought about by efforts that attempted to give effect to the constitutional mandate in section 25 (6) and (9). These provisions aim to secure tenure rights that are precarious for historical reasons and, simultaneously, to preserve the possibility of indigenous property management structures. The interpretation is also a response to the *CLARA* and the *TLFGA* collated in preparation for litigation that challenges the constitutionality of *CLARA* by alleging that it “undermines the rights of rural people to make them less secure than before”. In the same light, various commentators<sup>14</sup> emphasize overtly that there is nothing simple about the task of securing indigenous land rights. On the one hand, the policy has to acknowledge the traditional leadership institutions, and on the other hand, community interests must be ascertained; more often than not, these two conflict.

---

12 Claasens 2014 <https://www.cls.uct.ac.za>; Cousins 2007 *JAC* 280. This discussion is mainly based on the powers of the traditional authorities who have dominion over land issues in the communities.

13 Pope 2010 *LDD* 1.

14 See Pope 2010 *LDD* 1; Mostert and Pienaar “Formalisation” in Cooke (ed) *Modern Studies* 317; Cousins 2017 *Transformation: Critical Perspectives on Southern Africa* 32; Claasens 2014 <https://www.cls.uct.ac.za>; Pienaar 2011 “Land Information” in *Acta Juridica* 267; Pienaar 2015 *Scriptura* 13.

### 3.2.1 *The South African communal tenure legislative outline*

#### 3.2.1.1 The Land Rights Bill<sup>15</sup>

In 1998 the Department of Land Affairs drafted the *Land Rights Bill*<sup>16</sup> (hereinafter the *LRB*) and it was expected to go before Parliament at the end of 1999. Ntsebeza<sup>17</sup> was skeptical about it becoming an Act of Parliament before 2000 since it was procedurally flawed; auspiciously enough, it never saw the light of day.<sup>18</sup> The *LRB* proposed a category of “protected rights” created by law to secure the basic rights of rural people in the former Bantustans.<sup>19</sup> In 2001, the then Minister introduced a new bill named the *Communal Land Rights Bill* (hereinafter the *CLRB*) on the conviction that the 1999 version would be demanding in its implementation.<sup>20</sup> The *CLRB* came about as a result of frustration of different stakeholders who appealed that there was not an adequate amount of time allocated to give proper commentary on the preceding LRB.<sup>21</sup>

Likewise, another *CLRB* was drafted in 2002;<sup>22</sup> this version was published for comments in the same year but was criticized heavily for confusing administration structures.<sup>23</sup> After a careful consideration of these comments, the Department published a re-drafted version of the *CLRB* and it later

---

15 GN 1423 GG 23740 of 14 August 2002 and Bill of Land Rights n 67 of 2003.

16 At first instance it was called the “Security of Tenure Bill” dated 30 June 1998 but the title was later changed to “Land Rights Bill”.

17 Ntsebeza “Land Tenure Reform” 6-10.

18 Cousins 2007 *JAC* 282. Cousins opines that some of the contestations included the characterization of “unit of ownership”. The issue was whether land should be transferred to tribes, to the people under chiefs and designated tribal authorities or directly to villages and/or wards. Either option presented its own challenges; the first was that vesting land ownership in a larger group could make it difficult for other smaller groups within to make any pronouncements about land within their own communities.

19 Ntsebeza “Land Tenure Reform” 8. See also Cousins 2007 *JAC* 285.

20 Claasens 2003 <https://www.plaas.org.za>.

21 Claasens 2003 <https://www.plaas.org.za>.

22 GN 1423 GG 23740 of 14 August 2002.

23 Johnson *Communal Land* 33.

became evident that the re-draft *CLRB* had omitted particular provisions that were enshrined in the earlier 2001 *CLRB*. At this stage, the *CLRB* was rushed through Parliament without any meaningful contribution by those directly affected by it.

### **3.3 Land administration under CLARA versus the CLTB**

Okoth-Ogendo<sup>24</sup> believes that the security of indigenous land rights is dependent on a working social organisation and structures which are able to carry out their functions in a sustainable manner. Yet, *CLARA* fallaciously persisted with the common view of indigenous rights that there could be equivalence with real rights in land. *CLARA* also made it seem like overlapping rights were not problematic and that separation of land rights from issues of social organisation was acceptable. According to him,<sup>25</sup> the approach followed by *CLARA* inevitably meant that the state participated in “suppressing indigenous land rights and cultural resources” as a result of a “carry-over of colonial perceptions and strong beliefs that indigenous land rights cannot support modern agrarian development”.<sup>26</sup> In the same light, he<sup>27</sup> argued strongly that *CLARA* could not have achieved its stated objectives; rather it would have undermined tenure security under indigenous land law.

Alternatively, Westaway<sup>28</sup> strongly believes that *CLARA* was not an anomaly because it did not go against the grain of the South African democracy. If anything, it was but one of a number of post-1994 processes that delivered

---

24 Okoth-Ogendo “The Nature of Land Rights” 95-99; Cousins 2007 *JAC* 282.

25 Okoth-Ogendo “The Nature of Land Rights” 95-99; Du Plessis and Frantz 2013 <http://ssrn.com/abstract=2381922>.

26 Okoth-Ogendo “The Nature of Land Rights” 102; Du Plessis and Frantz 2013 <http://ssrn.com/abstract=2381922>.

27 Okoth-Ogendo “The Nature of Land Rights” 94-99.

28 Westaway *et al.* 2010 *JCAS* 103.



the perpetuation of segregationism in South Africa.<sup>29</sup> Additionally, Grande<sup>30</sup> posits that there is a standard on which to test if tenure is indeed secure. To fully understand tenure security in communal property systems, one has to look at these three indicators, namely:

- the who of whose tenure security is in question;
- the rules and practices; and
- the structures that apply to different land uses.

The rules in this instance refer to “who can do what and for what purposes”. The practices involve the enquiry of “who actually gets what and for what purposes”. Finally, the structures examine the “who makes the rules and enforces them”. Accordingly, these probes form the background against which *CLARA* is investigated under the tenure security aspect.

Wily<sup>31</sup> is of the opinion that customary rights are deemed to be legally secure when the national land law acknowledges the following indicators;

- (i) customary rights as a species of property due the same level of protection afforded rights acquired through non-customary systems;
- (ii) the holding of lands collectively as a lawful form of ownership within the customary sector and the collective as a natural person for purposes of registration of such rights;
- (iii) that customary rights apply to off-farm and undeveloped resources such as forests, rangelands, ponds, marshes and other lands and resources traditionally belonging to the community, in addition to housing and farming lands;
- (iv) that customary rights are inseparable from customary jurisdiction over those rights and provision for which exercise is duly made in the law, albeit within limits of constitutional requirements for

---

29 Westaway *et al.* 2010 *JCAS* 103.

30 Grande “Delivering Land” 5-9.

31 She warns that the indicators target weak points in legal provisions thus far, and weaknesses within the customary regime itself, such as may occur in the ordering of rights in ways contemporarily deemed discriminatory, The indicators therefore do not pretend to be other than proactive, modernising and majority-focused. Wily “Customary Tenure” 11.

- equitable and inclusive decision-making and accountability to all members of the community; and
- (v) which law provides for voluntary registration of customary land interests as adjudicated by communities, without conversion into non-customary forms of tenure or loss of community based jurisdiction, and which includes the right of the community to record all its lands and resources as community property.<sup>32</sup>

In view of this, *CLARA* endeavored to secure tenure to communities by introducing an adapted registration mechanism for communal land to fit in with the existing system of registration and title transfer in South Africa.<sup>33</sup> Its registration procedure envisioned the core tenets that included:

- (i) The transfer and registration of the communal land in the name of the community;<sup>34</sup>
- (ii) registration of the community rules as prescribed by the *CLARA*; and<sup>35</sup>
- (iii) conversion of new order rights into freehold.<sup>36</sup>

Accordingly, section 4 of *CLARA* provided for secure tenure in the communal areas of South Africa. In terms of this provision, a community or person was entitled to either secure tenure in land or comparable redress if they were dispossessed by the past racially discriminatory laws or practices.<sup>37</sup> In the same manner, an old order right held by a married person was deemed to have been held by all spouses jointly and in undivided shares. This, in turn, implied that married women's rights in land were deemed to be equal to their partners' despite any laws providing to the contrary.<sup>38</sup>

---

32 Wily "Customary Tenure" 11.

33 Mostert and Pienaar "Formalisation" in Cooke (ed) *Modern Studies* 318.

34 S 5 and 6.

35 S 19.

36 S 9.

37 S 12 provides that in the event that a community's tenure cannot be secured for whatever reason, comparable redress should be the next logical step. Redress could include alternative land, compensation in money or a combination of both.

38 S 4 (3) *CLARA*.

In this light, Johnson<sup>39</sup> rightly concurs with Mostert and Pienaar<sup>40</sup> who assert that section 4 of *CLARA* should have laid a basis as the constitutive provision for achieving security of “old order rights” as set out in the section.<sup>41</sup> They<sup>42</sup> suggest that the term “old order rights” dealt not only with rights that were previously formed during colonisation and apartheid, but also with all land relations. In the same way, section 5 dealt with registration of communal land and “new order rights”. These sections, when read together, made tenure security in South Africa a reality, since *CLARA* instituted a registration procedure that applied to all communities and also confirmed title to land owned by persons or entities other than the state.<sup>43</sup>

Furthermore, registration of land rights in the hands of communities was provided for in section 5(1) and 5(2). This section applied, irrespective of whether the predecessor of the community was an individual, a traditional leader or a communal property association, a trust or any other legal entity. Mostert and Pienaar<sup>44</sup> believe that reading section 5 and 2 together led to the conclusion that *CLARA* applied to all communal land in South Africa.<sup>45</sup>

In addition, in terms of section 18(3) of *CLARA*, the Minister was granted extensive discretionary powers that gave effect to the constitutional mandate stated in section 25(6) of the *Constitution*. If the Minister decided to convert old-order rights into new-order rights, he/she could singlehandedly determine what the content and extent of the newly awarded right or rights would be or cancel them. The Minister’s discretion even extended deciding whether or not

---

39 Johnson *Communal Land* 40.

40 Mostert and Pienaar “Formalisation” in Cooke (ed) *Modern Studies* 318.

41 Johnson *Communal Land* 40. See also Claasens 2005 *AJ* 46.

42 Mostert and Pienaar “Formalisation” in Cooke (ed) *Modern Studies* 318.

43 S 5(2) (a) and 5 (2) (d).

44 Mostert and Pienaar “Formalisation” in Cooke (ed) *Modern Studies* 319.

45 Mostert and Pienaar “Formalisation” in Cooke (ed) *Modern Studies* 319. As discussed in the succeeding chapters, this argument was the major concern for all the four applicant communities in the case of *Tongoane*. See s 3.5.1 in chapter 3.

rights could be made legally secure at all.<sup>46</sup> In effect, *CLARA* reduced a constitutionally entrenched right to a “nebulous something” dependent on the goodwill and/or convictions of the Minister.<sup>47</sup> An element of democracy on communal land issues is seen in section 6(2) of the CLTB wherein the Minister “must” consult the community members when he decides to convert or reserve part of communal land for public use by the state. Whether this will be followed as prescribed by the CLTB, is yet to be seen.

Notwithstanding, section 4 of the CLTB sets out a clear jurisdiction of its application: It provides that all communal land that vested in the state,<sup>48</sup> including all land that was restituted to a community by virtue of the constitutional requirements,<sup>49</sup> land provided on an equitable basis in conformity with the *Constitution*,<sup>50</sup> as well as land in respect of which the Minister will determine that the CLTB applies, is to be governed by the CLTB.<sup>51</sup> Thus, the CLTB will only apply to insecure communal land. Unlike *CLARA*, the CLTB details out all the Minister’s considerations before making the determination. This is a commendable improvement since under *CLARA*<sup>52</sup>

---

46 1996 (2) SA 464 (CC) at para 23. There it was held that constitutionally entrenched rights cannot be dependent upon the exercise of discretion. Ng’ong’ola “Constitutional Protection of Property” in Saruchechea *Securing Land and Resource Rights in Africa* 66.

47 Marcus Submission made to the Human Rights Commission on the 2003 Communal Land Rights Bill at 5. Budlender Submission made to the Commission for Gender Equality on behalf of the Legal Resources Centre on the 2003 Communal Land Rights Bill at par 31.

48 S 4 (a). This includes land that is vested in (i) a government contemplated in the Self-Governing Territories *Constitution Act*, 1971; (ii) the governments of the former Transkei, Bophuthatswana, Venda or Ciskei; and (iii) the South African Development Trust.

49 Inter alia s 26(7) and 25(5); s 4(b).

50 S 4(c).

51 S 4(d). The provision requires that the Minister’s determination should be preceded by a notice in the gazette. Does this go back to the controversial provision of wide discretionary powers given to the Minister under *CLARA*? What legal basis does the notice in a gazette serve to the rural people who seldom have access to these documents?

52 S 18(3)(d)(iii).

the conversion and extent of “old order rights” into either ownership or comparable new order rights were left solely to the Minister’s discretion.<sup>53</sup>

In terms of section 7 of the CLTB, the Minister must have regard to a number of factors including, but not limited to, all relevant legislation, including law governing land surveys, deeds registries as well as spatial planning and land use management,<sup>54</sup> all affected land right holders,<sup>55</sup> as well as the need to provide access to land on an equitable basis.<sup>56</sup> There also seems to be consideration for the interests of community members beyond the allocation and conversion of communal land into ownership:<sup>57</sup> The CLTB requires the Minister to regulate and support the land administration in an effective, efficient and sustainable manner.<sup>58</sup> He is also responsible for the promotion and protection of social, economic, environmental and sustainable development rights of communities and its members.<sup>59</sup>

Section 5 of the CLTB is somewhat similar to the much contested section 18 of *CLARA*. In terms of this provision, the Minister must upon satisfaction that the requirement of the CLTB have been met, determine<sup>60</sup> three factors. Firstly, the location and extent of the land in which the existing land rights have to be converted into ownership in instances where communities own or

---

53 Johnson believes that apart from the fact that this was both vague and insufficient, it left the Minister to his or her own devices in deciding upon conversion, and the public in the dark as to the reasoning and processes behind such a decision-making effort. Johnson *Communal Land* 143.

54 S 7(a).

55 S 7(b).

56 S 7(c).

57 Over and above these considerations, the Minister is enjoined to promote gender equality in providing land access, determine and solve all competing interests in the land, receive reports from community members regarding any issues relating to the land in question etc; See s 7(l), (h) and (g) respectively.

58 7(d).

59 S 7(e).

60 S 9 of the CLTB prescribes the process of conversion, transfer and registration of communal land.

occupy such land. Secondly, the Minister must identify where ownership is to be transferred to a community if the state had previously acquired land to enable equitable land access. Finally, he/she must ascertain state owned land that is to be granted to a community.<sup>61</sup> Despite the backlash from a broad spectrum of academics, section 5 of the CLTB has once again left it to the Minister to determine the location and extent of communal upon satisfaction that the CLTB requirements have been complied with. He/she alone can make this determination save for the considerations enlisted in the CLTB,<sup>62</sup> and reserve land rights for public use by the state.<sup>63</sup> Beinart<sup>64</sup> notes with concern that in terms of section 5 of the CLTB, it is the land rights enquirer who has the responsibility of compiling a report that determines whether a community has insecure tenure or not. Only then, can the Minister consult with the community and its members to determine if their insecure tenure can be transferred into ownership.<sup>65</sup> The main concern is whether it is only by the Minister's discretion that a community's insecure tenure can be converted into ownership. Are the communities barred from applying for secure tenure under the CLTB?

Beinart<sup>66</sup> doubts whether it is necessary to have the communities as "owners" of the land and not just the land administration authorities. His<sup>67</sup> concern stems from the fact that, more often than not, many threats to family landholdings emanate from the community's dealings with outsiders. He<sup>68</sup>

---

61 S 5 (a)-(c).

62 S 7 (a)-(l). See the discussion on these provisions in chapter 4.

63 S 6(1) and (2).

64 Beinart 2017 <https://www.gga.org>; s 5 and 9 (b) CLTB.

65 Seeing that there are so many rural communities with insecure tenure, there should at least be thousands, and tens of thousands, of enquiries. Therefore, the state must consider outsourcing staff since the Department on its own could be overwhelmed with work and end up making costly mistakes.

66 Beinart 2017 <https://www.gga.org>.

67 Beinart 2017 <https://www.gga.org>.

68 Beinart 2017 <https://www.gga.org>.

argues that the CLTB should focus on the protection of individual or household's land rights. What he is not aware of, are situations where even the legitimacy of the "community" itself is under attack. In South Africa, it is not unheard of to have communities lose their land for whatever reason, but, for the most part at the hands of the traditional leaders colluding with investors.<sup>69</sup> Therefore, having the communities as the owners of the land guards against these fateful events. To him,<sup>70</sup> the implementation of the CLTB proves to be a daunting task since it introduces a twofold concept of securing both community and individual land tenure simultaneously.

### *3.3.1 Procedure of the Land rights enquiry*

The determination of communal land and the tenure security thereof was governed by section 18 of the *CLARA*. Before section 6 of *CLARA* could be carried out, the Minister responsible had to employ the services of a land rights enquirer who would then determine if an old order right existed to then make a way for its conversion into a new order right.<sup>71</sup> Nevertheless, any member of the community or organ of state could apply for such enquiry using a Form 3 application form.<sup>72</sup> Likewise, regulation 14 also made provision for appointment of a land rights enquirer by the Minister, which appointment had to be in writing. An enquirer could be a member of the Department of Land Affairs or any other person assisted by that officer. The regulations sought an enquirer to be a person of stature by requiring them to possess or have access to the qualities, skills and knowledge required to

---

69 The land grabs are usually disguised as agricultural investments. Hall 2011 *RAPE* 197; Bakgatla-Ba-Kgafela cases (320/11Mafikeng High Court; (939/13) [2014] ZASCA 203; [2015] ZACC 25).

70 Bienart 2017 <https://www.gga.org/>; s 18 (1) and (2) CLTB.

71 Regulation 14. Form annexed as Annexure A. See also s 14(1) of *CLARA*.

72 Regulation 13(1).

effectively perform their functions and duties.<sup>73</sup> As expected of any official a land rights enquirer had to, in the exercise of their functions and duties, abide by the code of conduct enshrined as “annexure C” in the regulations. Notwithstanding, an enquiry had to be published in at least three languages mostly used in the area under investigation.<sup>74</sup>

The CLTB is somewhat unperturbed in this respect; section 17 thereof prescribes that the Minister will only convert and transfer ownership to a community once a general plan<sup>75</sup> has been drawn up in conformity with the *Land Survey Act*.<sup>76</sup> A general plan for communal land must at the very least contain parts of communal land designated for the following:

- (a) infrastructure investments for the entire community development that will benefit them economically, socially and sustain the environment;<sup>77</sup>
- (b) different communal land uses such as crop fields, pastures, water ways, etc.; and<sup>78</sup>

---

73 Regulation 14(3). See also details of the competence required by regulation 14(3) (a)-(l);  
 (a) a high level of personal and professional integrity;  
 (b) a commitment to equity;  
 (c) fluency in languages most commonly used in the area where the enquiry is to be conducted;  
 (d) skills in the facilitation of the community and other meetings;  
 (e) research ability;  
 (f) expertise in land, housing and agricultural reform and related matters;  
 (g) a knowledge of survey demarcation and land registration;  
 (h) an extensive knowledge of land use and development planning;  
 (i) project management ability;  
 (j) good verbal and written communication including report writing skills;  
 (k) mediation and dispute resolution skills; and  
 (l) legal expertise.

74 Regulation 3(2) read with regulation 16(1).

75 The format thereof is to be prescribed by the Minister. See s 17(2).

76 8 of 1997. In terms of s 3, thereof, it is the responsibility of the Surveyor General to draw up the general plan.

77 S 17(1) (a).

78 S 17(1) (b).



(c) communal land subdivisions that show residential, industrial and commercial areas.<sup>79</sup>

Once the Minister is satisfied that the general plan conforms to the standard set in section 17, he has the authority to convert or transfer ownership of communal land to a community through a Deed of Communal land. It is otherwise not clear who has to draw up the general plan or what qualification he has to possess. The format thereof is once again left to the Minister's "prescription".

#### 3.3.1.1 Powers and functions of a land rights enquirer

Section 17 of *CLARA* provided that a land rights enquirer had to conduct an enquiry openly and transparently while also affording the communities and persons who may be affected by such enquiry a chance to partake in the process.<sup>80</sup> Accordingly, all measures adopted by a community had to be well informed, democratic and made by a majority of the community members who are 18 years and older, either those present at a meeting or through representation by proxy. The meeting had to take place within 21 days of publication of notice of the enquiry.<sup>81</sup> An enquiry report had to include recommendations for the Minister to determine. These recommendations were required to include:

- The inner and outer boundaries of the land had to be depicted in a sketch plan if any dispute exists or in an approved general plan if no dispute exists.

---

79 S 17(1) (d).

80 S 17.

81 S 17(2).

- What rights were held and by what party. The interests included claims made in terms of the restitution programme<sup>82</sup> and any other programmes, content of records in the Deeds registration office concerning the land in question,<sup>83</sup> nature of the community and its leadership structures,<sup>84</sup> any written agreements made in respect of the land<sup>85</sup> and, if the community rules were drafted, registered and adopted.<sup>86</sup> Nonetheless, to assist the Minister in making a sound determination, any other information may be requested from different stakeholders, even information that is not in the report.<sup>87</sup>

Mostert and Pienaar<sup>88</sup> got disarrayed whether community members had access to the enquiry report before it was sent off for the Minister's determination. Coincidentally, section 17(3) (b) made provision for availing the report to the community members for inspection thereof. Whether this would actually happen in reality was yet to be seen. Nevertheless, it would otherwise not make sense to draw up recommendations in secret based on the property of the community involved. What remained mysterious about *CLARA*, nonetheless, was whether the recommendations thereof could be contested by interested parties. They<sup>89</sup> strongly asserted that it would otherwise not be fair that community members could partake in the enquiry process, but not be able to appeal the results in the event that the enquiry was unsatisfactory to them.<sup>90</sup>

---

82 Regulation 17(3) (d).

83 Regulation 17(3) (f).

84 Regulation 17(3) (i).

85 Regulation 17(3) (k).

86 Regulation 17(3) (j).

87 Regulation 20. There are no specific details on what the qualifications of the land rights enquirer should be.

88 Mostert and Pienaar "Formalisation" in Cooke (ed) *Modern Studies* 317; Pienaar 2009 *PELJ* 27.

89 Mostert and Pienaar "Formalisation" in Cooke (ed) *Modern Studies* 317.

90 S 14 (2) (e).

Similarly, despite indigenous land rights being based on membership of a group, democratic decision-making and self-regulation, *CLARA* imposed a structure that was purportedly built on decentralized control, yet dependent on state appointment of traditional councils.<sup>91</sup> Pope<sup>92</sup> rightly expounds that if land management and control are bureaucratic and politically motivated, rural people would most probably not be a part of discussions and decision-making. This non-participation in turn leads to little or no “real social development”. In this case, the exercise of legislating in the first place would prove futile.<sup>93</sup> Cousins<sup>94</sup> too, buttresses the importance of decision-making at local level in that it forms an integral part of indigenous land rights hence must be acknowledged in reform efforts.<sup>95</sup>

### 3.3.2 *Community rules*

According to Bennett’s<sup>96</sup> analysis of living and customary law, “customary law derives from social practices considered to be obligatory by the communities in which they operate,” it follows that rules imposed by external authorities and rules having no local support cannot be considered valid.<sup>97</sup> Certainty and coherence are fostered by a sense of tradition which gives legitimacy to the rules.<sup>98</sup> On these grounds McAuslan<sup>99</sup> decides that customary tenure will disappear in due course. On the other hand, Wily<sup>100</sup> submits that customary

---

91 Pope 2010 *LDD* 5.

92 Pope 2010 *LDD* 5.

93 Pope 2010 *LDD* 5; Bennett *Customary Law in South Africa* 381.

94 Cousins 'Characterising Communal Tenure' 126.

95 Cousins 'Characterising Communal Tenure' 126; Du Plessis and Frantz 2013 <http://ssrn.com/abstract=2381922>.

96 Bennett "'Official' vs 'living' Customary law" 138; Bennett *Customary law in South Africa* 382.

97 Bennett "'Official' vs 'living' Customary law" 138; Bennett *Customary law in South Africa* 382.

98 Bennett "'Official' vs 'living' Customary law" 138; Bennett *Customary law in South Africa* 382.

99 McAuslan *Land Law Reform in Eastern Africa* 96,138.

100 Wily "Customary Tenure" 11.

law rules will not fade but will adapt. The overall evidence suggests that customary land tenure will not disappear absolutely but that it will persist and evolve, much as it has done in the past by meeting changing circumstances. This is because customary land rights are inextricably a creature of community.

In her review of *Land, Power and Custom*, Pope<sup>101</sup> opines that the flaws of *CLARA* seemed to arise from the drafters of the legislation who either ignored local voices that testified on the actual customary practices or failed to interrogate the content of customary law in order to explore the implications of registering a “right” that may not be a clear right in common law terms but still had to be safeguarded. If overlapping or layered indigenous rights are registered and thus “fixed”, as it were under *CLARA*, the very nature of the indigenous land rights system was affected. The position that was taken by *CLARA* was that formalisation provided the opportunity for customary landowners to double-lock rights that the law should also protect as a matter of principle, registered or not. This also takes account of the urgency often felt within communities facing threats to their lands for certification of their existing rights to be available, the absence of which may force the better-off and more knowledgeable among them to abandon the customary sector altogether.<sup>102</sup>

Alternatively, not all was lost since the *Constitution* is designed to reverse the trend of “fossilising and stone-walling” customary law through codification.<sup>103</sup> The *Constitution* is also assigned to facilitate the preservation and evolution of customary law as a legal system that conforms to its provisions.

---

101 Pope 2010 *LDD* 5; Pope “Indigenous-law Land Rights” in *Pluralism and Development* 322.

102 Wily “Customary Tenure” 12; *Best v Chief Lands Registrar* (2014) EWHC 1370.

103 Para 23; Pope “Indigenous-law Land Rights” in *Pluralism and Development* 322.

Formalisation of indigenous tenure system could be seen as a contradiction in terms since customary rights do not exist by virtue of formalisation and registration as these could spell stagnation in the nature of rights and loss of traditional control over right-holding.<sup>104</sup> The counteractive measures are therefore important; that formalisation is voluntary, certification is of what exists, not an act that extinguishes customary rights by replacement with received tenure norms, and that registration does not remove community jurisdiction.

### 3.3.2.1 Drafting

In terms of *CLARA* and its regulations, any approval by the Minister was subject to the community compiling and having registered its community rules. The rules were meant to regulate the administration and use of a community's land.<sup>105</sup> They also determined the nature and content of the land tenure rights of individuals, households and families. Nevertheless, the rules had to meet standards laid down in *CLARA* as well as its regulations to protect human rights, democratic processes, fair access to the property, accountability and transparency.<sup>106</sup> Thus, a community was required to adopt and register its rules to gain recognition in terms of the *CLARA*.<sup>107</sup> Thereafter that community would acquire juristic personality despite the change in membership.<sup>108</sup> Like all creatures with legal personality, the community would then be able to contract, own and dispose of property, sue and be sued etc.<sup>109</sup>

---

104 Cousins "Characterising Communal Tenure" 126; Pope "Indigenous-law Land Rights" in *Pluralism and Development* 322. Refer to s 5.2.1.3 in chapter 5.

105 S 19(2) (a).

106 See s 19 and regulation 24.

107 In terms of chapter 6 s 3 read with s 19. See also regulation 24.

108 S 3(1).

109 S 3(1) (a) and (b).

The rules were meant to regulate the administration, use and any other functions incidental to the well-being of the community's enjoyment of their communal land.<sup>110</sup> Section 19(3) bound the community members to these rules. Furthermore, in the event that a community falling under the ambit of *CLARA* failed to create and register its rules, annexure D to the *CLARA* regulations prescribed standard rules which would be deemed to automatically apply to that community.<sup>111</sup> The regulations provided that a community or its members could make an application for assistance in drafting their rules.<sup>112</sup> Regarding the content of the rules, section 19 of *CLARA* and regulation 24 shed some light. In terms of these provisions, community rules were meant to regulate the administration and use of communal land by the community as land owner within the framework of law governing spatial planning and local government, any other prescribed matters in terms of *CLARA* as well as matters incidental or required by the community in question.<sup>113</sup>

All the same, the rules had to be drafted in the spirit of the constitutional principles including fair, democratic<sup>114</sup> and decision-making ideologies.<sup>115</sup> In this light, no direct or indirect discrimination in whatever form would be acceptable in the drafting of the community rules.<sup>116</sup> Upon coming into being,

---

110 S 19(2) (a).

111 Regulation 21 of *CLARA*. See also Mostert and Pienaar "Formalisation" in Cooke (ed) *Modern Studies* 318. This is where they argue that these provisions are a clear indication that *CLARA* did not give communities a choice regarding whether or not they want it to apply to them.

112 Regulation 21.

113 S 19(2)9(a)-(c). See also regulation 24(1) (a)-(d).

114 All members would have the right to receive adequate notice of all general meetings, have the right to attend, speak and participate in voting and inspect and obtain copies of the rules as well as minutes of the meetings.

115 Regulation 24(2) (a).

116 Regulation 24(2) (b). Discrimination in terms of the regulations is that based on race, gender, sex, pregnancy, marital status ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

the rules after being registered by the community were binding on them.<sup>117</sup> It is vital to note that these rules remained despite the change in community membership, could also be amended whenever there was a need to.<sup>118</sup>

### 3.3.2.2 Adoption

In terms of the regulations to *CLARA*, when a community desired to make and adopt community rules, a notification had to be duly made to the land right enquirer, the Board which had jurisdiction as well as the Director-General (hereinafter the DG) after which a meeting could be convened.<sup>119</sup> The land rights enquirer had to be present in this meeting and take minutes, witness, guide and advise the community in the creation of rules.<sup>120</sup> It goes without saying that the community rules had to be made in line with the democratic principle as espoused by the objectives of *CLARA*.<sup>121</sup> In the event that the communities had drafted their rules, they would then be adopted accordingly.<sup>122</sup> It is at this stage that the community would then have to furnish these rules within 14 days to the DG who had to ensure that the rules were up to standard.

Upon satisfying him/herself of this fact, the approved application would be sent to the Registration officer to register them, allocate a registration number and then issue the community in question with a certificate of registration.<sup>123</sup> In the absence of the Regulations, the CLTB is very shallow on the procedure to be followed in the drafting, adoption and registration of

---

117 S 19(3).

118 S 20.

119 Regulation 22(1).

120 Regulation 22(3).

121 Regulation 22(2).

122 Regulation 22(2).

123 Regulation 23 (1), (2) and (6).

community rules.<sup>124</sup> In terms of section 25 thereof, a community gained legal personality upon receipt of its Deed of Communal land. Only when issued with the Deed can a community make and adopt its rules that should govern a myriad of obligations including but not limited to the general management of communal land.<sup>125</sup>

### 3.3.2.3 Registration

Claasens<sup>126</sup> opines that a less exact survey system,<sup>127</sup> with a register of family names of those entitled to use and occupy the land would enable flexibility while also providing much needed individual security. This approach would not only be less expensive but it would provide a feasible substitute in other contexts such as informal settlements where the prohibitive costs associated with titling meant that no land rights were recorded.<sup>128</sup> Hence, section 10 must have foreseen these criticisms; it provided that no taxes or any other fees would be payable in the registration of communal land and new order rights.<sup>129</sup> Mostert<sup>130</sup> rightly points out that since spatial concepts differ, "westernised" and "traditional" communities, traditional communal tenure

---

124 S 26(4) merely gives the guidelines to be followed in the adoption of community rules namely, (a) fair and inclusive decision making;  
(b) equality;  
(c) access to communal property;  
(d) accountability and transparency; and  
(e) democratic processes governing the conduct of community meetings.

125 S 26(3) (a).

126 Claasens 2014 <http://www.cls.uct.ac.za>.

127 As opposed to the deeds registration systems inherited from apartheid which are designed to map exclusive ownership rights vesting in specified owners onto discrete and clearly defined parcels of land.

128 Claasens 2014 <http://www.plaas.org.za>.

129 This provision was limited to transactions in respect of ss 5 and 6 only. See also Mostert 2011 *PELJ* 89. Mostert maintains that the key questions used to evaluate governance in land administration focus on the registration process, its duration, its cost, and access to information. Pienaar too, believes that "...if a land rights enquiry is to be conducted according to the standards of the *CLARA* and the regulations thereto, it is going to be a very expensive and time-consuming exercise to deal with all of the communities". Pienaar 2009 *PELJ* 33.

130 Mostert 2011 *PELJ* 89. Full discussion on land registration follows in chapter five.



cannot be recorded in the same way as individual private ownership can. Individual ownership relies on accurate demarcation of land parcels, to ensure certainty and clarity as to boundaries and the exclusivity of tenure, while traditional communal tenure needs to be more flexible, based on its nature to allow for overlapping rights in respect of the same land and the seasonal/climate-driven change in the use of land.<sup>131</sup>

Section 19(4) (a) of *CLARA* provided that after the rules had been adopted by the community, the latter could apply to the DG for the registration of the rules.<sup>132</sup> Upon receipt of the application, the Director-General had to refer it to the Board having jurisdiction in the area to determine the suitability thereof.<sup>133</sup> If the rules were to the DG's satisfaction, they had to be registered. If the rules were found to be erroneous, regulation 21(2) could be employed to assist the community with the re-drafting process.<sup>134</sup> What was critically controversial through the brief lifespan of *CLARA* was the issue whether communal land rights were made inferior to the western "ownership concept," and if not why there had to be a separate register for them. The mystery remains even in respect of the CLTB.

The community rules under the CLTB are enshrined in chapter 7 sections 25-27. Section 25 of the CLTB renders juristic personality on a community upon receipt of the deed of communal land. Once issued with a Deed of Communal Land the community must make and adopt rules in the manner prescribed by the CLTB.<sup>135</sup> In the same light, section 25(3) (a) prescribes that the community rules must not only regulate the general management and

---

131 Mostert 2011 *PELJ* 90.

132 See s 27(2) CLTB.

133 S 18 (4) (a). S 27(3) of the CLTB.

134 S 27(1) through (6) of the CLTB is an exact replica of s 19-21 of *CLARA*.

135 S 25 (2) Community rules must be adopted by 60% of households of such community.

administration of communal land but also the nature of rights on subdivided sections of the land. In the regulation of communal land, the rules must control the termination of rights which do not include ownership,<sup>136</sup> the procedure to be followed in the allocation of subdivided portions of communal land and the general upkeep of the communal land register.<sup>137</sup>

The use of communal land by the community, households and persons in general, encumbrances<sup>138</sup> of sorts, administration fees<sup>139</sup> and land use by anyone who is not a member of the community<sup>140</sup> are all the factors that should be governed by the community rules. Any other matters incidental to the administration of communal land that the community may deem necessary should also be included in the community rules.<sup>141</sup> In the creation and adoption of these rules, the principles of fairness, inclusivity, equality, accountability, transparency and democracy must be engaged to govern the demeanor of community meetings.<sup>142</sup> Likewise, upon the formulation and adoption of the community rules, the said community must apply to the DG to have the rules registered. In reviewing the application, if satisfied, the DG must check that they do not only conform to the rules of natural justice but also the constitutional principles and principles set out in the CLTB.<sup>143</sup> As in *CLARA*, if the DG is peeved by the non-conformity of such rules, he or she must notify the community of the steps to be taken to ensure compliance. As mentioned beforehand, like any other creature with legal or juristic personality, the registered community rules will be binding on the community

---

136 S 25(3) (d) CLTB.

137 S 25(3) (e) CLTB.

138 S 25(3) (g) CLTB.

139 S 25(3) (i) CLTB.

140 S 25(3) (h) CLTB.

141 S 25(3) (k) CLTB.

142 S 25(4) (a)-(e).

143 S 26(2).

and its members and must, as matter of principle be made accessible to all those affected by them.

As can be seen, there is no notable transformation from *CLARA* to the CLTB in respect of the community rules, more so regarding the spirit of such rules. It goes without saying that it is insignificant what the contents of the rules are as they will certainly vary from community to community, what is fundamentally vital is that the constitutional principles and those that govern essence of the CLTB are followed.

#### 3.3.2.4 Determination phase

In the event that the rules were drafted, adopted, registered and the enquiry approved, the Minister could then transfer the land in question to the community. Section 18 of *CLARA* made provision for the determination that the Minister had to take upon satisfying him/herself that the enquiry report conformed to the standard mentioned above. In making the determination, cognisance had to be taken on all relevant law including customary law,<sup>144</sup> old order rights of affected right holders,<sup>145</sup> the need to provide access to land on an equitable basis<sup>146</sup> and promotion of gender equality.<sup>147</sup> The Minister was also entrusted with the powers of determining that land was indeed registered in the name of the community.<sup>148</sup> Over and above this, he had the obligation to ensure that the said land was sub-divided into portions of land which had to be registered in the name of the person and not the community.<sup>149</sup> The subdivided portion of land would then be an old order

---

144 S 18 (1) (b).

145 S 18 (1) (c).

146 S 18 (1) (d).

147 S 18 (1) (e).

148 S 18 (3) (a).

149 S 18 (3) (b).

right capable of confirmation and conversion into a “new order right”.<sup>150</sup> Cancellation of an old order right by the Minister was also permissible provided that alternative land was given to a rights holder.<sup>151</sup> Where there was no land available for redress, compensation would be due to the old order rights holder.<sup>152</sup> It was also possible for an old order rights holder to be awarded both where the available land was “inadequate” as comparable redress.<sup>153</sup>

Siegel<sup>154</sup> believes that tenurial reform will not automatically result in better land management practices. He<sup>155</sup> suggest that tenurial reform resources when coupled with institution building process can be a unique opportunity for instituting sound common property management practices. It has been argued by various academics that *CLARA* gave too much power to the Minister for determinations and these powers were prone to abuse.<sup>156</sup> Even so, the greatest opposition to *CLARA* was not limited to those with independent ownership rights.<sup>157</sup> It has been argued that a key component of customary land rights is decision-making authority at the level of smaller social units such as families, clans and user communities.<sup>158</sup> Cousins<sup>159</sup>

---

150 S 18(3) (d) (i) and (ii).

151 S 18(3) (d) (iii) read with s 12(2) (a).

152 S 18(3) (d) (iii) read with s 12(2) (b).

153 S 12 (2) (c).

154 Siegel 2015 *SAJHR* 372.

155 Siegel 2015 *SAJHR* 372.

156 Mostert and Pienaar “Formalisation” in Cooke (ed) *Modern Studies* 318; Claasens 2005 *AJ* 46; Cousins 2002 *ESRR* 8.

157 Against this background, *CLARA* did not take account of the situation where land was already owned or securely held by a group or an individual. Mostert and Pienaar make an example that, if the land owned by a CPA is located in an area that is otherwise managed and controlled on the basis of indigenous land law. There is a legal difference between the nature of the right registered in the name of the CPA and the rights included in the previously proposed Deeds of Communal Land Rights for other parts of the same geographical area. This is exactly what the communities fought against in the *Tongoane* case. See full discussion in s 3.5.1.

158 Minister Nkwinti announced that the *CLARA* was being redeveloped and its 2013 policies re-assert its central premise.

believes that when land is held and managed at different co-existing levels of social organisation emboldens accountability and mediates power. In instances where unilateral authority is vested at the apex of “tribes” the internal balancing mechanisms tend to be undermined.<sup>160</sup>

Besides, one of the main criticisms against *CLARA* was that it mainly aimed at individualisation of communal land tenure. Pienaar<sup>161</sup> opined that individualised land tenure is not always a viable option for rural communities, more so for those that rely on community structures for tenure security and group identity.<sup>162</sup> A plethora of academics compellingly maintain that individualised land tenure is not a prerequisite for tenure security. Tenure security is every so often obtained through strong community structures provided the community functions accurately and there is land available. According to Pienaar,<sup>163</sup> the conversion from communal land tenure to individualised land ownership through a land titling programme would only have benefitted the wealthy and powerful while leaving poor and vulnerable people in even worse conditions. Van der Walt<sup>164</sup> and others have shown that exclusive ownership is, in any event, an ideological construct out of touch with the social nature of property rights, which have always been regulated by the wider society to a greater or lesser extent.

---

159 Cousins “Characterising Communal Tenure” 126.

160 Claasens 2014 <http://www.cls.uct.ac.za>.

161 Pienaar 2009 *PELJ* 32; Hunt 2004 DPS 173; Haramata *Book Review* 39.

162 Pienaar 2009 *PELJ* 32. Hunt 2004 DPS 173; Haramata *Book Review* 39.

163 Pienaar 2009 *PELJ* 32; Okoth-Ogendo 1989 *Africa* 6.

164 Van der Walt *Constitutional Property Law* 330.

### *3.3.3 The communal land tenure policy framework*

As has been recurrently discussed, the present day challenges faced by people living in the communal areas are largely a product of racially discriminatory legislation and colonisation. Specific constraints facing rural people include but are not limited to land scarcity, poverty, food insecurity, marginalization from mainstream economic development and insecure land rights.<sup>165</sup> It is against this background that the Communal Land Tenure Policy Framework (hereinafter the CLTPF) was created, more so in respect of the lack of clarity surrounding governance of communal areas and subsequent tenure insecurity experienced therein.<sup>166</sup>

The CLTPF is centered on the establishment of institutionalized use rights of households under the administration of traditional councils or Communal Property Associations (hereinafter CPA).<sup>167</sup> The objectives of the CLTPF have thus been built on three principles namely; “the will of the people, transparency and accountability as well as equality”.<sup>168</sup> The will of the people requires the households and communities to have the final say in matters that concern land and development in their areas. The accountability and transparency principle on the other hand, will establish a system of downward accountability of governance structures to communities and households. Finally, the equality principle is proposed to be infused into all aspects of reforms.<sup>169</sup> Furthermore, the CLTPF proposes to reform communal tenure to guarantee secure land rights and equitable production relations for rural people.<sup>170</sup> More specifically, the purpose of the CLTPF seeks to;

---

165 Communal Land Tenure Policy Framework September 2014.

166 Communal Land Tenure Policy Framework September 2014.

167 Communal Land Tenure Policy Framework September 2014.

168 Communal Land Tenure Policy Framework September 2014.

169 Communal Land Tenure Policy Framework September 2014.

170 Communal Land Tenure Policy Framework September 2014.

- recognize, promote and facilitate legitimization of tenure rights and rights holders;
- protect communal land rights from threats and safeguards the interests of communities;
- deepen rural democracy and ensure accountability of governance and investment and development structures;
- promote equal land distribution, expanded land access and sustainable land utilisation;
- promote a spectrum of tenure systems that accommodate the diversity of situations on the ground;
- empower communal area households to make final determinations regarding their land;
- promote gender equality; and
- create a vibrant economy in which people strive to live in harmony.<sup>171</sup>

Based on these objectives, the National Land Tenure Summit proposed to intervene in the following ways:<sup>172</sup> The first step was to transfer state land to communities living in communal areas. Then institutionalisation of land rights in communal areas would follow. At this stage the summit suggested that undertaking a rights inquiry, surveys and registration be employed in order to strengthen and rationalise communal area land administration systems. In 2013, the Department of Rural Development and Land Reform introduced the “wagon wheel model”. The wagon wheel model is said to represent static land use frameworks for different categories of communal land. It is also a representation of the 4<sup>th</sup> tier of the 2011 Green Paper. This model was also developed to reinvent the African tenure systems that were in place before their distortions by colonial and apartheid policies. It is also meant to clarify and facilitate roles and functions of all the actors involved in communal land administration including local government, traditional leadership, CPA’s<sup>173</sup> and rural households.

---

171 Communal Land Tenure Policy Framework September 2014.

172 Communal Land Tenure Policy Framework September 2014.

173 In as much as the establishment of new CPA’s are discouraged, new ones will be created only on land acquired through farm dwellership and tenancy where no traditional authorities exist. But for communities under traditional leadership, in the

The Centre for Law and Studies<sup>174</sup> expounds that the wagon wheel involves a huge conceptual error because it describes CPAs and traditional councils as “governance structures”. Addressing them as such creates a 4<sup>th</sup> level of government, which is unconstitutional.<sup>175</sup> The CLTPF states that the government will delegate certain governance responsibilities to traditional councils.<sup>176</sup> In light of the abovementioned objectives, the CLTPF proposes the significant institutional reform by establishing new institutions.<sup>177</sup> To avoid the repercussions of *CLARA* the cabinet has since decided that consistent impact assessment of policies, legislation and regulations be undertaken. These assessments were meant to be done before a Bill is tabled before the Cabinet.

### **3.4 Management of communal land**

Since land governance is about the policies, processes and institutions by which land, property and natural resources are managed, sound governance requires a legal regulatory framework and operational processes to implement policies consistently within a jurisdiction in sustainable ways.<sup>178</sup> It has been repeatedly emphasised that a good land administration system leads to a predictable, open and progressive policy-making process which can

---

event that they choose to create a CPA as their land governance structure, a hybrid institutional model is to be developed and implemented. This will ensure that the roles and responsibilities between the traditional leadership and CPA are clear and can co-exist. If the two institutions fail to co-exist, the CPA will then be cancelled and an alternative option will be considered.

174 Author unknown 2103 <http://www.plaas.org.za>.

175 Chapter 3 of the *Constitution* provides for only three levels of government national, provincial and local all of them elected.

176 Preamble to the *CPA Act* states that CPAs were established specifically to enable groups to own land as legal entities and not meant to play a governance role and it is unfair to expect them to do so. Author unknown 2103 <http://www.plaas.org.za>.

177 These include Investment, Development and Finance Facility, Household Forums, Communal Land Boards and Communal Area Technical Support Facility. Of these five institutions, the CLTB has established the household forums and communal land boards. Refer back to s3.4.1.

178 Enemark *et al. Fit-For-Purpose* 13.



hold those in charge accountable for their actions.<sup>179</sup> In the context of the South African communal land, the CLTB and its predecessor *CLARA* placed the role of land governance to the land administration committees.

Under *CLARA*, the land administration committee (hereinafter LAC) was meant to play a vital role in creating and maintaining the tenure security of communities.<sup>180</sup> The establishment of the LAC was the sole responsibility of the community. The fact that *CLARA* made provision for traditional authorities to act as LACs in communities that operated under traditional leadership created so much controversy amongst various stakeholders.<sup>181</sup> Under *CLARA*, the number of committee members had to be enshrined in the community rules and one third of that number was required to be women.<sup>182</sup> In the same light, the term of office of the LAC had to be determined by the community rules provided it did not exceed a period of five years. The functions of the LAC among others were to allocate new-order rights to members of the community,<sup>183</sup> register them,<sup>184</sup> establish and maintain registers and records of new-order rights,<sup>185</sup> resolve land disputes, the promote co-operation between members of the community regarding land matters<sup>186</sup> and perform any other duties prescribed by *CLARA*.<sup>187</sup>

---

179 Pienaar 2006 *PELJ* 15; Cousins 2012 <https://www.hsrcpress.ac.za>; Manona *et al.* "Proposed Land Tenure and Land Administration Interventions".

180 Pienaar 2009 *PELJ* 28.

181 S 21(1) and (2). Similarly, s 21(4) provided that in the event that a traditional council was to perform the land administration functions, its traditional council functions ceased.

182 S 22(1) and (3). 22(4) provided for one person to represent the minority groups in the community, including the elderly, the disabled, the women and the youth.

183 S 24(3) (a) (i).

184 S 24(3) (a) (ii).

185 S 24(3) (b).

186 S 24(3) (d).

187 S 24(3) (g).

Pienaar<sup>188</sup> rightly fretted that it was highly unlikely that most of the LAC's would be able to function without extensive administrative assistance by the Department of Land Affairs given the gigantic role they were entrusted with. The primary role of the LAC in terms of *CLARA* thus, was to deal with individualization of communal land tenure.<sup>189</sup> One cannot help but wonder if the LAC would live up to the duties it was entrusted with. Also, could it be that the academics were worried about nothing given that the community structures preceding *CLARA* have been dealing with such issues since time immemorial?

Moreover, it has been proved that individualisation of communal land tenure is not always a viable option for communities, more so for those that rely on community structures for tenure security and group identity.<sup>190</sup> According to Pienaar,<sup>191</sup> land tenure is not a prerequisite for tenure security. Tenure security is often obtained by strong community structures as long as the community functions properly and sufficient land is available. Cousins<sup>192</sup> strongly believes that rural populations are large and diverse yet *CLARA* envisaged the adoption of one set of rules, to be administered by one authority structure. This represents a decisive shift of the "relative balance of power" between different actors and authority structures within communal area tenure systems, in favour of tribal authorities and chiefs at the expense of individual rights holders and of other levels of authority.<sup>193</sup> The result that might not have been projected by *CLARA* was that the shift of power included

---

188 Pienaar 2009 *PELJ* 31.

189 S 3 and 19(1).

190 Pienaar 2009 *PELJ* 32; Beinart 2017 <https://www.gga.org>.

191 Pienaar 2009 *PELJ* 32.

192 Cousins 2005 *SLR* 509.

193 *CLARA* moved the authority for land allocation to the pinnacle of the traditional hierarchy and provided the chieftainship with more powers than it previously enjoyed.

the potential for tensions between traditional authorities and other levels of authority who have always administered land transactions at the local level.

### *3.4.1 Institutions of administration*

In terms of the CLTB, once issued with a deed of communal land, a community must within two years, choose a traditional council,<sup>194</sup> a CPA<sup>195</sup> or any other entity of their choice provided the Minister approves of it.<sup>196</sup> This has to be done by way of a resolution to which a minimum of 60 percent households must support and adopt.<sup>197</sup> Over and above this, a community cannot choose a traditional authority that is not duly constituted in terms of section 3 of the *TLFGA* notwithstanding section 28(4) of same,<sup>198</sup> nor can a CPA not created in terms of the *CPA Act* perform the land administration functions set out in section 28(1).<sup>199</sup> To do away with the duplication of services as well as tempering with communal land that has already been secured, section 28(3) provides that a CPA must administer its land in terms of the *CPA Act* but in case of conflict between the *CPA Act* and the CLTB, the latter must take precedence.

A new institution has been introduced by the CLTB and is called the household forum. Upon the registration of a community, a household forum must be created for the general oversight of the management and administration of communal land.<sup>200</sup> The composition of the forum must

---

194 S 28 (1) (a).

195 S 28 (1) (b).

196 S 28 (1) (c). An institution entrusted with the duty of administering communal land on behalf of the community members has no inherent authority to sell, donate, lease, encumber or in any manner alienate communal land except in accordance with the provisions of the CLTB. See s 29 (2).

197 S 28 (1).

198 S 28 (4) (a).

199 S 28 (4) (b).

200 S 32 (1) read with s 35 (1) (a). Other functions of the forum include but are not limited to, the receipt of quarterly reports, provision of support to institutions

range from 20 to 30 elected members, half of whom should be women. This is praiseworthy since *CLARA* suffered a major backlash for its failure to place the elected male and female community members at par.<sup>201</sup> The household forum's term of office is strictly five years of service and is non-renewable.

The CLTB will also establish the communal land board which has jurisdiction in such areas as the Minister may determine.<sup>202</sup> The communal board must comprise of 10 to 15 nominees, one of which should represent a provincial house of traditional leaders,<sup>203</sup> an official of the Department, one person representing municipalities in the province, five members representing all communities in the board's area of jurisdiction etc.

### 3.4.1.1 The Communal Property Association

#### 3.4.1.1.1 Creation of a CPA

In terms section 5 of the *Communal Property Associations Act*,<sup>204</sup> a provisional CPA is created upon an application for registration by a community to the DG. The application for registration of a provisional association should at the very least contain the CPA's intended name,<sup>205</sup> information demonstrating that the community is indeed a community as

---

responsible for the management of communal land, holding those institutions responsible and accountable in the performance of their functions and any other matter incidental to the administration of communal land. See s 35(1) (a)-(f).

201 S 33(4). S 33(5) also specifically pinpoints that there should be members of the forum who represent the vulnerable groups including the disabled persons, youth, women and the elderly.

202 S 36(1) (a). The Minister may also (b) disestablish a board or recognize an already existing board subject to conditions as he may determine or amend a board's area of jurisdiction.

203 S 37 (1) and (3) (a). See also s 12 (2) (a) of the *Constitution*; this is in line with the CLTPF's promise of creating additional institutions of land administration to assist the LAC's.

204 28 of 1996.

205 S 5(2) (a).

contemplated by section 2 of the *CPA Act*,<sup>206</sup> a clear demarcation of the land to be registered,<sup>207</sup> identification of the association's intended membership and its elected interim committee<sup>208</sup> as well as any other information that may be deemed to be necessary.<sup>209</sup> Upon satisfaction of the aforementioned requirements, the DG must authorize the Registration Officer to register the provisional association and issue a certificate of registration to the community. At this point, a provisional CPA shall have been registered and will be valid for a period of 12 months, renewable at the discretion of the DG. During that 12 month prescribed period, the community must adopt a constitution of the intended association, failing which the DG may prepare a draft constitution for the community to present to the Minister.<sup>210</sup>

In the same light, once the DG is satisfied that the constitution has been drafted in a suitable manner and that all the requirements have been met, he may cause same to be registered as a legal entity capable of owning land, suing and being sued.<sup>211</sup> Over and above these, a methodical examination of the *CPA Act* and the CLTB implies that in the event that the community opts for the CPA to administer its communal land, the standing elected representatives of that CPA are answerable under both legislations. This is because any institution that the community chooses to manage and

---

206 S 5(2) (b). The definitions of a community member in both statutes coincide albeit the vagueness of thereof. The CLTB defines a member as a person who is born into a community or becomes accepted as a member of the community by that community and lives permanently in that community. Likewise, a member in the *CPA Act* is a member of the CPA (whose names appear on the membership list) or a community.

207 S 5(2) (c).

208 S 5(2) (d) and (e).

209 S 5(2) (g).

210 In terms of s 6 the community may seek assistance from the office of the DG in drafting the constitution, which to the satisfaction of the community and the DG may be adopted; see s 7 (1)-(4).

211 S 8(6) (a).

administer communal land has to perform a number of functions in relation to communal land namely:<sup>212</sup>

- (a) Management and administration of communal land in line with community rules and the CLTB.
- (b) Allocation of subdivided portions of communal land to community members, including women for residential and commercial purposes.
- (c) Establishment and maintenance of registers and records of land rights in communal land and transactions affecting such rights.
- (d) Promotion of development rights and interests of the community and members thereof.
- (e) Dispute resolution between community members.
- (f) Promotion of co-operation between community members and any third parties involved communal land dealings.
- (g) Any other functions incidental to the management and administration of communal land.<sup>213</sup>

As is analysed in chapter five, a good land governance structure is necessary irrespective of the land tenure system. The idea of having an option to choose which institution to administer communal land may be appealing *prima facie*, yet, in the face of the never ending conflicts between traditional authorities and communities, it might not be the brightest idea. On the one hand communities might opt for CPA's to administer land, which choice would be "ideal" for their land tenure security. Alternatively, in rural communities it is totally unheard of to have traditional councils which are not responsible in the regulation of community land. Be that as it may, if a community opts for CPA's to administer its land, without regard for the governing statute, there is

---

212 S 29(1).

213 S 29(1) (a)-(h).

a risk of having the chosen administrators (elected members of the CPA) being controlled by the traditional elites who believe that land “belongs” to them. There have been reported cases where traditional authorities have solicited commercial deals in respect of land they were meant to hold in trust for the community members.<sup>214</sup> The following are illustrations of the different scenarios as they happened in some areas of South Africa.

In terms of section 11 of the *Land Restitution Act*, (hereinafter the *LRA*)<sup>215</sup> after a successful land claim, the claimants must register a legal entity which will oversee the general management and control of the land in question. Yet, across the South African restitution landscape, there is a trend of fracturing communities along lines of dissent that were suppressed or restrained in the initial claim. It subsequently manifests in litigation and other appeals to the courts where members of claimant groups use the law, not to challenge the state or demand delivery, but to make claims and levy accusation on one another through challenges to the new legal entities created through restitution.<sup>216</sup> These contestations imply ongoing rural instability that may negatively affect how and natural resources and development pan out in communal rural areas across South Africa. To fully understand how CPA’s function therefore, one needs to look at instances where they bleakly failed following successful claims under the *LRA*.

---

214 The legitimacy of traditional authorities is rapidly eroding due to pressure from a recent surge in foreign direct investment, significant demand for land for large-scale agriculture, and associated opportunities for corruption.

215 22 of 1994.

216 Beyers and Fay 2015 44 8.

### *3.4.2 Case studies: Disputes within CPA's*

As a matter of principle, the impetus to create a legal entity that holds land on behalf of the community often comes not from the claimants but from state agencies or legislation attempting to manage the claim. This imposition contributes to potential disjunctures between the claimants and the legal entities that are meant to represent them.<sup>217</sup> In instances where the community has no appropriate committee, the legislation or courts often require or recommend the creation of one.<sup>218</sup> In this section the blurred lines in communal land administration between the institution of traditional leadership and the CPA's is discussed. The South African law allows for community members to choose an institution that they deem fit to administer their land, nevertheless, there is always potential conflict with either choice. The following cases illustrate this issue clearly.

#### 3.4.2.1 Elandskloof CPA

The Elandskloof community was forcefully removed by the missionary farmers from their land in the 1960's and the land was declared to fall under a white group area. At the dawn of the democracy, the state purchased the land in question and returned it to the previous owners. Since there was not enough land to accommodate everyone, disputes between community members ensued thereby rendering agricultural productivity inoperative, management committees collapsed and land grabs escalated.<sup>219</sup> Being one of

---

<sup>217</sup> Beyers and Fay 2015 *AA* 8.

<sup>218</sup> Beyers and Fay 2015 *AA* 9; Ramutsindlela and Mogashoa (Ramutsindela and Mogashoa 2013 *SD* 310) illustrate how the state's preference for a single CPA structure in a redistribution project in Limpopo contradicts an economically differentiated group of claimants' preferences for smaller structures. While officials would prefer a single legal structure to demonstrate "delivery" and facilitate administration they may be sowing the seeds for future dissent and conflict.

<sup>219</sup> Soon afterwards, the community collectively claimed back their land from the state administration but as the constructs of social change dictate, they later fought amongst themselves for supremacy. Bosch and Hirschfield assert that



the first restitution cases after apartheid, more was expected since it would set the precedent for similar cases. After the announcement of the award of land, the community duly set up a CPA that was meant to administer the land on their behalf. Sometime after the restitution settlement, disputes about the representation of the CPA arose wherein their competence was probed.<sup>220</sup> Additionally, some community members were dismayed and frustrated by the operation of their CPA. This dysfunctionality was attributed mostly to the membership of the CPA as well as the identity of the committee members (whether they were indeed the part of the Elandskloof community). Similarly, this led not only to disruptions of meetings but also vetoing of ratified majority decisions.<sup>221</sup> As mandated by section 13 of the *CPA Act*, in the event of maladministration of the CPA, the DG may either dissolve it or take over its land administrative duties. In their analysis of the Elandskloof cases, Everingham and Jannecke<sup>222</sup> believe that the restitution of this land was erroneous because it followed the right-based approach. Nonetheless, they do not hint at alternatives that could have been adopted to successfully carry out restitution claims. According to them<sup>223</sup> the rights-based enquiry romanticizes a cohesive community derived from a false dichotomy between individual and communal property.

---

"...prevarication by leadership exists as a general trend since making decisions appears to cause greater tensions than not making them".

220 One of the major contentions was the issue of the CPA membership. After the land was given back to the Elandskloof community, some other neighbouring villages (Allendale Group) were pronounced to be eligible more so with the introduction of the newly elected and democratic government. A number of consultations and negotiations took place dealing with who a member was, in terms of their constitution. A broader interpretation was thereby adopted to extend membership to those and their direct descendants who were a part of the Elandskloof community who were previously deprived and disadvantaged, any other persons who suffered similar dispossession, those related by marriage or blood or any other members who the community decided were members of the CPA.

221 This behaviour continued even after three subsequent elected committees. Barry "Dysfunctional CPA's" 21; Everingham and Jannecke 2006 *JSAS* 549.

222 Everingham and Jannecke 2006 *JSAS* 549.

223 Everingham and Jannecke 2006 *JSAS* 549.

On the other hand, Bosch and Hirschfield<sup>224</sup> assert that the issue is not the rights-based approach to the land restitution cases but that the local level rules should be established before the handing over of the land to the communities. To them<sup>225</sup> benefit-sharing and having use rights for the facilitation of labour and capital investment is a trite solution to safeguarding a functional property institution. In following Pienaar's reasoning, they<sup>226</sup> demonstrate that before occupation of the land, there must be a clear system of rules governing who has what rights and/or if they are transferable. Thus, transparency and accountability are guaranteed when people know and accept to be bound.

In agreement with Rudman,<sup>227</sup> Hall<sup>228</sup> argues that the rights-based approach is exactly what is needed over the developmental approach. To her,<sup>229</sup> it is wrong to bind communities by rigid business, land use and development plans in an effort to conform to state wishes. Because restitution means returning what is lost, the state must have minimal rights in that land as it did when it was first lost. Thus, communities must enjoy their rights in land provided it is within the confines of the rights enjoyed and obligations tied thereto.

#### 3.4.2.2 The Richtersveld claims<sup>230</sup>

In 2007, the Richtersveld CPA was awarded restoration of land and compensation by the Land Claims Court for minerals previously extracted on

---

224 Bosch and Hirschfield 2004 *CSIR* page unknown.

225 Bosch and Hirschfield 2004 *CSIR* page unknown.

226 Pienaar 2009 *PELJ* 32; Bosch and Hirschfield 2004 *CSIR* page unknown.

227 See s 4.2 chapter 4.

228 Hall 2003 <https://www.plaas.org.za>.

229 Hall 2003 <https://www.plaas.org.za>.

230 *Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC); *Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA); *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC).

their land. Regarded as one of the biggest land restitution cases in South Africa, this claim was awarded monetary compensation and land on condition that legal entities were created to hold the said land on behalf of the community members. This legal entity was meant to protect the assets of the community from third party interference of any kind. In response to this condition, the Richtersveld Community Trust was established with a number of subsidiary companies thereunder.<sup>231</sup>

As in the Elandskloof case, the agreed settlement in terms of the CPA required of the CPA to have and keep a membership list as this would help in determining who has access to the resources of the CPA.<sup>232</sup> In this instance, during the upkeep of the membership list, some members were removed without recourse to the necessary procedures set out in the CPA rules. This act and the numerous missed scheduled general meetings led to the confusion that the CPA was poorly managed and unaccountable.<sup>233</sup> Since the restitution award in 2007, there have been numerous claims against the CPA which include but are not limited to:

---

231 The Richtersveld Agricultural Holding Company.  
The Richtersveld Property Holding Company.  
The Richtersveld Mining Company and the Richtersveld Environment Rehabilitation Company. DRDLR <https://www.gov.za>; Fife "Richtersveld Restitution Implementation Challenges".

232 The one issue that has impacted most negatively on relationships in the Richtersveld in the recent history is the Land Claim against Alexkor. Throughout the long legal battle, the community and its leaders were united, but this changed dramatically when the leaders negotiated a settlement with the defendants (the state and Alexkor). The depth and nature of the wounds resulting from this "Settlement" cannot be underestimated. As the practical implications of some of the clauses and conditions in the Settlement become clear, new reasons for accusations and conflict emerge".

233 The Committee itself was hamstrung by disputes about the election of the Chairperson and Vice Chairperson as well as the status of members who no longer live in Richtersveld. Allegations relating to fraud, nepotism, incompetence, and conflict of interest were time and again leveled at leadership figures within Committee. Beyers and Fay 2015 44 18; Fife "Richtersveld Restitution Implementation Challenges".

- The 2009 interdict against the CPA regarding membership list.
- The 2010 interdict against the CPA.
- The 2010 application by CPA against the “new committee”.
- The 2010 application against the farm liquidation.
- The 2011 application in terms of the appointment of directors to companies.

These two case studies are merely illustrating all the things that can go wrong when a CPA is used as a land administration institution. Since the promulgation of the *CPA Act* in 1996, a very small number of CPA’s have operated successfully, with the rest of them failing for one reason or the other. According to Fife,<sup>234</sup> implementing settlement agreements is always going to be a tough task for any CPA Committee. The issue of having no post-settlement support from government and alienation of community support institutions has proven the task to be incredibly difficult. The biggest issue therefore remains guaranteeing that the membership of the CPA receives substantive, direct benefits, and that the deed of settlement is made to work for the benefit of future generations of the claimant communities.<sup>235</sup>

### *3.4.3 Conflict between tribal authorities and CPA’s*

Following Mamdani’s<sup>236</sup> line of reasoning, Ntsebeza regards the role and position of traditional leaders in colonial and post-colonial Africa as decentralised autocracy that are against the deepening of democracy in the countryside. Thus, to achieve democracy in the rural areas must first begin with the disbanding of the traditional leadership system. He<sup>237</sup> is also of the view that whilst the South African *Constitution* is based on democratic

---

234 Fife “Richtersveld Restitution Implementation Challenges”.

235 Fife “Richtersveld Restitution Implementation Challenges”; Pienaar 2009 *PELJ* 32.

236 Kepe 2001 *DSA* 287; Mamdani *Citizen and Subject* 68.

237 Ntsebeza 2003 *Development Update* 33; Baldwin 2014 *CP* 254; see s 2.4.2 in chapter 2.

principles, it also gives considerable acknowledgment to, and enables significant governance roles to unelected traditional authorities. This then implies that the *Constitution* opens up space for traditional leaders to subsequently claim and secure control over rural land allocation. This idea goes back the argument that there is no separation of powers in the institution of traditional leadership.<sup>238</sup> Bruce and Knox<sup>239</sup> found that efforts to decentralize authority over land in Africa often follow one of four basic strategies:

- (a) First they replicate locally, with some simplification, existing offices of the central government's land agency and granting them limited administrative autonomy.
- (b) Secondly, more modest and more locally representative specialised bodies at the community level are created. For example, community land boards or committees.
- (c) Land authority is decentralised to non-specialized local civil authorities, such as local councils, possibly with the creation of a subcommittee or other subsidiary unit for handling land matters, or
- (d) Reliance on traditional authorities as the lowest rung of land administration.

Although some countries adopt a combination of these, others usually discern one basic thrust. In many Southern African communities, land administration is effectively decentralized to traditional authorities who are responsible for the administration of land in terms of custom irrespective of the presence or

---

238 Refer back to the argument advanced by Ntsebeza in chapter 2. The same structures are given extensive powers over the lives of rural people, including the power of taxation. The accountability of these authorities to rural people is not adequately provided for and there is no mechanism to enable groups to withdraw from a community that was wrongly constituted under apartheid.

239 Bruce and Knox 2009 *WD* 1362.

absence of legal foundation in national law.<sup>240</sup> It should be primed that, traditional authorities are not democratic, efficient, or less corrupt *per se* and not all land administration functions are best carried out at the local level.<sup>241</sup> The following cases are used to showcase the issues faced by communities whose land administration functions are carried out by the institution of traditional leadership.

#### 3.4.3.1 Bakgatla-Ba-Kgafela v CPA<sup>242</sup>

Although, the *Constitution* contemplates that the institution of traditional leadership has an important role to play in a constitutional democracy,<sup>243</sup> if and when a headman fails to administer the functions of the office he holds in terms of customary law, he should be held accountable. The Bakgatla-Ba-Kgafela community dispute denotes the potential conflict and interference between the institutions of traditional leadership and the CPA in their land administration functions. In 2006, Kgosi Pilane, on behalf of the Bakgatla-Ba-Kgafela community claimed and won the restoration of lost land rights to the Bakgatla-Ba-Kgafela Community. The land claim related to land in and around Moruleng, the community's headquarters. According to the community members, a CPA was registered in October 2006 and the respondents had complied with the requirements under s 8(2) of the *CPA Act* for its "provisional registration". This led to the flawed belief that a permanent CPA was duly registered in September 2007.<sup>244</sup> The evidence before court proved

---

240 Byamugisha *Securing Africa's Land* 16; see s 2.4.2 in chapter 2.

241 Byamugisha *Securing Africa's Land* 16; Ojha *et al.* 2016 *WD* 275; Bruce and Knox 2009 *WD* 1362.

242 *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25.

243 Para 43. Rugege 2003 *LDD* 188. Indigenous law, customary law and traditional leadership are listed as functional areas of concurrent national and provincial legislative competence and, in each, the competence is subject to the *Constitution*.

244 The Department refused to issue a registration certificate in respect of the CPA.

that on that date, a provisional CPA was registered thereby having the validity period of only 12 months.<sup>245</sup> On finalisation of the land claim the land award had to be transferred to a legal entity that could hold it on behalf of the community and this led to a disagreement between members of the community as to which of two legal entities a CPA or a Trust would be registered to take transfer of the land.

The appellants on the other hand took issue with the respondent's *locus standi* and the merits. They insisted that because no CPA was registered as alleged, the respondents had no *locus standi* before court. They contended further that the matter was not urgent and that the respondent should have simply requested the CPA registration certificate in terms of section 4 of the Regulations issued under the *CPA Act*. In resolving this matter, the court set aside the Supreme Court of Appeal decision which adopted the technical approach that the CPA no longer existed since its validation period of 12 months had lapsed.

In effect, this meant that the CPA was still the owner of the land that had been transferred to it. The Constitutional Court also found that the CPA had been permanently registered save for the administrative mismanagement by the Department and the unlawful interference by the Minister. In support of this decision, the court pointed out that the CPA had complied with most of the requirements for the registration of a permanent CPA and that the Department's own memos showed that it recommended that a permanent CPA be registered.

---

245 Para 14. Du Plessis and Frantz 2013 <http://ssrn.com/abstract=2381922>.

### 3.4.3.2 Masakhane community

The Alice community case study (registered under Masakhane CPA) was picked to show the long standing battles that could occur if they traditional authorities make unilateral decisions on the land they hold in trust for their communities without consulting or involving them. The Alice community and surrounding villages<sup>246</sup> combined forces in 2001 to lodge a legal claim for the land that had once belonged to white farmers in the area. They formed the Masakhane CPA which consists of about 250 families. To date they have still not received the title deed to the land.<sup>247</sup> The CPA has been involved in a long-standing legal case concerning the ownership, use and benefit of bio-prospecting of the pelargonium plant which grows naturally in the area.<sup>248</sup> The perplexity of this case is brought about by the fact that Chief Tyali dissolved the ImiNgcangathelo Community Development Trust which signed a benefit-sharing agreement with Schwabe, a Swedish drug multi-national, over cultivation and harvesting of the pelargonium plant.

In objecting to the granting of bioprospecting permits, the Alice community, pleaded with the Minister not to grant them since they had neither been consulted nor informed about the benefit-sharing agreement.<sup>249</sup> In this light, the Minister assured the community that the application would definitely be

---

246 Lokwe, Joe, Nomtayi, Mfingxane and Krwanyli communities.

247 The CPAs neither received their land nor the title deeds to the land. Unofficial speculations range from administrative incompetence on the part of the Eastern Cape Province official handling the transfer to interference by wealthy Alice farmers who intend to continue grazing their cattle on the fertile Masakhane farms.

248 The communities pleaded with the Minister not approve the applications for bio-prospecting permits since they had not been consulted in any negotiations with regard to benefit-sharing agreements, material transfer agreements or the use of their knowledge and resources, as required by the *CPA Act*.

249 The Masakhane community claim that the CPA, rather than the Chieftainess, represents them, but the predicament is that both traditional authorities and democratic structures are recognised in South African law. After winning a claim to some of the land they lived on, the Masakhane community refused to fall under the jurisdiction of the traditional authority that claimed to rule over them. Msomi and Matthews 2015 *JDS* 69.



denied "if" it had not complied with the different laws and regulations. When interviewed the CPA Registrar insisted that since the transfer had previously been approved, the CPAs should receive their title deeds with immediate effect albeit never suggesting seeing this object through. Given the national task force that had recently been introduced to appraise the feasibility of the existing CPA's, the Registrar expressed concern for the Masakhane CPAs. He exclaimed further that all "non-functioning CPAs," including those without title deeds had to be de-registered, Masakhane CPA included.

Moreover, in an interview with the Masakhane CPA leadership, Morris<sup>250</sup> reported that the former elucidated that inasmuch as they respect the ceremonial authenticity and significance of the traditional leaders, they detest when the latter interfere with their livelihoods. As expected, there was diversity of opinion regarding this institution amongst the residents, nonetheless, the CPA leadership was unwavering in its claims that the local chieftaincy is self-serving and does nothing to better the lives of its purported subjects.

Accordingly, the above case studies illustrate how some communities still do not accept the authority of the traditional authorities.<sup>251</sup> Nonetheless, with those that do, there is no harmonization between legal structures (CPA's and Trusts) and the institution of traditional leadership insofar as land administration is concerned. This dissonance has proved to be very injurious to community members on a day to day basis. The next section analyses the

---

250 Morris <https://www.landdivided2013.org.za>; Bennett *Customary law in South Africa* 382.

251 On the 27<sup>th</sup> June 2017, the Bhisho High Court granted an order to disestablish a senior traditional leadership over residents of Amahlathi. By so deciding, the Court set aside the Commission's (Commission on Traditional Leadership Disputes and Claims) and the Premier's decision that recognised the authority of a chief over the Amahlathi. The Committee requested from the Court that the court set aside the decision, since, in terms of the Amahlathini custom the people were not meant to have a chief but self-governed through a system of elected chairpersons.

case of *Tongoane* which declared the *CLARA* unconstitutional. Not a lot of case law goes through formal channels of dispute resolution since the traditional method of resolving conflicts is still prominent in rural South Africa, hence, the discussion is limited to this case only.

### **3.5 The South African communal land tenure system through case law**

#### *3.5.1 Tongoane and Others v Minister for Agriculture and Land Affairs and Others*<sup>252</sup>

This case challenged the entire South African communal land tenure system as was introduced by *CLARA*. As shown above, *CLARA* was the first legislation aimed at codifying and securing communal land tenure in South Africa. The result of the nullification created a lacuna in the protection of indigenous land space.

##### 3.5.1.1 High Court Proceedings

The applicants sought confirmation of an order of the North Gauteng High Court that had the effect of declaring some provisions of *CLARA* unconstitutional since it undermined the security of tenure of certain communities in respect of their lands, in contravention of sections 25(6) read with section 25(9) of the *Constitution*;<sup>253</sup> *CLARA* was an effort by the legislature to respond to this constitutional requirement. Atypically, this

---

252 2010 ZACC 10.

253 Read together, these provisions require Parliament to enact legislation to provide for legally secure land tenure or comparable redress. The applicants also lodged an application for direct access to the Constitutional Court seeking an order declaring *CLARA* unconstitutional on the ground that the respondents failed to comply with its constitutional mandate to facilitate public involvement in its legislative process in contravention of s 59(1)(a) and 72(1)(a) of the *Constitution*.

attempt on the part of the legislature contravened the very constitutional requirement it sought to accomplish, namely communal land tenure.

#### 3.5.1.1.1 Factual background

##### (a) Kalkfontein Community

Around the late 19<sup>th</sup> century and early parts of the 20<sup>th</sup> century, a group of African people bought land in the Mpumalanga Province in private ownership which was later named the Kalkfontein B and C Community. These people passed on but the occupancy of the land was naturally passed to their descendants.<sup>254</sup> As required by the racial practices prevailing at the time, the ownership was exercised through a trust and the trustees were therefore the Ministers responsible for land over the time periods.<sup>255</sup> Notwithstanding their semi-private ownership, the land was left under the authority of the tribal authorities despite the constructs of private property holding. Although in the process of reasserting back their authority in their land then, the Kalkfontein Community feared that the promulgation of *CLARA* was going to further threaten their landholding (tenure security).

##### (b) Mokgobistad Community

The Makgobistad Community belongs to the Barolong-boo-Ratlou-baga-Maribaba of Makgobistad and established land rights in relation to land in Mayayane some kilometres away. This tribe established the Motsewakhumo Tribal Authority under the *Tribal Authorities Act*<sup>256</sup> and consequently

---

254 In the case of the Kalkfontein community, the farms were managed and administered according to indigenous law through a kgotla, a customary decision-making body.

255 At the time of purchase the trustee was the Minister of Native Affairs and the Minister of Agriculture and Land Affairs at the time of the proceedings.

256 68 of 1951.

recognised in terms of the *TLFGA*.<sup>257</sup> The major contention was in relation to a piece of land they inherited in Mayayane wherein the Chief of Makgobistad appointed his relative as a headmen thereby giving him authority of the land in question. During his headmanship he solicited the development of a housing project without consulting the rightful owners of the land.<sup>258</sup> The Mayayane community had successfully instituted a restitution claim in relation to a piece of land surrounding the land they previously owned but were never told that the case had been finalised. Upon the determination of this fact, both the community and the Restitution Commission of that time agreed to register the new acquisition under a trust. The traditional council opposed this notion and wanted to transfer the title to the chief or the traditional council.

Consequently, they collectively went to court to challenge the right of their chief and uncle in making unilateral decisions in relation to their land as well as the chief's unilateral decision in appointing his uncle as a headman. In relation to their claim in the High Court, the community contended that *CLARA* and the *TLGFA* will exacerbate the tendency towards high-handed and self-serving behaviour by traditional leaders.

(c) Makuleke Community

The Makuleke Community occupied a vast area of land called the Pafuri-Triangle in the Limpopo Province but were later evicted and part of their land got incorporated into the Kruger National Park, the remainder into the Madimbo Corridor and was used as a border defence and the Venda

---

257 S 28(4).

258 The Chief and the headman permitted a school to be built on a field belonging to a member of the community with neither her consent nor consultation. The Department of Public Works of the North West Province was also authorized by the Chief to construct a road cutting through the land in question.

homeland. Upon their eviction, the community was moved to Ntlhaveni, under the Mhinga tribal authority under chief Mhinga. After the displacement, Chief Magakula was made headmen under the Mhinga tribal council instead of being a chief, as expected, tension sparked. The overall development of the community suffered for a long time and even threatened the security of tenure of the community members.<sup>259</sup> Around that time, the Ralushai Commission was established with the main object of investigating the institution of traditional leadership; where leaders had previously been banished or driven into exile during apartheid. It was this Commission that recommended that Chief Magakula be reinstated as a chief of the Makuleke Community, these recommendations were ignored entirely. At the time of the challenge the land was still under the authority of the Mhinga tribal council, as such recognised as legitimate in terms of the *TLFGA*.

As luck would have it, the *Restitution of Land Rights Act* was promulgated in 1994 and the Makuleke community successfully claimed their land back and was transferred back to them and registered under a *CPA Act*.<sup>260</sup> It is against this background that the Makuleke Community together with the other three communities instituted claims against *CLARA*.

(d) Dixie Community

Dixie community occupies and independently controls the farm known as Dixie 240 KU, in the Pilgrims Rest District in the Limpopo province. In all cases, the land falls under a tribal authority's jurisdiction and the use and occupation thereof is regulated by indigenous law. In terms of their customs

---

259 Chief Mhinga's successor gave away land and allocated sites to outsiders without consulting the community members, arrested women of the Makuleke tribe who were collecting firewood because he was selling the wood for his personal gain.

260 The land was then co-managed by the Makuleke Community and the South African National Parks as an eco-tourism project. This was done in an effort to alleviate poverty and provide employment and revenues for the community at large.

rights to land vest in the families of the community, thus, the rights of each family in the fields and residential land are exclusive to that family members only. Due to their customary nature, these rights are perpetual in nature hence can be transferred and inherited by generations on end. The grazing lands are owned communally with all members of the community having the right of access.<sup>261</sup>

The Mnisi Tribal authority wanted to exercise jurisdiction over the farm and the village thus signed a long term lease with a private company allowing the latter to use a portion of the farm to operate a tourism lodge. During this time, the community established that this same company had signed a lease that would enable it to construct a tourist lodge. The community therefore instituted a claim preventing this construction against the company, the tribal authority as well as the Department of Land Affairs.<sup>262</sup> The Dixie Community decided to secure their tenure security independent of the tribal authority but the Chief of Mnisi community was hell-bent that Dixie fell under his jurisdiction. The Chief went as far as lodging a claim with the Restitution Commission to have Dixie farm included in his area of jurisdiction. The Dixie community consequently joined in on the claim against *CLARA* for these reasons.

The communities were thus contesting *CLARA*'s promulgation because there was a strong fear that its implementation would undo all the efforts that had already been achieved in an effort to repair all that the apartheid policies destroyed (land ownership rights). Its application would also mean that the administration of the farms would be handed back to the institutions that

---

261 Decisions pertaining to the community's land are taken by the community at village-level in meetings which are convened by the traditional leader.

262 The summons in this case were withdrawn upon the determination that no lease had been signed yet and the company showed disinterest since the land seemed to be under dispute.

have abused their powers tremendously to the detriment of the community members. In his supporting affidavit, Delius<sup>263</sup> confirmed that *CLARA* envisaged a fundamental shift in the allocation of ownership of land from the state to communities. He<sup>264</sup> added on that *CLARA* fell short of its mandate under section 25(6) by taking away a certain degree of security of tenure which existed before the colonial conquest. Also, that *CLARA* was informed by a notion of absolute ownership which seemed to be at variance with the system of overlapping rights that existed before colonialism. Delius<sup>265</sup> continued that *CLARA*'s provision that the traditional council could exercise land administration power that were previously left to the officials represented a shift and vested too much power in the former. Consequently, this management and allocation created a potential for the traditional leadership to expand their control over land.

### 3.5.1.2 Issues before the High Court

The issue that the Court had to decide was whether *CLARA* interfered with the communities' rights of ownership, control and management of the land they occupied. The plaintiffs alleged that their land tenure security would be undermined because instead of being able to exercise their ownership rights as they had done for decades, the effect of which would be to remove their

---

263 Delius Supporting affidavit. The vesting of land in communities undermined the rights of occupants which were relatively strong before colonial times and survived the racial discrimination periods.

264 Delius Supporting affidavit.

265 Installation of the institution of traditional leadership as land administrators of communal land provided arbitrary control with no checks and balances that were previously found in pre-colonial times. Similarly, this development would not provide effective recognition of the overlapping levels of authority. Finally, that the assumption that recognised traditional authorities as conterminous with communities fell short in the acknowledgment of the extent to which tribal authority boundaries were manipulated in favour of the pliant groups as well as to punish those that resisted aspect of the apartheid system.

control and place the land in the control of tribal authorities.<sup>266</sup> *CLARA* was meant to operate in all four communities and the applicants buttressed that it threatened the very objective it was meant to protect namely, their security of tenure, in terms of section 25(6) of the *Constitution*.<sup>267</sup> The other issue before Court was whether *CLARA* was properly tagged before being passed as legislation. In the event that the court found it to be tagged incorrectly, the applicants challenged its validity. *CLARA* was tagged in terms of section 75, a provision used for tagging Bills that do not affect provinces, but, the plaintiffs contended that this was not the correct procedure since *CLARA* fell within the functional areas set out in Schedule 4 of the *Constitution*.<sup>268</sup> Hence, they contended further that *CLARA* ought to have been tagged in terms of section 76.

### 3.5.1.3 The High Court decision

The first (substantive) challenge was partially successful and the High Court declared certain provisions of *CLARA* invalid and left it to the Constitutional Court to decide on the unconstitutionality thereof.<sup>269</sup> Regarding the

---

266 As required by s 21(2) of *CLARA*. Moreover, the *TLFGA* and *CLARA* did not make exceptions in favour of those communities that had already acquired full and secure ownership of the land.

267 *CLARA* applied to the communities in terms of s 2(1) which set out areas to which it would apply. S 2(1) (a) (ii) vested the community farms to the *Native Trust and Land Act*.

268 The functional areas under schedule 4 that *CLARA* fell within were (a) where indigenous law and customary law applied, (b) areas that were still under traditional leadership and (c) other areas.

269 In addition, it held that, in determining the validity of the procedure adopted in enacting legislation, a court should "consider if there is [a] substantial or material breach of the *audi alteram partem* rule". It concluded that there was no breach of the *audi* rule because Parliament did not suppress the views of the provinces as they were duly represented, and that "there was a public hearing on the matter". It may be argued that the Communal Land Rights Act is inconsistent with the *Constitution*. It seeks to transform a constitutionally guaranteed right into a discretionary benefit. The granting of such a benefit is, on the basis of s 18 of the *CLARA*, entirely subject to the discretion of the Minister. As such, it stands in direct contrast with s 25(6), which determines that legislation, and legislation alone, can determine the extent of



procedural aspects of the challenge, the High Court found that Parliament should have followed the procedure for the passing of Bills affecting the provinces prescribed by section 76, but declined to grant relief stating that the Parliament acted *bona fide* and did not intend to suppress the views of the provinces as the applicants suggested.<sup>270</sup>

#### 3.5.1.4 Constitutional Court proceedings

Courts ought not to be dismissive of these [traditional leadership institutions] institutions when they insist on the observance of traditional governance protocols and conventions on the basis of whatever limitation they might impose on constitutional rights.<sup>271</sup>

In the Constitutional Court, the applicants sought confirmation of the order of invalidity of *CLARA*. Over and above this, they sought leave to appeal against the dismissal of their application to have *CLARA* declared constitutionally invalid in its entirety for Parliament's failure to enact it in accordance with the procedure prescribed by section 76 of the *Constitution*. They further lodged an application for direct access to the Constitutional Court seeking an order declaring *CLARA* constitutionally invalid on the ground that Parliament failed to comply with its constitutional obligations to facilitate public involvement in the legislative process in terms of sections 59(1)(a) and 72(1)(a) of the

---

the rights to legally secure tenure or comparable redress. Ng'ong'ola "Constitutional Protection of Property" in Saruchechea *Securing Land and Resource Rights in Africa* 66.

270 He further went on to declare provisions 2 (1) [(a), (c), (d)], 2(2), 3, 4(2), 5, 6, 9, 18, 19(2), 20 21, 22, 23, 24 and 39 unconstitutional and invalid. He left it to the Constitutional Court to confirm the unconstitutionality thereof. S 167 (5) of the *Constitution*. s 2(1) was rendered unconstitutional insofar as it applied to land already owned or held securely by communities. This s provision sets out areas where *CLARA* would operate. S 2 (2) rendered the Minister responsible to determine land that could prospectively be administered in terms of *CLARA*. S 3 relates to the juristic personality that a community would acquire after registration, despite the change in membership thereof. Therefore, all characteristics of a legal entity or persona would apply. S 4(2) was rendered invalid for protecting tenure of married women only at the exclusion of all other women (unmarried and widowed).

271 Para 79 *Bakgatla-Ba-Kgafela* (CC).

*Constitution.*<sup>272</sup> Based on their submission in the court *a quo*, the communities were concerned that their indigenous law-based system of land administration would be replaced by the system that *CLARA* envisaged.

According to them, *CLARA*'s implementation would have an impact on the evolving indigenous law which has always regulated the use and occupation of land they occupy. Worried that their land would be subject to the control of traditional councils, the communities contended that the traditional councils were incapable of administering the land for the benefit of the community. As argued in the court *a quo*, the communities further claimed that *CLARA* would undermine the security of tenure they already enjoyed in their land and that those who own the land afraid that they would be divested of their ownership in the land.

#### 3.5.2.1 Issues before the court

This case raised important constitutional questions concerning one of the most crucial pieces of legislation enacted in South Africa since the advent of the constitutional democracy, namely, *CLARA*. It was intended to conform to one of the hoary constitutional commitments of the Parliament which was to put in place legislation that safeguarded tenure or analogous reparation to people or communities whose tenure in land was legally insecure because of the apartheid policies.<sup>273</sup>

- Whether the correct procedure was followed in enacting *CLARA*.

---

272 In the course of oral argument, the Court was informed by counsel for the Minister that *CLARA* would be repealed entirely, the parties disagreed on the proper course to be followed in the light of the Minister's affidavit. The applicants urged the Court to hear the case as originally presented while the respondents submitted that all the constitutional challenges had become moot given *CLARA*'s imminent repeal.

273 S 25(6) of the *Constitution*.

The South African *Constitution* prescribes the procedure for Bills amending the *Constitution*; there are three categories of Bills namely, first are ordinary Bills not affecting provinces, second, ordinary Bills affecting provinces and finally money Bills. In term of these provisions the Parliament must first categorize a Bill submitted before it in order to determine which procedure should be followed in enacting that particular Bill. Section 76(1) prescribes a rather burdensome procedure than section 75. In terms of this section, when the National Assembly passes a Bill referred to by subsection 3, 4 or 5, it has to be referred to the National Council of Provinces (hereinafter the NCOP) and dealt with in accordance with the procedure set therein.<sup>274</sup>

Furthermore, the joint rules establish the joint tagging mechanism (hereinafter the JTM). The function of the JTM is to make final rulings on the classification of Bills in accordance with joint rule 160. Nevertheless, *CLARA* was introduced in the National Assembly and thereafter classified by the JTM and enacted as a section 75 Bill. The Parliament explained that in order to determine whether *CLARA* fell within a functional area listed in Schedule 4 thereby under section 76(3), it was first necessary to determine its substance or essence and/or its true purpose and effect. This is referred to as its “pith and substance” test. Thus, it was necessary to have regard to the purpose for which *CLARA* was enacted and this was to be found in the preamble thereof. The substance of *CLARA* related to the issue of security of (communal) land tenure or comparable redress in the alternate. Based on this observation, *CLARA* did not fall within any of the areas enlisted under Schedule 4 and was therefore correctly tagged as a section 75 Bill.

---

274 S 76(3) in turn provides that “[a] Bill must be dealt with in accordance with the procedure established by either subsection (1) or subsection (2) if it falls within a functional area listed in Schedule 4”.

The communities on the other hand contended that *CLARA* should have been classified as a section 76 Bill because it affected the provinces. They relied heavily on the decision of *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill*.<sup>275</sup> In this case the test for the classification of Bills was formulated upon the decision that:

A Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 must be dealt with under section 76.

The communities submitted that the provisions of *CLARA* in substantial measure dealt with “indigenous and customary law” and “traditional leadership” which are functional areas listed in schedule 4.

- The other issue before Court was whether the Parliament complied with its constitutional obligation to facilitate public involvement in the legislative process that culminated in the enactment of *CLARA*.

According to section 59(1) (a) of the *Constitution*, the National Assembly is enjoined to facilitate public involvement in the legislative and other processes of the Assembly and its committees. Section 72(1) (a) of same requires of the NCOP to facilitate public involvement in the legislative and other processes of the Council and its committees. In the case of *Doctors for Life*<sup>276</sup> the Constitutional Court considered the consequences of a failure to enact legislation in accordance with a procedure prescribed by the South African *Constitution*. This was in the context of the obligation to facilitate public involvement in the law-making process.

---

275 2000 (1) SA 732 (CC).

276 *Doctors for Life International v Speaker of the National Assembly and Others* 2006 6 (CC) 416.

It is trite that legislation must conform to the Constitution in terms of both its content and the manner in which it was adopted. Failure to comply with manner and form requirements in enacting legislation renders the legislation invalid. And courts have the power to declare such legislation invalid.<sup>277</sup>

Insofar as the application for direct access is concerned, the communities alleged that whatever public hearings may have taken place on the Bill were inadequate and required of the Parliament to facilitate public involvement on the amended version of the Bill.

- Whether, if the procedural challenges are upheld, it was still necessary to consider the substantive challenges to the provisions of *CLARA*.

Despite the communities plea for the court to hear the entire case as originally presented (substantive aspects of the challenge) after the Minister presented an affidavit confirming that *CLARA* would be repealed in its entirety, the Constitutional Court failed to make a ruling when they clearly had the chance to develop customary landholding in South Africa.<sup>278</sup>

- Whether the provisions of *CLARA*, instead of providing legally secure tenure, undermined it.

The applicants submitted that it *CLARA* undermined their tenure security and thus inconsistent with section 25(6) read with section 25(9) of the

---

277 Para 208. The Court exclaimed that the duty to ensure that the law-making process prescribed by the Constitution was observed rests on it. Hence, if the conditions for lawmaking processes have not been complied with, the Court has the duty to declare the statute invalid. Since the Constitution manifestly contemplates public participation in the legislative and other processes of the NCOP, including those of its committees, failure to conform thereto renders the statute automatically invalid; S 72(1)(a).

278 See para 116; Para 41; Mailula 2011 *CCR* 73; Du Plessis and Frantz 2013 <http://ssrn.com/abstract=2381922>.

*Constitution* which requires Parliament to enact legislation to provide for legally secure tenure or comparable redress.<sup>279</sup>

### 3.5.2.2 The Constitutional Court decision

The Constitutional Court set aside the order of the High Court and concluded that *CLARA* was unconstitutional in its entirety for want of compliance with section 76.<sup>280</sup> The High Court was found to have erred in not striking down *CLARA* in its entirety on grounds that Parliament failed to enact it in accordance with the procedures set by section 76. Regarding the public involvement issue, the applicant's counsel thoughtlessly conceded that if tagging was decided in their favour it would be unnecessary to consider the argument based on the failure to facilitate public involvement in the legislative process. Thus, no order was made in respect of the direct access application.<sup>281</sup> In light of the substantive issues raised by the applicants, their Counsel submitted that the Court should make a ruling in that regard to ward off any other challenges that may be brought before Courts on the same issue in the succeeding legislation. This argument was quashed by the judge who asserted that because the Court had already concluded that *CLARA* was unconstitutional in its entirety for failure to conform to the provisions of section 76, it was "...the end of the matter".

The judge sympathised with the applicants for their wasted time and energy but made no order in that regard. This decision by the Constitutional Court was widely criticized by different commentators for failure to engage with the substantive issues presented before the court. Mailula<sup>282</sup> rightly ponders whether this decision overlooked or avoided the core (substantive) issues

---

279 Para 39. Ng'ong'ola "Constitutional Protection of Property" in Saruchechea *Securing Land and Resource Rights in Africa* 66.

280 Para 110 and 112.

281 Para 114.

282 Mailula 2011 *CCR* 73; Onyango 2014 *Sociology and Anthropology* 308.

raised. At that moment, there was an opportune moment that the courts should have capitalised on to develop customary law and landholding. Aware that judges face numerous land issues which are sensitive, complicated, challenging and controversial, Mailula<sup>283</sup> suggests that when adjudicating upon these issues, the judiciary should audaciously face the trials head-on and deal with the issues resolutely as and when they arise. In doing so, they are not only playing their transformative role but are also ensuring legal certainty. This task is particularly important in a constitutional state with a transformative mandate, like South Africa. Nonetheless, in doing so, the judiciary must be "...sensitive to the unique and complicated character of land holding," the polemics around it and the sensitivities of the land holders.<sup>284</sup> Mailula<sup>285</sup> is of the view that the issue that should have been investigated by the Court was how to recognise and secure land rights that are clearly distinct from "Western legal" forms of private property but are not simply "customary" given the impacts of both colonial policies and of past and current processes of rapid social change. Thus, pending the CLTB, the problem of securing indigenous land rights in South Africa remains unresolved.

### **3.6 Conclusion**

In this chapter, the legislation preceding *CLARA*, which was the very first attempt by the South African Government to enact legislation that would safeguard communal land right and interests was discussed. Attempts in creating legislation in this regard had not yielded satisfactory results. With *CLARA*, the government had too many agendas; on the one hand, to satisfy the traditional leaders by giving them powers that would prove to be

---

283 Mailula 2011 *CCR* 73; Du Plessis and Frantz 2013 <http://ssrn.com/abstract=2381922>.

284 Mailula 2011 *CCR* 73; Du Plessis and Frantz 2013 <http://ssrn.com/abstract=2381922>.

285 Mailula 2011 *CCR* 73; Du Plessis and Frantz 2013 <http://ssrn.com/abstract=2381922>.

detrimental to the rural communities. On the other hand, *CLARA* was expected to cure the longstanding insecurities experienced by the rural communities. Nevertheless, *CLARA* was never implemented since its promulgation in 2004. The contestations by four communities that felt prejudiced and vulnerable by the promulgation of *CLARA* led to its demise. These communities believed that since *CLARA* was to operate in their areas, it jeopardized their land tenure security that they had legitimately obtained. This claim went through different courts until it was finally decided by the Constitutional Court in 2010; the result being a revocation of the *CLARA* in its entirety for not following the procedure set in section 76 of the *Constitution*. Other substantive issues that were brought before the court were not discussed and it is believed that the Courts had an opportunity to set precedent in respect of the communal land tenure and how it operates.

Furthermore, it has been shown that the CLTB has addressed some of the issues raised by its predecessor *CLARA*. Nonetheless, it presents its own predicaments: While acknowledging that some communities have secure tenure in their land, the CLTB fails to foresee the dilemma that lies ahead, that CPA's, whether *inter se* or with traditional authorities are prone to disputes. Whether CPA's can administer their functions as expected by the law, remains to be seen. In respect of the equality principle, the CLTB should be commended for placing an equal number of women and men in leadership positions. In spite of these efforts, if communities opt for the institution of traditional leadership to administer its land, women are likely to be sidelined since the institution in itself is patriarchal. In this light, it is up to the DG and the Department as a whole to oversee that the provisions of the law are carried out to the letter.



In the next chapter, the communal land tenure systems of South Africa, Tanzania and Kenya are compared to determine the similarities and differences between them. This is done by examining the current measures involved in the protection of communal land rights in these countries.

## **CHAPTER FOUR**

### **A COMPARATIVE ASSESSMENT OF THE COMMUNAL LAND TENURE IN SOUTH AFRICA, TANZANIA AND KENYA**

#### ***4.1 Introduction***

The preceding chapter examined the communal land tenure legislation in relation to the overall administration of land tenure; the processes involved in the drafting, adoption and registration of the community rules. Subsequent to the registration, the community gains legal personality capable of having land transferred to it by the Minister. In conformity with the selected themes, on the current chapter, the communal land legislative framework is discussed to determine the similarities and differences in the three jurisdictions. The first section of the comparisons is in relation to the procedure followed in the adoption and registration of community rules, nature of communal land rights and administration of communal land. The second section analyses women's lack of access to communal land owing to the patriarchal practices of rural communities. The last portion of the discussion looks into the different approaches and techniques of solving communal land tenure disputes.

#### ***4.2 Tenure security***

Land tenure systems have two important dimensions: property rights definition, which entails the security of land rights associated with tenure possession, and property rights distribution, which has to do with the "whom the land rights are distributed to".<sup>1</sup> Security in tenure, thus, involves the individual's discernment of their rights to land on a recurrent basis, without interference from third parties, as well as the ability to reap the benefits of

---

1 Roth and Haase 1998 *BASIS* 1; Ubink 2007 *JAL* 220.

labour or capital invested in land, either in use or upon alienation. Hence, Roth and Haase<sup>2</sup> rightly summarize tenure security in approximately three components, namely breadth,<sup>3</sup> duration and assurance. Thus, conditions that influence tenure insecurity include rights that are overly limited in breadth and scope, are too short in duration, are conflicting as well as inadequate and unenforceable.

Security of tenure is achieved through flexible and uninterrupted processes of negotiation and political steering. Over the years it has been repeatedly debated that secure rights in land range from the most short-term to the most long-lasting while also swinging to and fro along the continuum.<sup>4</sup> Thus, comprehensive land reform cannot be undertaken without a deliberate effort to recontextualise African customary tenure.<sup>5</sup> This is because customary tenure has been the subject of much intellectual confusion and distortion, a consequence of scholars' simplistic reliance on colonial English or Roman-Dutch concepts of property in trying to understand the nature and institutions of African land relations.<sup>6</sup> These delusions, according to Himonga,<sup>7</sup> have somehow led to the relegation of customary land law to an inferior status from which it has never recovered since the colonial era. By the same token, one cannot deal with communal land tenure system and not probe into the greater realm of indigenous or customary law.<sup>8</sup> Thus, the only avenue for the

---

2 Roth and Haase 1998 *BASIS* 1; Ubink 2007 *JAL* 220.

3 Breadth in this context refers to the quantity or bundle of rights held, or possession of key rights if certain ones are more important than others.

4 Kameri-Mbote "Land Rights for African Development" 1-3. Kameri-Mbote summarizes tenure security as having three dimensions namely, "people, time and space".

5 Lund *Securing Land Rights* 45; Ubink 2007 *JAL* 220.

6 Three fundamental misconceptions have arisen from the overreliance upon foreign notions of landholding (ownership). First, that Africans did not own land. Secondly, land belonged to the community as a whole. Finally, that as a result, land could not be transferred. Roth and Haase 1998 *BASIS* 11.

7 Himonga and Manjoo 2000 *SALJ* 160; Smith and Wicomb 2011 *AHRLJ* 423.

8 Himonga and Manjoo 2000 *SALJ* 160; Smith and Wicomb 2011 *AHRLJ* 423.

African regional human rights system to guard the communally held rights of Africans at large is to deal with customary law directly.<sup>9</sup>

The Framework and Guidelines on Land Policy in Africa<sup>10</sup> have acknowledged that there are several significant land issues and challenges in Africa. Amongst others, the challenges include land and natural resources degradation, land tenure insecurity, land conflicts and women's land rights.<sup>11</sup> Likewise, Kenya, Tanzania and South Africa have been in the midst of land reforms that have extensive implications for securing the land rights of rural people while also promoting political stability and economic development.<sup>12</sup> Tanzania, being one of the pioneers in community land regulation in Africa through the *Village Land Act*<sup>13</sup> and the *Land Act*<sup>14</sup> set the bar very high.<sup>15</sup> Both these Acts are milestones for land administration in Tanzania. This legislation came about as a consequence of land conflicts as well as the

---

9 Wicomb and Smith (Smith and Wicomb 2011 *AHRLJ* 423) opine that more than 60% of land in Africa is held communally. International and regional human rights institutions (Framework and Guidelines on Land Policy in Africa, the African Union Commission, the African Development Bank and the United Nations (UN) Economic Commission for Africa) are increasingly moving towards the idea that proper recognition of customary law tenure systems may be a solution to Africa's problems of poverty and unequal resource distribution and indeed to realise the right to land.

10 United Nation Economic Commission for Africa 2006 <https://www.uneca.org>.

11 United Nation Economic Commission for Africa 2006 <https://www.uneca.org>; Kironde *Improving Land Sector Governance in Africa* 3.

12 Wily "Community-based Land Tenure Management" 12-14.

13 5 of 1999.

14 4 of 1999.

15 Englert 2003 *AJDS* 82. In following Manji's reasoning, Englert is critical about the feasibility and validity of the Tanzanian land laws, for, their operation began very auspiciously. Odote (2013 *NP* 10) too believes that they have not forestalled the challenges that rural communities have since encountered since its promulgation. In his opinion the process of land reform in Tanzania denoted a lack of democracy as evidenced by the Tanzanian Government's secrecy, since it did not permit any form of public debate or involvement. The implementation of these Acts was met with difficulties as there was also a strong conviction amongst villagers that registering their lands would seem absurd since their families had been farming the very same parcel of land for over three generations.

pressure from the global institutions for the liberalisation of land markets.<sup>16</sup> The CLTB of South Africa was in fact a replacement of the *CLARA* that was revoked in 2010 by the Constitutional Court decision of the *Tongoane* case. Accordingly, a comparative assessment of rural land tenure in Tanzania and Kenya is made in relation to rural tenure in South Africa, under the following three themes: tenure security, women's access to communal land and dispute resolution.<sup>17</sup>

In Kenya, like many African states, there have been debates on community land rights since she gained her independence in 1964. The argument in this regard has always been whether community land rights should be codified and evidenced by title deeds.<sup>18</sup> Exponents of this never-ending debate contend that codification of community rights ensures secure tenure and non-discrimination between individual and communal land rights.<sup>19</sup> Alternatively, opponents assert that formal codification denotes a lack of contextual appreciation of multiple and layered interests in and meanings of land which may actually reinforce the insecurity.<sup>20</sup> Nonetheless, the titling and registration issue is discussed in-depth in the next chapter. In line with these arguments, the *Constitution* of Kenya has realized community land rights and

---

16 International institutions such as the World Bank (WB) and the International Monetary Fund (IMF) influenced many African countries to probe into the issue of liberalising the land markets. Englert (Englert 2003 *AIDS* 82.) suspects that akin to their policies concerning other sectors of the economy, these institutions did not only demand an easier access to land for foreign investors but also a stronger orientation of the agricultural sector towards exports.

17 In South Africa, re-writing the wrongs of apartheid became the principal motive behind the Government's land reform project. For a detailed discussion on this issue, see chapter 3.

18 One can only wonder if by the time some countries do device legislation that secures communal land, there will still be land to secure. Kameri-Mbote *et al.* *Ours by Right* 44; Ubink 2007 *JAL* 230.

19 Ubink 2007 *JAL* 230; Mostert and Pienaar "Formalisation" in Cooke (ed) *Modern Studies* 317.

20 Okoth-Ogendo "The Nature of Land Rights" in *Land, Power and Custom* 98; Mostert and Pienaar "Formalisation" in Cooke (ed) *Modern Studies* 317. See a comprehensive discussion of this issue in chapter 3.

put them at an equal stance with the other tenure systems.<sup>21</sup> The *CLA* is charged with the object of giving effect to and providing for the allocation, management and administration of community land as requested by section 63 of the Kenyan *Constitution*.<sup>22</sup>

In the period from 1968 to 1975, the Tanzanian Government as led by President Julius Nyerere re-settled the majority<sup>23</sup> of Tanzanian rural population into “planned villages” in an attempt to “improve the human conditions”.<sup>24</sup> This was called the villagisation project. It was an attempt to realise *ujamaa* which directly translates to “African socialism” in the rural areas. *Ujamaa* was purportedly executed without consultation and consent of the people who were moved with no regard for the prior land tenure systems.<sup>25</sup> Research and experience has shown that the *ujamaa* project, that is, the rules that governed land relations, did not bring about the desired results (security of tenure).<sup>26</sup> Correspondingly, Tanzania’s community land

---

21 Section (hereinafter s) 63(5) of the Kenyan *Constitution* 2010. In his speech, the Minister for Lands buttressed that in order to secure community lands, documenting and mapping existing forms of communal tenure in consultation with the stakeholders. To do this, it is necessary to have a clear legal framework that recognizes, protects and registers community rights to land while also bearing in mind, the multiple interests of all land users.

22 Preamble *CLA*; Onyango 2014 *Sociology and Anthropology* 306.

23 In 1976 there resettlement campaign had affected over 70% of Tanzania’s population and was reported to have created about 7 000 to 8000 villages.

24 Schneider 2007 *AS* 11; s 1 of the Tanzanian *Constitution* reinforces the principle of the pursuit of *ujamaa* and self-reliance.

25 Englert 2003 *AJDS* 82; Schneider 2007 *AS* 11; s 15(1) of the *VLA* confirmed that the displacements caused by *ujamaa* were irreversible. The *Regulation of Land Tenure (Established Villages) Act* 22 of 1992 was also instrumental in the displacement of peasants during operation Vijiji. This legislation was the cause of most land disputes during that time in Tanzania. Nonetheless, the *Constitution* and the *VLA* make it explicit that any person has the right to own or hold any property lawfully acquired and that the deprivation thereof should be done in terms of law and that compensation be duly effected.

26 Tsikata 2003 *JAC* 154; Englert 2003 *AJDS* 81; Schneider 2007 *AS* 12.

experts also believe that tenure insecurity is not the result of the absence of registration; instead, it is a possible consequence of registration.<sup>27</sup>

Sundet<sup>28</sup> nevertheless, reiterates the De Soto approach about “dead capital”. This principle advocates for setting up and executing formalisation programmes and registrations which are thought to aid the poor in obtaining access to credit as well as the protection of the legal system afforded those in the formal sector. In response, Englert<sup>29</sup> justly warns that promoters of the De Soto principle constantly and conveniently overlook the prospect of individuals losing their property in the event that they default in paying their loan. In a nutshell there is now a higher risk that the formalisation of property which has led to the “formalisation of villager’s dispossession” and it remains to be seen whether banking and financial institutions have any interest in lending money to poor farmers with only small plots of rural land to use as collateral.<sup>30</sup>

#### *4.2.1 Legislative and policy framework*

##### *4.2.1.1 National land policies*

National land policies are often founded on opinions and expert views collected and organized through a well-thought-out, all-inclusive and consultative process which “ought to” bring together patrons from the public,

---

27 Englert 2003 *AJDS* 82; Yngstrom 2002 *ODS* 28.

28 Sundet 2006 <https://www.landportal.info>.

29 Englert 2003 *AJDS* 81; Gilbert 2002 *IDPR* 11; Boone 2017 <https://www.wider.uni.edu>; Claasens 2005 *AJ* 42; Maoulidi 2004 <https://www.hakiardhi.org>; Hunt 2004 *DPS* 173; Haramata *Book Review* 39. The De Soto principle has been widely criticised as not being apt for African communities that practise communal land tenure. When disrupting community structures by individualisation of communal lands, poverty will in all likelihood be increased rather than alleviated.

30 Pallotti 2008 *RAPE* 230; Gilbert 2002 *IDPR* 11; Boone 2017 <https://www.wider.uni.edu>; Wily “Customary Tenure” in Graziadei and Smith (eds) *Comparative Property Law* 460.

private and civil society organizations.<sup>31</sup> Hence, it was no different with the drafting of the land policies in South Africa, Tanzania and Kenya.

#### 4.2.1.1.1 Kenya

With the drafting of the Kenyan National Land Policy came a myriad of legislation<sup>32</sup> that sought to strengthen tenure in land, specifically rural tenure. Like many African countries, right after her independence Kenya operated on a delusional credence that conversion of customary rights into private individual ownership would boost the economy.<sup>33</sup> This meant that rights of people who lived in rural communities were sacrificed by virtue of the dispossession. This policy was a first of its kind since Kenya gained her independence.<sup>34</sup> Its adoption and implementation have been hailed for going through proper consultation and public participation channels.<sup>35</sup> This policy takes cognizance of the importance of communal land tenure system and notes with interest that individualisation of tenure has and continues to undermine customary land rights and traditional resource management institutions.<sup>36</sup>

---

31 Maoulidi 2004 <https://www.hakiardhi.org>; Springer 2016 <http://www.usaidlandtenure.net>. The Tanzanian Presidential Inquiry into Land Matters Report sums it up neatly and states that this policy was "...an authentic record of the grievances, complaints, hopes and fears of the sons and daughters of the soil".

32 The *National Land Commission Act* 2012 (revised version 2014, chapter 5D), *The Land Act* 2012, Cap 280, *The Land Registration Act* 3 of 2012, *The Marriage Act* 4 of 2014.

33 Odote *Legal and Policy Framework* 8. Refer back to chapter 3.

34 Before the Land Commission 2009 was the Commission of Inquiry into the Land Law System in Kenya (also known as the "Njonjo Commission") It was appointed in 1999 and was submitted to the Government in 2002. Onyango 2014 *Sociology and Anthropology* 304.

35 Odote *Legal and Policy Framework* 8; Taylor 2004 *Habitat International* 278.

36 Hunt 2004 DPS 173; Haramata *Book Review* 39; Odote *Legal and Policy Framework* 2; Kameri-Mbote *et al. Ours by Right* 25; reflected in s 27 (1) and (2) of the *CLA*.



Thus, in 2013 the Kenyan Government created the National Land Commission<sup>37</sup> as a lead agency in land matters. Amongst its focal areas were land registration, land information management systems as well as resolution of land related disputes.<sup>38</sup> More than two thirds of Kenya's land was unregistered community land, thus, tenure security for the rural populace was a major setback since it made them susceptible to land acquisitions and spurious claims. Quite fortunately, the Kenyan *Constitution*<sup>39</sup> and more recently the *CLA* protects all community land holders against arbitrary acquisitions against all third parties.<sup>40</sup>

#### 4.2.1.1.2 Tanzania

The National Land Policy in Tanzania had long been awaited since her independence in 1961. There was a need to have in place a policy that would govern land tenure, land use management and administration.<sup>41</sup> Some court cases of that time affirmed that customary tenure rights in the areas affected by villagisation provided guidance to address such land tenure problems in a manner compatible with the basic values and ideals of the nation. The overarching objectives of the policy are for the promotion of a secure land tenure system, of equitable distribution of and access to land by all citizens of Tanzania as well as the promotion of sound land information.<sup>42</sup>

---

37 The National Land Commission is a body created under the *National Land Commission Act* 2012 (revised version 2014, chapter 5D) and was enacted to make provision for the functions and powers of the National Land Commission as well as to give effect to the objects and principles of devolved Government in land management and administration and matters connected therewith. Onyango 2014 *Sociology and Anthropology* 304.

38 Paragraphs 24 and 25; Kibagendi *The Problem of Land Rights Administration* 74.

39 S 40(3)

40 S 5(3).

41 Objectives of the National Land Policy 1995.

42 Objectives of the NLP 1995; Maoulidi 2004 <https://www.hakiardhi.org>; Heck 2009 <https://www.hj2009per1tanzania.weebly.com>.

There was also the Presidential Commission of inquiry into Land Matters (hereinafter PCILM) whose recommendation was that the tenurial status of all lands in Tanzania be declared constitutionally to be either national or village lands or that village lands be vested in Village Assemblies. And so,<sup>43</sup> the PCILM endorsed the notion that land in Tanzania would continue to be vested in the President and managed by the Commissioner for Lands.<sup>44</sup> At the village level the Commission suggested a management role for the village council as well as a consultative role for the village assembly. It was from these recommendations that the *Land Act*<sup>45</sup> and the *Village Land Act*<sup>46</sup> were born.

#### 4.2.1.1.3 South Africa

The South African National Land Policy is thoroughly analysed in chapter two, thus to avoid repetition, refer back to section 2.3.5.

### 4.2.2 *Legislative protection of community land rights*

#### 4.2.2.1 South Africa

In an effort to echo what is systematically dealt with in chapter three, a brief outline of the legislative protection of communal land tenure is given in the following paragraphs. As indicated, the constitutional protection of rural land rights in South Africa is enshrined in s 25(6). It provides that people whose tenure in land as a consequence of past racially discriminatory laws are entitled to secure tenure in land or comparable redress. It was because of

---

43 This Commission was chaired by Shivji, a communal land expert in Tanzania. Shivji "Village governance and common pool resources in Tanzania" 15-22; Maoulidi 2004 <https://www.hakiardhi.org>; Wily "Customary Tenure" in Graziadei and Smith (eds) *Comparative Property Law* 466.

44 The only drastic departure in the NLP from the previous land regime was to assert that "land has value" should become a market commodity. This meant that restrictions on transfer of lands had to be relaxed.

45 4 of 1999.

46 5 of 1999.

this mandate that the Parliament began drafting the *CLARA*. Nonetheless, this piece of legislation was revoked and its replacement, the CLTB, is in the process of being tabled before Parliament. The CLTB embodies the principles of promotion and fulfillment of social, economic environmental and sustainable development on the land, as does the Kenyan *CLA*.<sup>47</sup>

In the same light, the CLTB re-emphasizes the need to secure land rights of African people in terms of the Constitutional imperative above, failure of which comparable redress must be invoked.<sup>48</sup> Furthermore, section 2(e) of the CTLB provides for the protection of communal land against unfair acts of disposal. Additionally, the CLTB defines communal land as land occupied, owned or used by members of a community in terms of the shared rules, norms and customs of the said community.<sup>49</sup> The *CLARA* and the *TLGFA* had to always be read together in relation to communal land since they worked hand in hand to ensure the protection of rights of people living on communal lands of South Africa. Likewise, this interconnectedness remains with the CLTB. It is interesting to note that the CLTB like its predecessor intends to convert communal land rights into ownership for communities.<sup>50</sup>

Similarly, section 2(a)(ii) provides that communal land is to be transferred to and registered in the name of the community by the state. The usual rights associated with "ownership" will then apply; these include the right to use and regulate the administration therein.<sup>51</sup> The governing principles of regulation, management and administration of communal land in terms of the

---

47 S 3(g) *CLA*.

48 Preamble CLTB 2017; s 2(b).

49 Ss 1 and 2 (a). Communal land also includes state land that is used by communities.

50 S 2(a) (i). At this point it is clear that the use rights of the community will now be converted into ownership. But, as Okoth-Ogendo, Bennett and Cousins keep warning that customary/ community land rights should be approached with caution. Kameri-Mbote *et al. Ours by Right* 24; Okoth Ogendo *Tenants of the Crown* 12; Cousins "Contextualising Controversies" 12-15.

51 S 2(a) (iii) and (iv).

CLTB are embodied in section 3, similar to the Tanzanian section 3 in the *VLA*. In terms of this provision, the CLTB recognizes, respects, provides and protects all legitimate land rights and holders thereof. Hence, it is the responsibility of each community to choose institutions that will administer land on their behalf.

#### 4.2.2.2 Kenya

The Kenyan *Constitution* categorizes Kenyan land into three classes namely, public, community and private land.<sup>52</sup> It also has a whole chapter dealing with land and the environment.<sup>53</sup> The vital and fundamental principle guiding this chapter is that land must be held, used and managed in an equitable, efficient and sustainable manner.<sup>54</sup> This chapter also accentuates the need for community members to have secure tenure in the land they hold. Kimeri-Mbote<sup>55</sup> is of the opinion that this protection will catalyse the framing of normative and institutional structures for handling community rights to land. Likewise, section 61 of same vests *all* land in Kenya in the citizens of Kenya

---

52 The Constitution of 2010 came about in a period when the people of Kenya wanted nothing to do with the President because he had used the state funds for his personal gain. (Off the record discussion with Kimeri-Mbote August 2016).

53 Kibagendi *The Problem of Land Rights Administration* 81. Kibagendi believes that this amalgamation is absurd (as it stems from the National Land Policy) because it undermines the land issue. According to him, land requires a separate treatment due to its complex nature. In his own words, he poses the question of "how can environmental issues be handled by the Ministry of Lands?"

54 Kimeri-Mbote *et al. Ours by Right* 106. Kimeri-Mbote believes that the constitutional recognition of the communal tenure may turn out to be inconsequential since the community land is currently being parceled out as individually held land which is disguised as a defense by community members against future land grabs. She caveats further that if the authorities (law makers) are not careful there will be no land to protect when they finally do come up with community land legislation. The proposed moratorium on dealings with community land to make way for legislation thereof has not been affected and registration of individual titles over community land continues unabated. Kimeri-Mbote and Akech "Ownership and regulation of land right in Kenya" 8-10; Odote *Legal and Policy* 2.

55 Kimeri-Mbote *et al. Ours by Right* 103.

collectively as a nation. More specifically, section 63 vests community land<sup>56</sup> in communities based on similar ethnicity and culture. County Governments act as trustees to ensure that unregistered community land is administered on behalf of community members.<sup>57</sup>

August 2016 saw the birth of the *CLA* in Kenya. As in South Africa's CLTB and Tanzania's *VLA*, section 4 thereof vests all community in the communities of Kenya. The *CLA* recognises three land tenure types as valid namely; customary, freehold and leasehold.<sup>58</sup> All citizens of Kenya are therefore entitled to acquire and own property, whether individually or in association with others.<sup>59</sup> Similar to the Tanzanian *VLA*, the *CLA* deemed it necessary to explicitly mention that customary land rights will be adjudicated and recognized in the same manner as their freehold and leasehold counterparts, that is, in terms of law, all rights are equal.<sup>60</sup> It is also vital to note that customary land rights, like leasehold and freehold, protect holders thereof

---

56 S 1 defines community land as "...land held by groups in terms of the *Land (Group Representatives) Act*, land held in trust by county Governments on behalf of and land that is lawfully transferred to communities etc. The *Representatives Act*, defines a group as a "tribe, clan, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner".

57 The trusteeship relationship is governed by the *Trust Land Act* which provides for the management of trust land. The procedure protects the rights of residents from expropriation of trust land without compensation. Chapter 288 of the Laws of Kenya; Kamari-Mbote *et al. Ours by Right* 108. The Kenyan Land Laws Amendment 2016, s 98 thereof, authorizes the County executive committee member responsible for land matters is under an obligation to evict anyone or any community which occupies unregistered community land. The eviction has to be publicized in writing, within three months, in a gazette or national newspaper to notify all the parties concerned.

58 S 4(3) (a)-(c).

59 S 40 of the *Constitution* and s 5 of the *CLA*.

60 S 5(3) and 14(1) of the *CLA* and 18(1) of the *VLA*.

from arbitrary deprivation of property.<sup>61</sup> It suffices therefore, to indicate that community land rights are secure in Kenya, even if only on paper.<sup>62</sup>

#### 4.2.2.3 Tanzania

Section 9 of the Tanzanian *Constitution* provides that the state authority and its agencies are under an obligation to direct their policies and programmes towards ensuring that the land laws are enforced and upheld. Likewise, sections 145 and 146 establish local government authorities in all the regions, districts and villages which are mandated to transfer authority to the people. The basic unit of governance at village level is the village assembly. The *VLA* vests all land in the village assembly and administered by the village council.<sup>63</sup> Village land accordingly refers to all land that is not reserved or general land and land not governed by the *Land Act*.<sup>64</sup> Village land also comprises of land falling under the jurisdiction and management of a registered village.<sup>65</sup> This land category is not subject to allocation by the village council since it is already occupied. It also includes other lands, which can be the subject of a grant of customary right of occupancy by the village council to a villager who is a citizen. The category of communal land consists of land, which is occupied and used or available for occupation and use on a

---

61 S 5(4) provides that no interest or rights in community land may be compulsorily acquired by the state except in terms of law, for a public purpose and upon prompt payment of compensation; s 40(3) of the *Constitution*.

62 Based on the definition of tenure security above, there is an established right of use or ownership and third parties are prevented from disturbing the enjoyment thereof.

63 S 8(1). The village council must exercise the management mandate in accordance with the principles applicable to a trustee managing property on behalf of a beneficiary as if it were a trustee for the village land (trust) and the villagers as beneficiaries.

64 S 7(1) has a comprehensive list that shows what village land entails. Village land is also said to be the greater portion of all three tenure types in Tanzania. Tanzania consists of a vast countryside with a few urban areas, thus the bulky part of land in the country is village land.

65 Ss 1 and 2 *VLA*. Furthermore, village land is land, which is being occupied or used by an individual or family or group of persons under customary law within any village boundary. This category includes land already being held under a right of occupancy.

community and public basis by the village. It follows therefore that this land is not available for grants of customary rights of occupancy or derivative rights to investors. The vacant land category is land which may be available for communal or individual occupation and use through allocation by the village council by way of customary right of occupancy or derivative rights such as leases, licenses and other derivative rights.<sup>66</sup>

#### *4.2.3 Procedure for registration of a community*

Lugoe<sup>67</sup> is of the opinion that registerable customary tenure can be correctly branded as the cornerstone of land tenure systems in many southern African countries, that has a central role to play in poverty reduction in agrarian economies. Hence, registration of a community as owner of land vests in that community, the proprietorship of the land together with all rights and privileges belonging.<sup>68</sup>

##### *4.2.3.1 Kenya*

The Kenyan *CLA* prescribes the procedure for community members to apply for recognition of community land.<sup>69</sup> The Cabinet secretary (hereinafter the CS) must develop and publish in the Gazette and adjudication programme to allow registration of community land. The CS must always do so after consulting with the responsible county governments. Another responsibility of the CS is to ensure that the process of mapping, documenting and developing the inventory of community land is transparent and cost effective.<sup>70</sup> Before community land can be demarcated and surveyed, the CS has to publish a

---

66 Lugoe "Government Regulated Land" 4-6; Maoulidi 2004 <https://www.hakiardhi.org>.

67 Lugoe "Government Regulated Land" 4-7; Maoulidi 2004 <https://www.hakiardhi.org>. A comprehensive discussion of the registration processes follows in chapter 5.

68 S 16(1) *CLA*.

69 S 8 (1). A comprehensive study of the registration procedure follows in chapter five s5.2.3.

70 She/he must also ensure that in the survey of the land in question, does not include parcels already in use for public purpose, private land etc.

notice to that effect the in the gazette.<sup>71</sup> A cadastral map of the surveyed land has to be furnished to the Registrar for registration. As in South Africa and Tanzania, the *CLA* makes provision of a separate register for community land, while also maintaining that community land is in all ways on an equal stance with the other tenure systems. The Registrar will then issue the community with a certificate of title which constitutes *prima facie* evidence that the community is the true owner of the land in question.<sup>72</sup>

#### 4.2.3.2 South Africa

Equally, the CLTB enshrines what the responsibilities of the Minister are. This is similar to section 8 of *CLARA*. What is evident *prima facie*, is the diminished size of the provision, *albeit* the content being the same. In terms of section 5 thereof, upon being satisfied that the requirements of the CLTB have been met,<sup>73</sup> the Minister responsible must determine the location and extent of land.<sup>74</sup> This land is the object of land rights which must be converted into ownership in cases where the community already owns or occupies it.<sup>75</sup> Instead, if the state owns the land in question, ownership or use rights therein will be transferred to the community.<sup>76</sup> To enable him to make this determination, the Minister has to institute a land rights enquiry to avoid

---

71 S 8(4) *CLA* prescribes that the notice must contain; the name of the community, the subject matter (land), invite interested person with claims on the land for lodgment of claims, the specific area of land chosen to be a community land registration unit.

72 S 18(1). The certificate cannot be challenged unless in the case of fraud of misrepresentation or illegal acquisition through corruption. The certificate must also bear a seal of the register and have appended to it the signature of the Registrar. See also s 18(2). S 11 also states that community land should be registered in terms Of the *CLA* and the *Land Act* 2012.

73 Some of the considerations that the Minister has to make must have regard to all the relevant laws (land surveys, deeds registries, spatial planning and land use legislation), affected land right holders, sustainability in the regulation and support in land administration etc.

74 The land must also be surveyed in terms of the *Land Survey Act* 8 of 1997.

75 S 5(a).

76 S5 (b) and (c). Also, s 17 requires that a general plan of communal land be drawn and should outline parts of communal land designated for various land uses.



future conflicts.<sup>77</sup> This probe must also look into the interests of the state and the options available for guaranteeing legally secure rights amongst other things.<sup>78</sup>

In the same light, section 12 of the CLTB provides for registration of communal land in the name of the community. Of importance in this regard, is the provision that the Minister is responsible for all the payments of transfer, survey and registration costs of communal land. This is a commendable modification since the payment of these costs was a very belligerent issue under *CLARA*.<sup>79</sup> Thus, in order for the registration to be effected, the community must meet all the requirements enlisted under section 13.<sup>80</sup> These conditions of registration must in turn be registered in terms of the *Deeds Registration Act*,<sup>81</sup> section 63 thereof.

#### 4.2.3.3 Tanzania

In Tanzania, for a village to secure its land, it first has to acquire a certificate of village land after submitting a prescribed application form to the village council.<sup>82</sup> The certification process includes an obligatory agreement upon the perimeter borders among neighbouring villages. After a consensus is reached

---

77 S 20(1) and 2(a). A notice of enquiry has to be published in the national, regional and local media in respect of the community land in question. S 23(a) and (b).

78 S 20(2) (h) also makes provision for an enquiry into the existing administration of communal land. In this light, the Minister may probe an enquiry into any other matters incidental to the determination. Furthermore, it thus becomes evident what the functions of the land rights enquirer are, based on what the enquiry entails itself. S 22(a)-(f).

79 See a detailed analysis of the arguments levelled against *CLARA* in terms of the registration costs in chapter 3.

80 The conditions include; communal land or a subdivided cannot be sold, mortgaged, donated, leased or disposed of in any manner without the written approval of 60% of the households within the community. Any other transactions incidental to communal land must also be registered in terms of the *Deeds Registration Act*. See s 5.5.2 in chapter five.

81 37 of 1947.

82 S 7 VLA.

and the border is properly demarcated, a formal certificate of village land is issued in the name of the president and registered in the National Register of Village Land.<sup>83</sup> In terms of section 48 of the *VLA*, where boundaries in land are fully accepted and agreed to, there shall be no grant of customary occupancy until the land has been adjudicated.<sup>84</sup> Once the demarcation and mapping have been done, the village council is required to start the administrative process of applying for a certificate of occupancy. It is from this certificate that the village council derives its authority while also binding such council to respect the position of “trust” they hold.<sup>85</sup>

- In terms of the *VLA*, the application for registration must be in writing.
- The application must be submitted to the village council within whose community area the land in question is situated. In reviewing the application, the village council must investigate and consult persons in connection with such application and investigate whether the land is available.<sup>86</sup> If the council grants the application, it issues the applicant with a letter of offer which

---

83 S 7(7) *VLA*. Processes for titling, granting and registration of family and communal land within villages are established and village councils are given the power and authority to administer and manage village land in terms of customary rules. Furthermore, village councils are supposed to demarcate which land in the village should be held communally. Pastoralists should always be considered when these decisions are made.

84 S 7 *VLA*; Kironde *Improving Land Sector Governance in Africa* 9. There are just over 165,000 land parcels registered nationwide and most of these are in urban areas. As a result 90% of Tanzanians cannot be located through a property registration system. The majority therefore lack formal security. Only 2% of rural land is held under statutory tenure.

85 S 8 (1) and (2) *VLA*. Kameri-Mbote is appalled by the wording of the provision which states that the village council should “act as if” they were trustees of the land instead of establishing an outright trustee and beneficiary relationship; Bennett and Powell 2000 *SAJHR* 619.

86 S 23 *VLA*. In the event that any members or the traditional authorities object to the application, the LAC must conduct hearings between the opposing parties as well as the applicants and arrive at a decision whether to reject or grant the application.

will stipulate all the conditions of acceptance.<sup>87</sup> After payment of the necessary fees, the village council has to issue a certificate of occupancy to the applicant.<sup>88</sup>

#### 4.2.4 *Community rules*

##### 4.2.4.1 South Africa

Rules between property holders are very essential components to ensure not only good neighbourliness but also great organization. As Pienaar<sup>89</sup> expounds, societies function better when there are clear cut rules that they agree to be bound by. In the same vein, those that do not follow such rules should know the consequences that follow. Regarding the community rules in South Africa, section 25 of the CLTB provides that a deed of communal land is evidence of the juristic nature of a community.<sup>90</sup> Once issued with the deed, the community is enjoined to make and adopt its rules which must at the very least be endorsed by 60 per cent of the community households.<sup>91</sup> The rules must in terms of section 26(3), regulate the general management

---

87 The conditions can include, the development conditions, yearly rent and any fees, which the village council may stipulate

88 S 24 *VL4*. In the event that the application is a first time grant of a certificate of customary right of occupancy the Village Council is under no obligation to seek approval from the village assembly. Generally, there are two alternatives; if the person applying to register a customary right of occupancy applies to the Village Council for "spot-adjudication" on a prescribed form in terms of s 49, upon the satisfaction of the village council that it will be unnecessary to first adjudicate it may approve the application. In the event that the process of adjudication is deemed necessary, it needs to submit its decision to the Village Assembly for approval; S 49 and 50.

89 Pienaar 2009 *PELJ* 22; Mostert and Pienaar "Formalisation" in Cooke (ed) *Modern Studies* 315.

90 S 25 CLTB.

91 S 26(1) and (2) CLTB. In order to be adopted, the community rules have to conform to the principles of equality, accountability and transparency, democratic processes in the governance and conduct of community meetings etc.

and administration, allocation and *nature of the rights to subdivided portions* and keeping of the register, amongst others.<sup>92</sup>

After making and adopting community rules, the community has to make an application for registration to the DG who in turn has to ensure that they conform to the standard set in section 26. Over and above this, the application will only be granted if the rules conform to the principles of natural justice and the South African *Constitution*. Once registered, the community would then have to govern and administer tenure relations as per the community rules.<sup>93</sup> The rules would thus be binding on the members of the community.<sup>94</sup>

#### 4.2.4.2 Tanzania

Likewise, in Tanzania, after the land is identified or demarcated and community rules are approved, the village assembly is authorized to record the said land in a register of communal land and evidenced by a certificate.<sup>95</sup> The village council must maintain the register in accordance with the prescribed rules.<sup>96</sup> The certificate is meant to upgrade and secure customary tenure. The community rules may contain any rule that is established by usage and accepted as having the force of law by the community. Rules and

---

92 S 26(3) (e) CLTB.

93 In the event that the rules do not conform to the standard set in CLTB, the DG has to notify the community of the steps to take to rectify them. On the other hand, if the community fails to make and adopt community rules and have them registered, shall be inferred to have adopted the standard rules and will apply and become binding to such a community.

94 S27 (4) CLTB.

95 S 13. Maoulidi 2004 <https://www.hakiardhi.org>; Kironde (*Improving Land Sector Governance in Africa* 9) where he asserts that in Tanzania there has been no surveying or registration of communal land areas such as those for pastoralists and hunters and gatherers although plans to do so have been expressed now and again. Pastoralists have continued to traverse the whole country or continue to have their land encroached upon, both processes leading to regular conflicts.

96 S 21(1).

law about land have to be laid out in such a way that every citizen may easily understand them.<sup>97</sup>

#### 4.2.4.3 Kenya

From the perusal of the *CLA*, the rural communities in Kenya have an option whether to adopt community rules or not. The law makes it optional that a registered community *may* make rules or by-laws for regulating the management and administration of their land. The rules or by-laws *may* provide for:<sup>98</sup>

- (a) the regulation of investments on the land;
- (b) the determination of terms of any leases granted for purposes of investment;
- (c) the conservation and rehabilitation of the land;
- (d) land use and physical planning; and
- (e) any other relevant matter.

Consequently, the use of the word “may” would imply that the community rules are not a prerequisite in the establishment and registration of a community. This could also mean that the “standard rules” will be invoked. The obscurity in the wording of the *CLA* leaves room for commotion since when there are no clear rules that have to be followed, community members are likely to be involved in wrongdoing in the name of custom. When rules are definite and have been agreed upon by all community members, it becomes easier to hold them accountable for their transgressions since by virtue of being a member of a registered community, one agrees to be bound. The choice whether to adopt community rules or not, potentially breeds preventable conflict.

---

97 S 3(1) (m) *VLA*.

98 S 37 *CLA*.

A feature similar to the South African and the Kenyan communal legislation is that they allow for each community to freely determine their rules and practices, provided that such do not contradict with any other laws or contravene the rights of others.<sup>99</sup> In the same manner, this provision has been said to be very antagonistic and impractical since in most rural communities where customary law is applied, these rules could leave the vulnerable and minority groups worse off. Experience and research show that most rural communities are patriarchal. Thus, leaving the responsibility of drafting and adopting community rules to the leaders of the community who are usually men, defeats the whole purpose of securing tenure for all since women have little or no say in the process. Another argument that has been levelled against the registration of community rules is that it leaves no room for flexibility as the arguments against codification of customary law suggest.

#### 4.2.5 *Nature of the communal land rights*

Communal ownership is a different concept to westernised Roman-Dutch or English common law ownership. Nonetheless this is the language used by all three legislations, the CLTB, *VLA* as well as the *CLA*. The rights conferred by these statutes are for all intents and purposes communal.

Generally, the holders of communal land use rights have the following rights:<sup>100</sup>

- right to protect the land;
- right to use the land;
- right of usufruct; and

---

99 S 20 of the *VLA* provides for the customary law (rules) to be applied to land held under customary tenure, this in turn must have regard to the customs, traditions and the practices of the community concerned, to the extent that they conform with the principles of the national land policy and any other written law.

100 Rock *et al. Systematic Land Registration* 21.

- right of inheritance.<sup>101</sup>

Subject to these rights the land or right holders cannot alienate the land without the approval of the majority of the community.

#### 4.2.5.1 Kenya

Section 16 (a) of the *CLA* deals with the nature of a community land title and states that the rights of a registered community are “ownership rights,” thus, all rights and privileges of ownership attach.<sup>102</sup> Land is “owned” by a community since the state has formally recognised the rights of the communities, thus, securing their tenure in land.

In going back to the analysis made at the beginning of the chapter, the communities have tenure that is unlimited in duration, they have the legal right to exclude outsiders and ability to reap the benefits. These rights are not liable to being defeated except as provided in the *CLA* or any other legislative pronouncements.<sup>103</sup> In the event that there are any encumbrances on the land, they should be clearly reflected in the register.<sup>104</sup>

Section 14 of the *CLA*, akin to section 18(1) of the *VLA*, provides that a customary right of occupancy in community land is equal in status and effect to a right granted in any other category of land in Kenya. Subsection 5 thereof provides that upon approval by the registered community, it shall issue a certificate of customary right of use and occupancy in the prescribed

---

101 Maoulidi 2004 <https://www.hakiardhi.org>.

102 The rights of an owner include; the right to be in possession, control, to determine use, to receive benefits from its use as well as the right to dispose of the object of ownership; Anon. 2015 <https://www.rightsandresources.org>; Roth and Haase 1998 *BASIS* 1; Ubink 2007 *JAL* 220.

103 S 17(1) *CLA*.

104 S 17(1) (a) *CLA*; Onyango 2014 *Sociology and Anthropology* 304.

form, as evidence that the community is the proprietor of the community land.

#### 4.2.5.2 Tanzania

The *VLA* and the *Land Act* were initially drafted as one land law but due to its bulkiness, it was split up. While the two have a close relation, at time the *Land Act* had to be consulted to clearly appreciate some subjects of the village land.<sup>105</sup> The *VLA* was created to set up a communal tenure system and to manage land tenure in rural areas.<sup>106</sup> Section 3 of the *VLA* is pivotal because it contains the principles of the Tanzanian Land Policy.<sup>107</sup> It further re-established a system of village based land tenure through recognition of customary rights and creation of the means through which to formalize these rights by issuance of certificates of customary occupancy.<sup>108</sup> The only form of land rights that may be registered and titled in Tanzania is called a right of occupancy. The right of occupancy assigned on general land is known as a granted right of occupancy,<sup>109</sup> while that granted on village land, is termed a customary right of occupancy.<sup>110</sup>

---

105 Issues such as land ownership between husband and wife and mortgages are in the Land Act despite the land in issue being village land. Shivji "Questions on the *VLA* and *LA*"; Kironde *Improving Land Sector Governance in Africa* 8; Maoulidi 2004 <https://www.hakiardhi.org>.

106 This includes a system through which every villager may get his/her land right formally recorded as existing. A certificate of ownership may be issued once the right is formally registered (a title deed).

107 Preamble and s 4(3). The leading goals of the *VLA* in terms of s 1:

- to ensure that existing customary land rights are legally secured;
- to ensure efficient and effective village land administration;
- to enable villagers to participate in land administration; and
- to ensure gender balance in land administration and ownership

108 In Tanzania, there are three main registers of land rights in the country: the Village Land Registry, the Local Land Registry and the Registry of Titles.

109 S 2 *VLA*; Shivji "Questions on the *VLA* and *LA*".

110 Shivji "Questions on the *VLA* and *LA*" 8-13; Sundet 2006 <https://www.landportal.info>.



Moreover, section 12 (a) of the *VLA* makes provision for communal village land and recognises it as one of the three categories of village land. Rights in village land are registerable and evidenced by certificates of title.<sup>111</sup> It is important to note that in Tanzania, customary tenure does not apply to village land only; instead, it applies to general land, reserved land as well as urban and peri-urban areas.<sup>112</sup>

The definition of a customary right of occupancy in the *VLA* is very vague and does not offer much insight as to the exact nature of the right.<sup>113</sup> According to section 1 thereof, a customary right of occupancy means right of occupancy created by means of the issuing of a certificate of customary right of occupancy, it also includes a deemed right of occupancy. Thus, a right of customary occupancy is two pronged namely, deemed right of occupancy<sup>114</sup> and allocated right of occupancy (evidenced by a certificate).

Despite the overemphasis by the *VLA* to equate the granted right of occupancy and the deemed right of occupancy, over the years, evidence has shown that granted rights of occupancy are given preference in Tanzania.<sup>115</sup>

---

111 Shivji (Shivji "Questions on the *VLA* and *LA*" 1-13) points out that before the land Acts were enacted, upon registration of village land rights, their nature as customary rights changed. Thus with the legislation in place the rights can be registered "as is" without its nature changing [s. 18 and 20].

112 Fimbo *Land Law Reforms in Tanzania* 49; National Land Policy 1995; Lugoe "Government Regulated Land" 12-13.

113 The South African and Kenyan legislation transfer ownership rights from the state to the communities upon their registration. In contrast, s 3(b) of the *VLA* provides that all land vests in the President of Tanzania and is held in trust for all citizens of Tanzania. S 18 does not shed any light as to what a customary right of occupancy entails. Thus it can be inferred that the nature of a customary right of occupancy is a right protected by legislation.

114 A "deemed right of occupancy" is the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent *using or occupying land under and in accordance with customary law*.

115 An apparent example is in areas earmarked for mining, sadly, pre-existing rights and enjoyments are ignored and more often than not, the compensation offered does not match up to them. Similarly, the *Land Act* in s 34 (3) makes room for customary

Section 14 of the *VLA* sets apart land that is capable of being held under a customary right of occupancy.<sup>116</sup> Tenga and Mramba<sup>117</sup> expound that the customary right of occupancy is one of the oldest land occupation rights in Tanzania since it dates back to the pre-colonial era.<sup>118</sup> A certificate of customary right of occupancy (hereinafter the CCRO) was previously issued to individuals in Tanzania. In 2011 when the *Ujamaa Community Resources Team* was doing some pilot work, they discovered that despite the opportunity of a certificate still being available in law, CCRO's had not been issued to groups of people to formalise their rights to communally held and managed land.<sup>119</sup>

A CCRO renders the holder(s) with rights:

- capable of being of indefinite duration;
- subject to any conditions which are set out in section 29 of the *VLA* or any other conditions which the village council determines;<sup>120</sup>

---

rights of occupancy to be quashed in favour of granted rights of occupancy. Tenga and Mramba *Theoretical Foundations* 140; Lange *Land Tenure and Mining* 8.

116 There is a general misconception that a customary right of occupancy is synonymous with a "deemed" right of occupancy amongst Tanzanian authors. S 18(1) of the *VLA* provides that a right of occupancy is in every respect of equal status and effect to a granted right of occupancy and shall, subject to the provisions of the Village Land Act be capable of allocation by a village council to all citizens of Tanzania and other eligible groups. Nonetheless, s 2 thereof provides that a customary right of occupancy also extends or includes a deemed right of occupancy. Thus, in effect, the latter group of rights forms a part of the larger group of customary rights of occupancy. Similarly, deemed rights are more informal than the customary rights of occupancy allocated by the village council. A clearer differentiation of the two manifests where anyone in possession of a deemed right of occupancy can be register their land and have such registration evidenced by a certificate of customary occupancy. Shivji "The Land Acts".

117 Tenga and Mrenga *Theoretical Framework* 138; Lange *Land Tenure and Mining* 5; Tenga and Mramba *Manual on Land Law* 114; Wily "Customary Tenure" in Graziadei and Smith (eds) *Comparative Property Law* 458.

118 Tenga and Mramba *Theoretical Foundations* 139; Lange *Land Tenure and Mining* 5. Onyango 2014 *Sociology and Anthropology* 307.

119 Ujamaa Community Resource Team 2014 <https://www.ujamaa-crt.org>.

120 Each certificate of land ownership is usually issued with conditions, violation of which can lead to the certificate being dissolved revoked by the relevant authorities. For

- capable of being assigned to a citizen or a group of citizens; and
- inheritable and transmissible by will.

On the other hand, a CCRO cannot be traded or sold, because such transactions can only occur if an entire group agrees with it. In turn, the communal nature of the CCRO inhibits the subdivision. This generates an additional layer of secure tenure in land security to what can be provided through certificates of village lands or land use plans.<sup>121</sup>

#### 4.2.5.3 South Africa

The nature of communal land rights in South Africa is discussed comprehensively in section 2.1.1 of chapter 2.<sup>122</sup>

#### 4.2.6 *Administration and management of communal land*

Bruce<sup>123</sup> expounds that control of land and feasible local government are intertwined in rural Africa. Thus, local governance that does not control land is almost inconsequential since the concerns of rural people are focused on land.<sup>124</sup> Likewise, according to the UN Land Administration Guidelines,<sup>125</sup> land administration refers to the processes of recording and disseminating information about the ownership, value and use of land and its associated resources. As a consequence, the goal of any land rights administration process is to support the implementation of a land policy using the aspects of

---

example, land issued as communal "grazing" land cannot be used for agricultural purposes without seeking approval from relevant authorities of a new or amended CCRO.

121 Ujamaa community Resource Team 2014 <https://www.ujamaa-crt.org>; Tenga and Mramba *Manual on Land Law* 124; Maoulidi 2004 <https://www.hakiardhi.org>; Onyango 2014 *Sociology and Anthropology* 307.

122 S 2.1.1 chapter 2.

123 Bruce *A Review of Tenure Terminology* 4-5; Lugoe "Government Regulated Land" 12-13.

124 Bruce *A Review of Tenure Terminology* 4-5.

125 Preamble to the United Nations Land Administration Guidelines 1(996).

land management.<sup>126</sup> Kibagendi<sup>127</sup> believes that most states' land rights administration is dwindling as is evidenced by innumerable practices such as corrupt state officials, inadequate record keeping and competing claims between players in the land sector.<sup>128</sup>

#### 4.2.6.1 South Africa

Within the *CLARA* traditional councils were to be recognized as land administration committees and the rights holders having no effective choice on the matter became a subject of controversy for a long time in South Africa. This move was seen as undermining fundamental democratic rights of rural communities.<sup>129</sup> It, thus, suffices to indicate that chapter 8 of the CLTB enshrines the "cream of the crop". In terms of section 28, a community that holds a deed of communal land has an option to choose as its land administration authority, a traditional council, a communal property association or any other entity<sup>130</sup> provided it is approved by the Minister.<sup>131</sup> In the event that a community chooses a communal property association, the association must be registered, hence, land administration shall unmistakably

---

126 In light of this goal, the National Land Policy (2009) had aimed to address the land administration and management problems through streamlining and strengthening surveying and mapping systems, land registration and allocation systems and land markets. Kibagendi *The Problem of Land Administration* 31.

127 Kibagendi *The Problem of Land Rights Administration* 13; Okoth-Ogendo "The Legal Basis for Land Administration" 28-30.

128 The Presidential Commission of Inquiry into Illegal and Irregular Allocation of Public Land (Ndung'u Commission of 2003-2004) took these unruliness into consideration and noted the inefficiency of the land administration systems and how they have complicated the management of land. Through this policy, the Tanzanian Government intends to remedy and improve the quality of land administration through electronic record keeping at all levels of Government.

129 Claasens and Cousin (eds) *Land, Power and Custom* 48.

130 "Any other entity" could prove troublesome and is open to many interpretations.

131 S 28(1) (a)-(c). Like in South Africa under *CLARA*, Tanzania's *VLA* was rooted in and built upon a pre-existing system of village administration institutions tasked with the administration and management of village land. There is therefore a fundamental difference in the CLTB since villagers now have an option of either choosing the pre-existing traditional council or creating a CPA.

be governed by the *Communal Property Associations Act*<sup>132</sup> (hereinafter the *CPA Act*). Nonetheless, if there are inconsistencies between the *CPA Act* and the CLTB the latter shall take precedence.<sup>133</sup> This might be a great initiative to get the CPA's functioning successfully; since the enactment of the *CPA Act*, its implementation has not been efficacious.<sup>134</sup> If a traditional council is chosen by the community, on the other hand, it has to be constituted in the manner prescribed by the *TLFGA*. It follows as a result that, the responsibilities and loyalties of either land administration authority will be in terms of its founding legislation as well as the CLTB.<sup>135</sup> The choice between these institutions will perhaps lessen the disputes between them in terms of land transfers and administration.<sup>136</sup>

Another new creation in the CLTB is the Households Forum. The CLTB defines it very vaguely by referring to it as "a household forum established in terms of section 32 of the CLTB". In the same light, a household is described as a person, or a group of persons who live together as a family unit through common land occupation or part of it and provide themselves jointly with food and other essentials for living. The membership of the forum ranges from 20 to 30 elected members of the community.<sup>137</sup> Of this number, two of these people must be elected by the traditional council,<sup>138</sup> the other two must

---

132 28 of 1996.

133 S 28 (3).

134 See discussion on failed CPA's in chapter 3. Cousins 2001 *Land & Rural Digest* 24.

135 See chapter 3.

136 Despite the efforts made by the CPA Amendment Bill to remove the potential of "duality" where Traditional Authorities and CPAs co-exist in the same area, conflict is still prone since the traditional authorities will not readily succumb and transfer land administration powers to the CPA's. Nonetheless, the Amendment Bill is meant promote clear roles and responsibilities that will ultimately enhance the impact of development initiatives in this area and ensure the attainment of the overall objective of agrarian transformation.

137 S 33(1).

138 S 33 (3).

be elected as the chairperson and the deputy chairperson.<sup>139</sup> Like many leadership institutions, the forum's term of office is five years which may be renewed. Over and above the land administration functions performed by an institution of choice (traditional community, communal property association or any other institution of choice), the household forums are general overseers in managing and administering communal land.<sup>140</sup> Finally, these forums must report back to the communities annually and may instigate an enquiry into the affairs of the CPA or the traditional authority for mismanagement and maladministration.<sup>141</sup>

On the other hand, the CLTB authorizes the Minister to select a land rights board which is charged with the object of advising, assisting and monitoring institutions that are responsible for administering and managing communal land. This is to ensure that the CLTB is implemented in the manner intended. With the CPA's, the household forums and the land rights board, could there be a likelihood of overlapping in the performance of their duties?

#### 4.2.6.2 Tanzania

The *VLA* explicitly emphasizes that the most important aspects of land administration in Tanzania have been decentralized to the village level.<sup>142</sup> In so doing, guarantees were put in place to ensure that the community's land

---

139 S 33(2).

140 S 35(1) (a). Other functions of the Forum include, receiving quarterly reports from the communal property associations or traditional councils, s 35(1)(b). to facilitate the land administration functions by providing the institutions (traditional councils and CPA's) with the necessary support, 35(1)(c). Holding such institutions accountable 35(1)(d). As well as any other functions that may be needed in terms of the community rules.

141 S 35(2) (a) and (b). See also s 41(1) which describes maladministration as failure to perform functions and/or corruption.

142 S 7 *VLA*. Prior to the *VLA*, the *Villages and Ujamaa Villages Act* 21 of 1975 gave powers to Village Governments to acquire and plan land within their boundaries.

tenure in land would be safe.<sup>143</sup> Essentially, the *VLA* vests all village land<sup>144</sup> in the villages which in turn confer the land unto the village assembly. The village assembly charges the village councils with the administration thereto. Sundet<sup>145</sup> expounds that the *VLA* is not all clear on the distribution of authority amongst these two institutions. Furthermore, sections 3, 8 and 20 oblige the village councils to be efficient, transparent and participatory in administering the land in line with the leading principle of the customary law.<sup>146</sup> In the event that the village council fails to meet this standard, they stand the risk of being sued by the villagers.<sup>147</sup> The responsibilities of the village councils include reporting to and taking account of the views of the village assembly with regards to the administration and management of village land.<sup>148</sup> It is also the assignment of the village council to brief the Ward Development Committee and District Council that have jurisdiction in the area of the village how the land is being managed. In the administration process of land by the village council, the Commissioner may give advice concerning any matter of administration.

---

143 Shivji "The Land Acts" 9-11.

144 S 7 gives definitions on what village land entails.

145 Shivji "The Land Acts" 7-11.

146 S 8 of the *VLA* further authorizes the village council, in accordance with the *trustee* principles to manage the land in accordance with customary law of the area; protect the environment; protect rights of way; maintain the perimeter boundary of the village area; keep secure the certificate of village land which is given when it is made Land Manager; report alterations in the boundary to the Commissioner for endorsement on the certificate; issue certificates of customary title, and maintain a register of communal land. S 7(7) (b).

147 S 8(12). Finalised in April 2005, the Strategic Plan for the Implementation of the Land Laws (SPILL) was mandated with 'operationalising the land laws'. This implied that it would take on board all that had to be done by the land administration machinery and structure as well as protect customary and granted land rights for land users.

148 S 8(6) *VLA*.

#### 4.2.6.3 Kenya

The Kenyan National Land Policy (hereinafter the KNLP)<sup>149</sup> and the Kenyan *Constitution* have introduced a fundamental shift in management of communal lands in that the former advocated for vivid classification and instigated a definite regulation framework for communal lands. Thus, both the *Constitution* and the KNLP offer vibrant structures for communal land tenure security.<sup>150</sup> In Kenya, the community assembly must consist of adult members of the community, two thirds of which must be involved in the decision-making on behalf of the community.<sup>151</sup>

The *CLA* does not give an indication of how many people constitute the community assembly. For registered community land, the *CLA* prescribes the land to be managed by the community land management committee whose functions include: management of registered community land, coordination and preparation of land use plans which must be ratified by the community assembly as well as the prescription of rules and regulations that govern the operations of the community.<sup>152</sup> On the issue of rights and entitlements, a community may allocate land to members but individual entitlement shall not be superior to the community title.

---

149 Sessional Paper 3 of 2009.

150 S 63 Kenyan *Constitution*; Kanyango "Land Use Planning and Communal Land Tenure Reforms; Onyango 2014 *Sociology and Anthropology* 306.

151 S 15(1) *CLA*.

152 S 15 (4). Other functions include running daily responsibilities of the community, managing and administering registered community land on behalf of the community, promoting cooperation and participation between community members and prescribing rules and regulations to be ratified by the assembly in order to govern the operations of the community.



#### 4.2.7 Conclusion

Common to South Africa, Tanzania and Kenya community land rights derive from indigenous property law, based on customary rules and practices.<sup>153</sup> For this reason it is a juridical content as it is an integrated social system. The central basis of community land is anchored on two foundations. To understand the nature of community property rights, the double issues of power and control are palpable. The key defining features of African land that would equate to community land tenure can be described as follows:<sup>154</sup>

##### (i) Social relationships

Cousins<sup>155</sup> aptly describes this as follows: the embeddedness of community land rights as involving social units, households, kinship networks as well as various levels of community. This usually relates to the multiplicity and overlapping of social identities. It has become clear at this point that community land rights are unique and must be treated as such. According to Kimeri-Mbote,<sup>156</sup> rights to community resources belong to the community. Thus, communal land tenure acknowledges multi-layered rights, i.e. from the clan, political leadership, family and individual level.<sup>157</sup> As such, the tenure security question needs to determine who owns what interest in what land; the probe deserves to be answered in the context of multi-layered rights.

---

153 Kimeri-Mbote *et al. Ours by Right* 24.

154 Kimeri-Mbote *et al. Ours by Right* 24; Okoth Ogeton "Tenants of the Crown" 12-13; Cousins *Contextualising Controversies* 32-33.

155 Cousins 2007 *JAC* 293.

156 Kimeri-Mbote *et al. Ours by Right* 41.

157 Kimeri-Mbote asserts that determining who is a member of the community in some parts of rural Kenya is not as clear cut as it seems. She expounds that some non-members in the Samburu region are allowed to hold and access pastures for their livestock despite the fact that they are not members of that community. Also, there is non-uniformity in the registration procedure for some communities in Kenya. The *Land (Group) Representatives Act* prescribed that community land be registered in the name of a group or a group of representatives who hold the land in trust for the community. In some communities, the land is registered in the name of a family head and others in the names of all family members.

According to section 14(1)(a) of the *CLA*, a customary right of occupancy is capable of being allocated by the community to individuals, family, a group of persons, clan, an association, partnership and body corporate wholly owned by the citizens of Kenya. Equally, section 30(1) provides that every member of the community has the right to equal benefit from community land. Thus, any member of the community who possesses a certificate of customary right of occupancy possesses this right.

Nevertheless, section 63 (4) of the *Constitution* of Kenya prohibits the disposal of community land or any other use thereof unless such use or disposal is in terms of legislation specifying the "...nature and extent of the rights of members of each community individually and collectively". Equally, the CLTB confers on the communities the right of ownership after all the prerequisites have been met. Section 18(1) therefore states that a community in whose name the communal land is registered is the rightful and legal holder of such communal land.<sup>158</sup>

(ii) Inclusivity

CLTB provides for communal land that is designated for crop fields, grazing land, water ways, wood lands, conservation, recreational and any other purpose for the entire community.<sup>159</sup> The *VLA* equally provides for communal land that has been used or occupied as a matter of practice under customary law by community members, or land regarded by villagers as available for use as community or public land is deemed to be communal land.<sup>160</sup> More directly, section 28 of the *CLA* provides that the customs and practices of pastoral communities relating to land have to be taken into account by a

---

158 The South African position under the CLTB has been discussed in previous chapters.

159 Chapter 4, s 17(1) (b).

160 S 13(7) *VLA*.

registered community provided that these are consistent with any written laws.<sup>161</sup> This designated land is available for use by members of the community for the grazing of their livestock, subject to some conditions.<sup>162</sup>

(iii) Membership of a social unit

In terms of the *VLA*, a person or a family or group of persons may apply to the village council of that village for a customary right of occupancy.<sup>163</sup> Additionally, the recurrent use of the words membership of a community or members of the family (community) in all three pieces of legislation is proof of the "social unity". This can also be seen in the definitions "community" in the legislation.

In terms of the *CLA*, a "community" means

...a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes; common ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical space; ecological space or ethnicity.<sup>164</sup>

In turn, the CLTB echoes the same principles above and states that a community is

...a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group regardless of its ethnic, tribal, religious or racial identity and includes a traditional community.<sup>165</sup>

---

161 S 30 (6) Subject to Article 159 of the Constitution, the culture of each community shall be recognized in accordance with Article 11(1) of the Constitution in the exercise of community land rights.

162 S 28 (2) (a) states that the community may impose any conditions incidental to the usage of land. For example, the kind and number of livestock allowed on the grazing land.

163 S 22(1).

164 S 2 *CLA*.

165 S 1 CLTB.

While a community member is a person who resides in a community and is accepted as such by other “community members”.

(iv) Access

Similar to (iii) above, access to community land is attained by virtue of being a member of that community. Hence, it has been shown that the rights available to members of registered communities are the rights of ownership.

(v) Control

Dispute resolution is dealt with in section 4.5 of this chapter.

In the next section the marginalisation faced by women in land matters is focused upon. Despite being the tillers of the land, they have little or no access to land. This side-lining has been attributed to numerous reasons which are subsequently uncovered through different theories and principles.

### **4.3 Women's access to communal land**

#### **4.3.1 Introduction**

Land access and control statistics reveal that women have access to far less land than men throughout Africa.<sup>166</sup> In Kenya for instance, women had only 19 percent of the 89,799 land titles issued to individuals between 2005 and 2013.<sup>167</sup> The reason for this has been attributed to the indigenous culture<sup>168</sup> which promotes communal as opposed to individual control of land. The communal land tenure system, in turn, highlights men's access to land at the expense of their female counterparts.

In contesting this notion, it has been asserted that because access and control<sup>169</sup> of communal land is vested in families, villages, clans and tribes, it is absurd to claim that women are discriminated against; this is because access to land in communal areas is protected for anyone with membership to any of those groups.<sup>170</sup> Then again, it is men who control the resources since they are family heads. In as much as Njoh<sup>171</sup> *et al.* agree with the

---

166 Owoo and Boake-Yiadom 2015 *JID* 917; Odote *Legal Policy and Framework* 34.

167 Njoh *et al.* 2016 *JAAS* 760. Women in Kenya control between 1% and 5% of land although women contribute over half of the country's total agricultural labour force. In Kenya, as in many developing countries, unequal distribution of land and land resources is the major contributor of poverty, which is more prevalent among women than men.

168 Njoh *et al.* 2016 *JAAS* 760; Owoo and Boake-Yiadom 2015 *JID* 917-18; Kimani and Maina 2010 *JECDSW* 260.

169 Control in this instance is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access and resolving disputes over claims to land. Njoh *et al.* 2016 *JAAS* 761.

170 Every woman is a member of some societal group, such as a family, where she may be a family head, a daughter, sister, or wife. Hence, a distinction between the traditionalists of the African tenure systems *vis-a-vis* the modernists approach (statutory laws) hinges on the conditions for access to land. In the indigenous African model, subsumed under customary law, access to land is contingent upon one's membership in a group. Alternatively, in the modernist model, access is conditioned by one's ability to pay. See also Armstrong "Customary Law in Southern Africa".

171 Njoh *et al.* 2016 *JAAS* 761.

reasoning that communal land tenure system discriminates against women's access to land, they<sup>172</sup> believe that isolating the tenure system as the sole impediment to women's access to land is flawed. This is because attributing the roots of an already complicated problem (women's remoteness to land) to a single cause is a reductionist approach. Nevertheless, it is widely acknowledged that the communal tenure system is not without blemish especially when it comes to hindering women's access to land.

It has also become gradually apparent that the struggle for women's rights to land must go further than the household and the village. In most cases the women in the communities suffer at the hands of land grabbers who are usually big companies, bankers and/or foreign governments through the assistance of local elites.<sup>173</sup> Hence, the struggle is no longer just against husbands and chiefs who deny women land in the name of culture and tradition. This dispossession has been dubbed "the new scramble for Africa".<sup>174</sup> In contrast, Yngstrom<sup>175</sup> opines that universal claims that women are dependent on men for access to land have deflected attention away from questions about why women as wives experience tenure insecurity in different historical contexts, and why others do not.<sup>176</sup> Accordingly, there is a

---

172 Njoh *et al.* 2016 *JAAS* 761.

173 The Gupta saga in South Africa is but one of the examples of rich dispossessing the poor. Win 2016 <https://www.awfd.org>; Meer 2013 <https://www.za.boell.org>; Zetterlund *Gender and Land Grabbing* 14; Wisborg 2013 *FE* 24.

174 According to Zetterlund (Zetterlund *Gender and Land Grabbing* 15) land grabbing is a phrase first made up by civil society organizations which were skeptical towards the increasing global trend of land acquisitions by foreign investors from the rural population in the developing world. These were a result of the increased demand for food and biofuels in the North through a desperate need to secure food production for countries with big population but little land.

175 Yngstrom 2002 *ODS* 35.

176 Yngstrom 2002 *ODS* 35. For many women rural women, use and occupation rights derived from customary entitlements are the only means of countering threatened evictions. More often than not, these customary entitlements are usually contradictory to formal legal rights (statutory rights); this despite the Constitution's

fierce debate surrounding the precise source of the problem. In any case, the debate often boils down to one between the modernist and the traditionalist theories.<sup>177</sup>

This section analyses women's access to communal land in terms of the communal land legislation, i.e. the *CLA*, *CLTB* and *VLA* of the three countries, Kenya, South Africa and Tanzania respectively. Thus the focus of this section is to deal with the modernist approach to women's access to land or lack thereof. A brief conceptual background of the genesis of these legislations is made in an effort to trace women's ostracism in this challenging land issue. This is followed by the impact such legislation has had on women.

#### 4.3.2 Conceptual background

##### 4.3.2.1 Kenya

Kameri-Mbote<sup>178</sup> opines that to understand the interface between gender, customary law and tenure, one has to look at gender as a social construct and the role that it plays in pastoral communities. Among farming communities where the basic property is land, women's access to it is determined by men as a matter of patriarchal traditions.<sup>179</sup> According to Karuru and Kabugij (eds),<sup>180</sup> women only access land to the extent that they perceive, more so for women within marriage and other cohabitation

---

recognition of customary law, in turn, customary rights; Claasens and Mnisi-Weeks 2009 *SAJHR* 492.

177 Njoh *et al.* 2016 *JAAS* 762.

178 Kameri-Mbote "The Land has its Owners" 11-12; Kameri-Mbote 2013 <https://www.za.boell.org>

179 Kameri-Mbote "The Land has its Owners" 12-14; Monene 2010 <https://ke.boell.org>.

180 "Property Rights Inheritance and Succession" in Karuru and Kabugij (eds) *Women and Law in East Africa* 24. There is still a widespread practice for fathers to leave land to their sons, in the expectation that daughters would be cared for by their husbands. This practice was upheld by the courts in the *Njeru Kamanga* (Succession Case 93 of 1991 (unreported). Over and above this, the draft Constitution sought to affirm women's equal right to inherit land was rejected in a national referendum. See Cotula *Gender and Law: Women's Rights in Agriculture* 39.

relationships. It only manifests that they do not control any property when such relationships end.<sup>181</sup> It therefore goes without saying that this does not only place women in a precarious position in terms of their survival and livelihoods, but also suppresses their role and involvement in national development.<sup>182</sup> The 2003 World Bank Report<sup>183</sup> noted that "...if women have access to and control over land then family livelihood patterns improve". Numerous studies<sup>184</sup> have exposed that most women-headed households have better management policies in terms of farming practices, marketing of produce and use of the income. Nonetheless, the interplay of customary, codified and colonial laws in communal areas has been detrimental to women insofar as land access is concerned.<sup>185</sup>

Moreover, in 2011 the International Land Coalition (ILC) of Kenya,<sup>186</sup> engaged in a study on the "Commercial Pressures on Land Initiative" to support the efforts of patrons to influence global, regional and national processes on land. This was embarked on to facilitate secure and equitable access to land for poor women and men in the face of the increasing commercial demand for land. It was expounded that, for rural women to be able to exercise rights of access, control and use, it is essential to enforce

---

181 Gomez and Tran "Women's Land and Property Rights"9-10; Among various Kenyan communities, women do not traditionally control land, at the very best, they have usufruct rights which are dependent on the nature of the relationship between them and men, either as husbands, fathers, brothers or such other male relatives. Kimani and Maina 2010 *JECDSW* 259; Kameri-Mbote 2013 <https://www.za.boell.org>.

182 Kameri-Mbote "The Land has its Owners" 16-17. Verma 2014 *FE* 61. Gender inequality in secure rights to land and property is intertwined to the development-related problems, which are key factors impeding efforts to achieve equitable and sustainable human development.

183 World Bank Report 2003 page 23.

184 Cotula *Gender and Law: Women's Rights in Agriculture* 22.

185 Cotula *Gender and Law: Women's Rights in Agriculture* 22; Fredman 2015 <https://ohrh.law.ox.uk>.

186 The International Land Coalition (ILC) was established by civil society and multilateral organizations which were convinced that secure access to land and natural resources is central to the ability of women and men to get out of and stay out of, hunger and poverty.



them both in the legal and social sphere.<sup>187</sup> In this way women's rights are bound to be broadly acknowledged as valid by the rural communities, thus creating an enabling environment for women to be able to demand them and enjoy the benefits that these rights offer them and their dependents.<sup>188</sup>

Then again, Whitehead and Tsikata<sup>189</sup> believe that a re-examination of the local level studies on land use by women in sub-Saharan Africa can safely lead one to conclude that a return to custom might be useful in solving women's land problems in Africa. In following Nzioki's line of reasoning, Ochieng<sup>190</sup> asserts that tenure security for women within statutory land tenure entails other rights including control and access, spousal joint-access of land and protection of widows and orphans from eviction or dispossession.

#### 4.3.2.2 Tanzania

During the villagisation programme, women were banned to own land and this move was seen as their "protection".<sup>191</sup> Clearly this violated their human rights and sections 12 and 13 of the Tanzanian *Constitution*. Women's marginalization got worse with the shift towards the market economy since it changed many aspects of the economy such as land institutions and organisations. Nonetheless, the promulgation of the *VLA* brought about a negligible level of land tenure security for some women. In terms of section

---

187 This is to avoid instances where women's legal rights have been provided for but ignorance or illiteracy ensures that they do not benefit from such provisions. The effectiveness of laws depends largely on the society's willingness and ability to enforce such laws. Odote *Legal Policy and Framework* 35; Mburugu "The Limits of Law" 26-27.

188 Owoo 2015 *JIS* 919; Mburugu "The Limits of Law" 26-28; Ochieng *Opportunities and Challenges* 4; Monene 2010 <https://ke.boell.org>.

189 Whitehead and Tsikata 2003 *JAC* 73; Mutopo 2011 *JPS* 1036; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 93.

190 Ochieng *Opportunities and Challenges* 4; Monene 2010 <https://ke.boell.org>.

191 A more detailed discussion on women's land rights in Tanzania follows in s 4.3.3.2. Dancer 2017 *SLS* 3; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 88.

36 (1) (i) thereof priority is given to wives as beneficiaries when their husbands surrender their customary rights of occupancy. This meant that other categories of women were formally sidelined. This position placed blame back on the Shivji Commission for its failure to consider women's land problems explicitly.<sup>192</sup>

On the other hand, as discussed above, it is not unusual to find legislation that supports women's rights in land, but these provisions are either inaccessible to them or they are not aware of its existence.<sup>193</sup> Furthermore, even for those that are aware, they usually do not have the resources to sue when their rights have been infringed. The worst case scenario is of women who do not perceive their right in land as insecure based on the household and community stability.<sup>194</sup> In the face of commercialisation of land, Ossome<sup>195</sup> believes that customary law (practices) promises a better path for the recuperation of women's rights in land. By understanding the customary systems that mediate women's relationship with the state, capital and community she<sup>196</sup> believes that this will go towards shaping the nature of interventions by feminist activists in promoting gender equality in land tenure.

---

192 The Commission was criticised for its failure to capture the different ways in which women can be involved in the land activities, their role as food producers and producers for their families, other community members or the market. Goldman *et al.* 2016 *JPS* 780.

193 Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 93; Isinika and Mutabazi ("Gender dimension of land conflicts" in Havnevik and Isinika (eds) *Tanzania in Transition* 135) established that over 60 percent of respondents especially women, were unaware of the ongoing Tanzanian land reforms. Half of them did not believe that titling and registration would enhance land tenure security.

194 Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 93; Isinika and Mutabazi "Gender dimension of land conflicts" in Havnevik and Isinika (eds) *Tanzania in Transition* 135; Bryceson "Reflections" in Stahl (ed) *Looking Back, Looking Ahead* 14.

195 Ossome 2014 *FE* 158.

196 Ossome 2014 *FE* 176; Dworkin 2014 *JCP* 389.

#### 4.3.2.3 South Africa

The lack of access to communal land by women in South Africa is analysed in section 2.3 of chapter two.

##### *4.3.3 The communal land tenure system: women and the law*

To understand the role of law in women's lives, one needs to understand not only the intention and rationale behind the law but also the consequences of law on individuals. In many cases, despite the gender neutrality of legal provisions, equal rights and privileges cannot be assumed to have been guaranteed and realized. Gender neutral laws have, in many instances, resulted in *de facto* discrimination. Dahl<sup>197</sup> accentuates this notion so accurately in the following words:

As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potentials, rules of law will necessarily affect men and women differently. The gender-neutral legal machinery ... meets the gender-specific reality.<sup>198</sup>

Shivji,<sup>199</sup> Claasens and Mnisi-Weeks<sup>200</sup> are all in agreement that it is erroneous to observe the issue in terms of customary law being anti-women and statutory law being pro-women. According to them,<sup>201</sup> it is more about making progress within the customary land tenure system instead of eradicating or substituting it altogether. More so, since individualization and titling have not necessarily worked in favour of women.<sup>202</sup> Lastarria-

---

197 Dahl 1987 CC 368.

198 Dahl 1987 CC 368.

199 Shivji "The Land Acts 1999"; Claasens and Mnisi-Weeks 2009 *SAJHR* 491; Banda "Romancing Customary Tenure" in *The Future of African Customary Law* 327.

200 Shivji "The Land Acts 1999"; Claasens and Mnisi-Weeks 2009 *SAJHR* 491 and 493; Banda "Romancing Customary Tenure" in *The Future of African Customary Law* 327.

201 Shivji "The Land Acts 1999"; Claasens and Mnisi-Weeks 2009 *SAJHR* 491 and 493.

202 Shivji "The Land Acts 1999"; Claasens and Mnisi-Weeks 2009 *SAJHR* 491. A detailed discussion on the alternative types of titling will follow in chapter 5.

Cornhiel<sup>203</sup> too observed that increasing transformation of customary tenure systems in Africa is not “unlinear” and affects women differently. Yet, with the move towards “market-based individualized tenure system, women’s already limited land rights may be ignored and consequently lost”.<sup>204</sup>

Furthermore, in terms of the Framework and Guidelines on Policy in Africa<sup>205</sup> the system of patriarchy dominates social organization and discriminates against women when it comes to ownership and control of land resources. Thus, if law and policy are to redress gender imbalances in land holding and use, it is necessary “...to deconstruct, reconstruct and re-conceptualize existing rules of property in land under both customary and statutory law”<sup>206</sup> in a way that will reinforce women’s access and control while also respecting family and other social networks. Whitehead and Tsikata<sup>207</sup> caveat that the debate over land reform has become locked into an excessively legalistic language with such terms as customary law rights, ownership and usufruct. It is these terms that often lead analysts and researchers to misjudge the dynamic power relations which are central to understanding gender inequality in access to land.<sup>208</sup> Hence, the terminology does not accommodate the ways

---

203 Lastarria-Cornhiel 1997 *WD* 1325.

204 Lastarria-Cornhiel 1997 *WD* 1325; Cotula *Gender and Law: Women's Rights in Agriculture* 22.

205 Clause 2.5.2.

206 Framework and Guidelines on Land Policy in Africa 2006; Claasens and Mnisi-Weeks (Claasens and Mnisi-Weeks 2009 *SAJHR* 493.) who assert that legal strategies aimed at improving women’s land rights must prioritise engagement with the changes taking place. To do this involves interrogating and debunking some formalist assumptions underlying “orthodox” policy approaches to women’s land right in Africa.

207 Whitehead & Tsikata 2003 *JAC* 75; Isinika and Kikwa “Promoting Gender Equality” in Stahl (ed) *Looking Back, Looking Ahead* 93; Claasens and Mnisi-Weeks 2009 *SAJHR* 493.

208 Zetterlund *Gender and Land Grabbing* 10.

in which women use existing social relations and customary institutions to their own advantage in order to gain access to land and other resources.<sup>209</sup>

Accordingly, it can be inferred that the foremost impediment facing the successful execution of land laws is that whatever opportunities arise therein, they are usually inscribed in legislations at the national level and are often not implemented at the community level, where they actually matter most.<sup>210</sup> When this occurs, it is the rural women who continue to toil the land without the right to control it, which is usually contrary to the (new) legislation that gives them these rights individually or together with their spouses. Thus, Ochieng<sup>211</sup> suggests that these new legislations regarding land ought to be translated into practice at the community level in order to change the attitudes and practices held by most communities and deeply embedded in customary law. It is this view of customary law that disregards and undermines women land rights creating great irregularities in law and between practices at the national and community levels.<sup>212</sup> It may be argued that putting these laws in place is only a piece in a much bigger puzzle, for rural women this legislative protection is not as vivid as it may seem.

In a different light, Claasens and Mnisi-Weeks<sup>213</sup> assert that the solution lies with paying attention to the external changes outside the legislative route.

---

209 It has been suggested that women have contested claims made on their land and it is that ability to negotiate access to land which needs to be supported and harnessed into land policies.

210 Fredman (Fredman 2015 <https://ohrh.law.ox.uk>) adds that simply giving poor women basic human rights does not magically imply that they can enjoy and exercise them. Similarly, opening up opportunities in principle does not mean that they are feasible for poor women. Hence, it is necessary to deal with the constraints imposed by a range of other factors including the power structures within the family. Claasens and Mnisi-Weeks 2009 *SAJHR* 494; Moeng *Land Reform Policies* 24.

211 Ochieng *Opportunities and Challenges* 4.

212 Ochieng *Opportunities and Challenges* 9; Fredman 2015 <https://ohrh.law.ox.uk>; Zetterlund *Gender and Land Grabbing* 12.

213 Claasens and Mnisi-Weeks 2009 *SAJHR* 493.

This implies that one must look to instances where women are playing key roles in renegotiating the content of custom and rights. This approach should not only recognize the mutable nature of customs but should also pay particular attention to processes of contestation on the definitions and scopes of customs and rights.<sup>214</sup>

#### 4.3.3.1 Kenya

Despite a progressive and contemporary legal framework,<sup>215</sup> women's land rights continue to lag behind those of men in Kenya. The customary law and customs which often victimize women and restrict their land and property rights, govern more than half of all land in Kenya.<sup>216</sup> Like in many African states, the patriarchal nature of Kenyan society time and again confines even the rights of women not living on land governed by custom.<sup>217</sup> Karanja<sup>218</sup> expounds that women in Kenya comprise of more than half of the country's population. Of that half, over 80 percent reside in the rural areas of Kenya. Yet, while the need for more effective participation by women in the agricultural sector and their incorporation into the development process has been recognized, the Government intervention through land legislation and the formulation of policies intended to protect women's access to land have been unsuccessful in correcting the existing sexual inequalities in access to land.<sup>219</sup>

---

214 Claasens and Mnisi-Weeks 2009 *SAJHR* 494.

215 The Kenya Constitution of 2010, *Land Act*, *Land Registration Act*, and *National Land Commission Act* were all approved in 2012, as well as a new set of marriage laws, the *Matrimonial Property Act* 2013 and the *Marriage Act* 2014.

216 Gafaar "Women's Land and Property Rights in Kenya".

217 Gafaar "Women's Land and Property Rights in Kenya"; Kimani and Maina 2010 *JECDSW* 258.

218 Karanja 1991 *TWLS* 109.

219 Tsikata 2009 *FA* 14.

Accordingly, the enactment of more unbiased and distributive laws that regulate the rubrics of access to land as well as the distribution of the benefits of agricultural production should be a priority issue for all governments.<sup>220</sup> Although Fredman<sup>221</sup> believes that the repeal of discriminatory laws followed by the promulgation of anti-discriminatory laws can be a solution, full equality is not easily attainable. Women, as part of the often ostracized groups, are less likely to have secure rights over land since most are not in a position to influence distribution of rights in the village forums.<sup>222</sup> In Kenya, this position has been exacerbated by the post-independence policies and legislation which to a large extent leaned on the protection of private individualised land rights.<sup>223</sup> Initially, there were no constitutional or legislative structures for the protection of women's access to land in Kenya.<sup>224</sup> As shown above, the contemporary Kenyan legislative framework acknowledges women as well as their access to property. The issue that remains, therefore, is whether they will be applied as they appear in black and white.

#### (a) The Kenyan National Land Policy

The KNLP proposed a range of measures to the Government of Kenya including the protection of the rights of women.<sup>225</sup> This incorporated the rescission of existing laws as well as outlawing regulations, customs and

---

220 A 2012 Report analyzed by the OECD Development Centre shows that countries where women lack rights or opportunities to own/control land have on average 60% more malnourished children than countries where women have some or equal access to land.

221 Fredman 2015 <https://ohrh.law.ox.uk>.

222 Odote *Legal Policy and Framework* 34; Moeng *Land Reform Policies* 22.

223 NLP Sessional Paper 3 of 2009 at para 53. The Policy includes a specific portion on Gender and Equity Principles stating that "...culture and traditions continue to support male inheritance of family land while there is lack of gender sensitive family laws".

224 Ochieng *Opportunities and Challenges* 2.

225 KNLP para 225.

practices that have in the past discriminated against women in relation to land. Effective implementation of this commitment was presumed to greatly boost land productivity given that women account for the higher percentage of Kenya's agricultural production. It also noted that there was conflict between constitutional and international provisions on gender equality as against customary practices which marginalize women in relation to land access and inheritance. Therefore, the Kenyan Government was urged by the KNLP to implement appropriate legislation to ensure women's rights in land, to repeal existing laws and customs that discriminate against women and to establish clear legislative framework in matters of inheritance, regardless of their marital status.<sup>226</sup>

Summarily, in relation to women's access to land, the KNLP:

- recognizes customary rights to land;<sup>227</sup>
- addresses issues that require special intervention, including resolving historical injustices around land and improving gender equity in land use, management and control;<sup>228</sup>
- explicitly cites the need to protect women's right to inherit land;<sup>229</sup>
- provides for the protection of the widows and divorcees' land rights;<sup>230</sup> and
- establishes a matrimonial property framework that provides equal rights to land for men and women during marriage and upon dissolution of the marriage.<sup>231</sup>

---

226 Kameri-Mbote (2013 <https://www.za.boell.org>) on the other hand believes that policies and laws are not enough to address the issue of women's land access, more so in case where their application is mediated by customary law.

227 Chapter 1 s 22.

228 Chapter 2 s 7(c) and part 3.6.10.3.

229 Chapter 2 s 25(f).

230 Part 3.6.10.4 s 225. The KNLP also distinguishes between married and unmarried women's inheritance rights, directing the Government to secure the inheritance rights of unmarried daughters.



(b) *Constitution of Kenya*

The Kenyan *Constitution* is the most recent amongst all three jurisdictions, and it embodies the most relevant and up to date principles on gender equality in land matters. This *Constitution* went above and beyond by mandating the Parliament of Kenya to instigate communal legislation within five years of its enforcement. To this end, the *CLA*<sup>232</sup> was born. This section analyses the provisions of the *Constitution* that specifically deal with women's access to land in Kenya.

- According to article 21(3) all state organs are under an obligation to observe, respect, protect, promote and fulfill the rights and needs of vulnerable groups within the society, including women.
- Similarly, article 27(3) provides that women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.
- By the same token, article 30(4) states that a registered community shall not directly or indirectly discriminate against any member of the community on any ground including race, gender, marital status, ethnic or social origin, colour, age, disability, religion or culture. Additionally, article 60(1) (f) provides for "elimination of gender discrimination in law, customs and practices related to land and property in land" as one of the principles of land policy.

According to Zetterlund,<sup>233</sup> although there are laws and constitutional provisions that provide women with the same rights as men, but if history is

---

231 Part 3.6.10.4.

232 27 of 2016. The Community Land Bill was first published in August 2015, hence was delivered within the time frame that was set by the Constitution.

233 Zetterland *Gender and Land Grabbing* 17.

anything to go by, the patriarchal traditions are bound to hinder the enjoyment of these rights at the ground level.

- More specifically, article 68(c)(vi) provides that the Parliament must enact legislation to protect all the dependents of deceased persons holding interests in any land including the interests of spouses in actual occupation of land.

Therefore, in terms of this provision, it is unconstitutional to chase a widow out of hers and her husband's property upon the death of the latter.

(c) The *Land Registration Act*

The *Land Registration Act*<sup>234</sup> (hereinafter the *LRA*) recognizes and safeguards all legitimate rights and interests in land.<sup>235</sup> In terms of the *LRA*, when a spouse acquires land for joint-access and occupation for both parties to the marriage, it should be presumed that both spouses hold the land jointly except if the certificate clearly provides that only one spouse is acquiring the land in his/her own name.<sup>236</sup> This provision should be read in conjunction with the *Matrimonial Act*.<sup>237</sup>

---

234 3 of 2012. The Acts proscribe management of land in Kenya using the following principles: equitable access to land; security of land rights; and elimination of gender discrimination in laws, customs and practices related to land and property in land. Gomez and Tran "Women's Land and Property Rights" 13-14; Ochieng *Opportunities and Challenges* 2.

235 Preamble *LRA* 2012.

236 S 93 *LRA*.

237 Article 93 (1) (a) and (b). *The Matrimonial Property Act* 49 of 2013 establishes that the default property regime is separate property for married couples, although parties have the right to enter into an agreement regarding property rights prior to the marriage that will then apply instead. Since men are more likely to have property rights in land than women, it is argued that this default regime makes it difficult for wives to gain property rights within marriage. Each spouse retains exclusive rights to property he or she held prior to entering the marriage, and is entitled to marital property according to his or her contribution. Under the Act, contribution refers both to monetary contributions and non-monetary contributions, including domestic work, child care, companionship, and farm work. Property acquired during the marriage

In the same manner, the *LRA* further provides that in the event that land is registered in the name of one spouse, but the other spouse contributed in any way towards the betterment of productivity, then that spouse is deemed to have acquired an interest in that land with the spouse whose name appears on the certificate.<sup>238</sup> Thus, a presumption of joint tenancy for any land obtained for joint access and use by both spouses, requires spousal consent for the disposition of any land or dwelling.

(d) *The Community Land Act*

In terms of the KNLP, approximately 65-70 per cent of land in Kenya is estimated to fall under the category of “community land”.<sup>239</sup> Even so, the *CLA* is not very overt and inclusive of women’s access to land in Kenya. It instead leaves all the decisions regarding the community land to the usually “patriarchal institutions”. The following important aspects are emphasized:

- Section 14(3) of the *CLA* defines a customary right of occupancy as a right that a registered community is entitled to after the satisfaction of the prerequisites set out in section 14(4) of same.
- The *CLA*, like the Tanzanian *VLA* and the CLTB of South Africa, mandates all the registered communities to consider the principle of equality of all persons as well as equal treatment of applications (for land) for women and men.<sup>240</sup>

In the same light, every member of the community has the right to equal benefit from communal land used by the community. For the avoidance of doubt, every man or woman married to a member of the community shall gain automatic membership of the community and such membership shall

---

and owned by and titled in the name of only one spouse would therefore remain the sole property of that spouse and not be considered part of the marital property.

238 Article 93 (2).

239 Gafaar “Women’s Land and Property Rights in Kenya”.

240 S 14(c) (i).

subsist until the spouses legally divorce and the woman remarries or the woman remarries after the death of a spouse.<sup>241</sup> This is not what happens in practice as is evidenced by constant disputes at the local courts.

#### 4.3.3.2 Tanzania

In Tanzania the formal or statutory marginalization of women dates as far back as the 1960's. In 1963 the *Customary Law Declaration Order*<sup>242</sup> was introduced in an effort to homogenize marriage and succession between patrilineal people at the Primary Court. In terms of this Order women were excluded from inheriting or controlling land, save for explicit circumstances.<sup>243</sup> Subsequently, the post-colonial Government began the Presidential Commission of Inquiry into Land Affairs around January 1991. Of all the four underlying principles guiding the Commission's work, the most significant for purposes of this study was called "the modernization of tradition as opposed to the imposing of modernization on tradition". Shivji<sup>244</sup> recognized and appreciated secure tenure, specifically for women and children as the most important aim of the land law in Tanzania.

Nevertheless, he<sup>245</sup> buttressed that the security of the most susceptible groups was equally related to the security of the rural community as a whole. Albeit under heavy fire from the gender activists, this position was based on

---

241 S 30 (1). In light of article 68(c) (i) of the *Constitution*, the *CLA* embodies the principle that a woman should stay on the shared property upon death of her husband. Thus it is only upon remarrying that she can be evicted off the premises. It follows that she can leave with all the pre-marital property unless the contract stipulates otherwise.

242 GN 436 of 1963 Schedule 1; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 91.

243 Gafaar "Women's Land and Property Rights in Kenya". For instance, a woman could only control land if she was keeping it until her son to become of age. The son would take full control of land and so would all the other sons coming after him. Even at this point unmarried daughters of the family were side-lined.

244 Shivji *Not Yet Democracy* 43.

245 Shivji *Not Yet Democracy* 43.

the fact that equality with men was not an ideal goal to strive for as long as the land rights of the entire community are under threat, otherwise the equality would be equality in landlessness. Shivji<sup>246</sup> has unswervingly contended that equality of women and men in land matters is essential, but not nearly adequate to enable equitable access to land; for, if the majority of both men and women were deprived of their security of tenure and were faced with the threat of landlessness the objective of tenure security would still not be achieved. The question to be answered is without male land rights, who would women be enforcing their rights against?

The Tanzanian National Land Policy was stirred by the dissatisfaction with some of the recommendations of the Shivji Commission since it is widely believed that it did not seriously engage with gender issues.<sup>247</sup> Thereafter, in its 1994 Report, the Commission defended its approach on three grounds that:

- (a) its terms of reference did not require it to focus on gender issues;
- (b) women's land issues were mainly succession issues and therefore outside the purview of land law reform; and
- (c) women would in any case benefit from the reforms being proposed in the Lands Commission Report, for example, the proposal to include the names of both spouses in the customary land certificates.<sup>248</sup>

These arguments were challenged by Manji<sup>249</sup> who argued that it was a particularly narrow interpretation of the Commission's brief to put gender

---

246 Shivji *Not Yet Democracy* 49.

247 Pedersen *et al.* 2016 <https://www.econstor.eu>. The Government mandated the Shivji Commission to investigate the issue of female succession only and not access to land in general. The Land Commission Report's approach therefore, did not make proposals based on the evidence it had heard but attempted to demonstrate that its recommendations would have a positive impact on gender relations, without explaining how or why.

248 Tsikata 2003 *JAC* 165; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 88. Manji 2001 *TWQ* 330; Pedersen *et al.* 2016 <https://www.econstor.eu>.

issues outside its areas of concern and that the convention of dividing the relevant legal provisions into succession and land laws as though they were discrete, was quite artificial.<sup>250</sup> Furthermore, women's land issues were not confined to succession matters, but included problems of access, control and the impacts of land grabbing. Therefore, around January 1995, the Tanzanian Government convened a national workshop in Arusha to discuss the draft National Land Policy (hereinafter the TNLP). Within this draft was the Government's response to the Shivji Commission,<sup>251</sup> the most crucial being the provisions regarding women's interests in land. Its findings included a statement that women had inferior land rights relative to men and that their access was indirect and insecure. It was also indicated that the traditional provisions which protected women's land use rights had been eroded and that village councils had used customs which discriminated against women to allocate land to heads of households who were usually men.<sup>252</sup>

It was ultimately decided that women from then on, would be entitled to acquire land in their own right whether through purchase or allocation. Nonetheless, it was stipulated that the inheritance of clan land would continue to be governed by custom and tradition, provided it was not contrary to the Tanzanian *Constitution* and principles of natural justice.<sup>253</sup>

---

249 Manji 2001 *TWQ* 330; Tsikata 2003 *JAC* 165; Pedersen *et al.* 2016 <https://www.econstor.eu>.

250 For instance, the Commission believed that some of its recommendations would address many of the injustices women experienced in relation to land. These included vesting the radical title in the Village Assembly and the recording of names of spouses on land certificates.

251 Tsikata 2003 *JAC* 162; Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead* 88.

252 S 4.2.5.

253 Kimani and Maina 2010 *JECDSW* 260; Pedersen *et al.* 2016 <https://www.econstor.eu>.

Likewise, the TNLP could be discounted for the fact that in some communities, women had strong claims to land.<sup>254</sup>

One of the instances in which a woman possessed strong claims to land was in the landmark decision of *Epharahim v. Holaria Pastory*,<sup>255</sup> wherein one of the discriminatory customary practices of Tanzania was overruled. In this case, a discriminatory customary land tenure rule was invalidated for lack of conformity with the *Constitution* as well as other international human rights standards. Customary law forms part of the Tanzanian legal system.<sup>256</sup> The facts are as follows: a Haya woman who had inherited land from her father under testamentary succession sold it outside their clan. A male clan member then brought an action to declare the sale null and void since women could not sell land under Haya customary law.<sup>257</sup> The High Court invalidated the discriminatory norm on the basis of the principle of non-discrimination on the basis of sex, as affirmed in the Bill of Rights.<sup>258</sup> The court held that Haya women could sell land on the same conditions as Haya men, thus the disputed land sale was declared valid.

(i) The Tanzanian National Land Policy

Additionally, the TNLP's recommendation that traditions or customary law and practice be observed with regard to family land ignored the fact that some important traditions of women's access to and control of land were not widely

---

254 *Epharahim v. Holaria Pastory*. Unreported Primary Court (Civil Appeal) 70 of 1989.

255 Tsikata 2003 JAC 157; Unreported Primary Court (Civil Appeal) 70 of 1989.

256 In *Maagwi Kimito v. Gibeno Werema* (Court of Appeal of Tanzania, Civil Appeal 20 of 1984), the Court stated that "...the customary laws of this country have the same status in our courts as any other law, subject to the Constitution and to any statutory law that may provide to the contrary".

257 As codified in the Customary Law Declaration Order of 1963 and Laws of Inheritance s 20.

258 Article 13(4) of the Bill of Rights of 1984 and by the Constitution of 1984) and in many other international human rights treaties ratified by Tanzania (CEDAW, ICCPR, and ACHPR etc).

known. This was because traditions of male control had become the dominant discourse on land rights in spite of the more complex character of realities on the ground. These arguments are in line with the “invention of tradition” literature which has drawn attention to the constructed, dynamic and contested character of customary law.

After the adoption of the TNLP, the Government employed experts to draft the legislation which later became the *Land Act* and *Village Land Act* (hereinafter the *VLA*). In alignment with the TNLP all lands were to continue as public land hence vested in the President of the Republic as trustee for and on behalf of all citizens.<sup>259</sup> This in effect meant that the use and occupation of land would continue to be through granted and customary rights of occupancy, the two types of occupancy which have the same status in Tanzanian law.<sup>260</sup> Tanzania is one of the first of a few African countries to explicitly establish women’s rights in land through legislation.<sup>261</sup> It was through the introduction of the *VLA* where female representation on the village councils<sup>262</sup> has been rendered mandatory, which Shivji<sup>263</sup> believes was a measure intended to address the lack of female representation on decision-making bodies in Tanzania.<sup>264</sup> Ochieng<sup>265</sup> believes that women who are elected into the village council are unlikely to demonstrate particular support for women’s land claims. All the same, it may be argued that, if female

---

259 S 3 of the *VLA*.

260 S 18.

261 S 20(3) thereof provides that any law or rules that deny women access to *ownership*, occupation or use of land is void and inoperative. Adams and Knight *Land Policy Developments and Setbacks* 45.

262 S 5 (1) of the *VLA* provides that the Village Land Council shall comprise of seven members, three of whom should be women and that each of those members must be designated by the village council and ratified by the Village Assembly.

263 Pedersen *et al.* 2016 <https://www.econstor.eu>.

264 Land Disputes Tribunals are also required to have at least one woman in all mediation matters in terms of s 14 (1).

265 Ochieng *Opportunities and Challenges* 10; Pedersen *et al.* 2016 <https://www.econstor.eu>.



representation in the village councils directly implies a victory for female litigants, then the object of equity and equality is completely defeated. The principle should be that cases that come before the council are entitled to be adjudicated on their own merit.

In support of Ochieng's<sup>266</sup> line of thought, Verma<sup>267</sup> is of the opinion that having women on land boards does not change the underlying norms and behaviours. Power relations still privilege men, and women often find it difficult to make progressive decisions that protect the rights of other women. By doing so, they face an uphill battle, resistance and backlash from male board members. Ochieng<sup>268</sup> maintains that most social claims are decided on the basis of kin or patron-client alliances instead of the foundation of alliances of gender or class.

To this end, Yngstrom<sup>269</sup> suggests that the solution to women's insecure tenure lies not with institutional reform, but with a change in family and inheritance legislation.<sup>270</sup> This argument is a direct echo of the findings presented by the Shivji Commission.<sup>271</sup> Following Claasens<sup>272</sup> view on how registration of rural land rights exaggerates the existing insecurities faced by rural women on land, Yngstrom<sup>273</sup> supports the argument that land

---

266 Ochieng *Opportunities and Challenges* 12; Pedersen *et al.* 2016 <https://www.econstor.eu>.

267 Verma 2014 *FE* 69; Meer 2013 <https://www.za.boell.org>; Karanja 1999 *TWLS* 120.

268 Ochieng *Opportunities and Challenges* 13. He buttresses that women cannot participate on equal terms with men in these institutions but that does not mean that these are inappropriate institutions to regulate land rights. According to him, women are less successful than men when it comes to realizing their claims by way of dispute settlement. Therefore a wider social context needs to be considered to understand these inequalities.

269 Yngstrom 2002 *ODS* 25; Pedersen *et al.* 2016 <https://www.econstor.eu>.

270 Fredman 2015 <https://ohrh.law.ox.uk>; Pedersen *et al.* 2016 <https://www.econstor.eu>.

271 See s 4.3.3.2 chapter 4.

272 Claasens 2005 *AJ* 46.

273 Yngstrom 2002 *ODS* 25.

registration which took place in the 1950s in Tanzania and Kenya, did not extinguish women's customary claims on land as wives nor did it create these gender struggles over land. Instead, it intensified existing insecurities.<sup>274</sup>

(ii) The *Village Land Act*

The following provisions of the *VLA* are noteworthy in respect of women's land rights:

- Section 20(2) of the *VLA* provides that any rule of customary law and decisions taken in respect of land held under customary tenure shall have regard to the customs, traditions and practices of the community concerned provided they conform to all written laws of Tanzania and do not go against women's or children's rights, in which case, that rule or decision will be rendered void.
- In determining whether to grant a customary right of occupancy, the village council has to treat an application from a woman no less favourably than a similar application from a man.<sup>275</sup> In the determination of such an application, section 33(1) (d) requires the village council to ensure that women's special needs for land are taken into consideration.

Regarding village land, certificates are dispensed to village councils to authorize their management powers over village land. In turn, the members

---

274 Tsikata 2003 *JAC* 157. Women have in the past made efforts to safeguard their rights by resorting to favourable traditional practices. For instance, the institution of female husband enables widows to protect their interests in their husband's land by marrying a woman who will provide labour and children (who will be born in the name of the deceased husband).

275 S 23(2)(c)(i).

of the community are issued certificates of customary right of occupancy through a process of adjudication and titling.<sup>276</sup>

- According to section 53(2) a village adjudication committee should consist of not less than six or more than nine persons, of which not less than three persons should be women, who serve for a term of three years and will be eligible to be re-elected for one further term of three years. Thus women must form one third of the quorum.<sup>277</sup>

S 60 (2) where a village council establishes a village land council, that council shall consist of not less than five but no more than seven persons, of which a minimum of two should be women. These women must be

- (a) nominated by the village council; and
- (b) approved by the village assembly.

In relation to women's representation in village decision-making bodies, Shivji<sup>278</sup> argued that the *Land Act* and the *Village Land Act* have not advanced the cause of women by providing that they participate in village land councils and the national advisory board, largely because these bodies are toothless bulldogs with very little power.

#### 4.3.3.3 South Africa

A land reform programme that is thoughtful about empowering women must also be responsive to the significant, though uneven, processes of social change that are redesigning the domestic sphere. Similar to the Tanzanian and Kenyan customary practices, the South African customary law does not

---

276 Ss 48- 59.

277 S 53 (5).

278 Shivji 1999 "The Land Acts 1999"; Gomez and Tran "Women's Land and Property Rights" 14-15; Pedersen *et al.* 2016 <https://www.econstor.eu>.

give women inheritance rights, which ultimately implies insecure tenure.<sup>279</sup> Consequently, daughters are marginalized in relation to their brothers, younger or older alike, while widows and divorcees are marginalized in favour of their in-laws and sons.

If a man dies, depending on the amount of property that he had and the degree of interest that his brothers and uncles have in it, there is competition for his property between his wives, their male children as well as their in-laws.<sup>280</sup> Quite fortunately, this *status quo* has been changed in Kenya through section 68(c) of the *CLA*. For Tanzania and South Africa it would seem that no legislation exists on this issue. Furthermore, if a man divorces his wife, her parents, brothers and even sons are reluctant to take her in and give her “permanent rights” to plots of land.<sup>281</sup> In the event that they do give her access to a plot of land, it is just so she can use it to meet her needs and that of her children.<sup>282</sup> Quite fortunately, women’s participation in communal land matters has been improved in line with the arguments raised against the CLTB’s predecessor *CLARA*. At the National Land tenure Conference held in Durban in 2001, it was acknowledged that the discrimination of women is one of the key land tenure reform issues in South Africa. Women have not only been discriminated against by tribal authorities, but the colonial and apartheid administration rulings and laws<sup>283</sup> have also put their toll on women in terms of inheritance and family law provisions.<sup>284</sup> Moeng<sup>285</sup> follows

---

279 Moeng *Land Reform Policies* 21.

280 Rudman “Genderised Land Reform” 27-29; Mostert and Pienaar “Formalisation” in Cooke (ed) *Modern Studies* 317.

281 Ochieng *Opportunities and Challenges* 14. Walker 2011 *Du grain a moudre* 249.

282 Ochieng *Opportunities and Challenges* 14. Walker 2011 *Du grain a moudre* 249.

283 According to Moeng all the Policies that were introduced since South Africa gained her democracy in 1994, not much has been achieved in terms of empowering women through land access. Moeng *Land Reform Policies* 26.

284 Moeng *Land Reform Policies* 24.

285 Moeng *Land Reform Policies* 24.

Freddy's<sup>286</sup> line of thought in expounding that women are usually singled out as the largest group by the legislative and policy framework, but the challenge vests in the interpretation and implementation of those policies and laws.

Walker<sup>287</sup> is dumbfounded by the dilemma and discrimination faced by women as a general social category based on their gender. She<sup>288</sup> nonetheless acknowledges women's varied interests in land, which in turn raises a number of policy challenges:<sup>289</sup> The challenge lies in the creation of uniform policies that will benefit all women regardless of location (urban or rural); policies that will recognize the differences among them as well as their varied interests in land.<sup>290</sup> Of greater challenge is the integration of the communal areas into the mainstream land reform and agrarian policy and expanding the concern with women's land rights. There is also a need to address land reform in the communal areas as central and not a marginal concern; here strengthening women's land rights is extended beyond a narrow focus on tenure reform and its current ghettoisation in the debate on authenticity and plurality in culture and custom.<sup>291</sup>

(i) CLTB

The CLTB has made an effort to address the gender disparities mentioned in the preceding chapters. Nevertheless, there is still a long way to go if gender equality is to be achieved. Below are some of the vital provisions of the CLTB insofar as women are concerned:

---

286 Fredman 2015 <https://ohrh.law.ox.uk>.

287 Walker 2011 *Du grain a moudre* 249.

288 Walker 2011 *Du grain a moudre* 249.

289 See s 2.2.1.1 chapter 2.

290 Walker 2011 *Du grain a moudre* 249.

291 Walker 2011 *Du grain a moudre* 262.

- Section 3 provides for the principles that have to be adhered to in the management and administration of communal land in South Africa. In particular, sub-section (f) makes provision for promoting the rule of law, good governance, accountability and equality between men and women.
- Regard must always be had by the Minister to the measures required in the advancement of gender equality when transferring communal land, subject to section 5 and 9 of the CLTB.<sup>292</sup> Likewise, in the event of a land rights enquiry, the Minister has to consider whatever measures necessary to endorse gender equality in the allocation, registration as well as the general exercise of land rights before making a determination.<sup>293</sup>
- Refreshingly, the CLTB<sup>294</sup> mentions specifically that an institution that is charged with the responsibility of managing and administering communal land should perform the function of allocating of subdivided portions of communal land to community members, *including women* for residential and commercial purposes while conforming to community rules and the CLTB.<sup>295</sup>
- In an effort to ward off the suppression of women under *CLARA*, the CTLB has made it mandatory that there shall be an equal

---

292 S 5 provides that upon the Minister's satisfaction that the requirements of the CLTB have all been met, he has to determine the location and extent of the land rights subject to conversion into ownership as well as transference of ownership rights to a community. S 9 on the other hand states that over and above the determinations provided for in s 5 the Minister, on behalf of the community, has to have an approved general plan converted or transferred ownership of communal land to a community (in terms of a valid Deed of Communal Land).

293 S 20(g). s 22(d) also lists the provision of land on an equitable basis( while bearing in mind the principle of gender equality) as one of the functions of a land rights enquirer.

294 S 29 (1).

295 S 29(1) (b).

number of women and men representatives on the household forum.<sup>296</sup>

- Similarly, within the board of not less than 10 members but with a maximum of 15 people, half of these people must be women.<sup>297</sup>

The board must be appointed by the Minister in terms of the prescribed nomination and selection process.<sup>298</sup>

#### 4.3.4 *Reasons behind the advocacy*

According to Moagi,<sup>299</sup> land is central to women's quest for rights. This is because of the gendered division of labour which leads to women spending more time working on the land, yet they have limited rights of ownership, access and control. This segregation obviously denies women the social, economic and political autonomy that is necessary for full membership in any given society, the exercise of functions relating to property, as well as the capacity to fulfil reciprocal obligations and responsibilities within the community. Land therefore epitomizes the vehicle through which women can move from the "...mere reproductive realm to the productive realm".<sup>300</sup> It has been established that several South African customary laws view women's relationship to land differently from that of men. In most societies, women's land rights are treated as secondary in nature and women are only allowed access to land through their husbands or other male relatives. This is based on the assumption that "all women will be married throughout their lives."<sup>301</sup>

---

296 S 33(4).

297 S 37(6).

298 S 37(1).

299 Moagi 2008 *INGOJ* 215.

300 Kameri-Mbote 2013 <https://www.za.boell.org>; Anon. 2015 <https://www.one.org>.

301 Yngstrom 2002 *ODS* 25. According to a study in Murang'a District of Kenya, under the customary system women were unable to inherit land. Usufruct rights acquired upon marriage were secure and women maintained considerable control over subsistence production through land and the control of its products. Mackenzie argues that there is a strong case against vesting particular individuals or groups

Yngstrom<sup>302</sup> opines that the assumption that the right of the male household head is superordinate to other rights is the reason for the characterization of women's rights as wives, sisters, daughters or mothers being "secondary" to and dependent on those of men. Moreover, it is believed that women do not need land in their homes of birth since they will receive it from their homes of marriage.

This characterization of women's rights as "secondary" to men's has led some to argue that women should receive their own land. Despite their efforts in tilling the land, women are not given any access or control to the land. Englert<sup>303</sup> noted that this lack of control of land by women in patrilineal societies as an important means of production, has largely contributed to their marginalization.<sup>304</sup> Tascott<sup>305</sup> is also of the opinion that marginalizing women has a dual negative outcome: it reinforces gender inequality and excludes actors who have a proven potential to play a valuable role in furthering development outcomes.

By the same token, Agarwal<sup>306</sup> believes that the advantages of women who exercise secure land rights are threefold:

- Firstly, when women exercise their land rights, their welfare is greatly enhanced. This is because land serves as security against

---

with "superordinate power" in understanding land tenure relations. See Gomez and Tran "Women's Land and Property Rights". 13-14; Toulmin and Quan (eds) *Evolving Land Rights* 123.

302 Yngstrom 2002 *ODS* 26.

303 Englert 2003 *AIDS* 77; Mutangadura "Women and Land Tenure Rights in Southern Africa" 3-4; Zetterlund *Gender and Land Grabbing* 18.

304 Ochieng *Opportunities and Challenges* 13; Gafaar "Women's Land and Property Rights in Kenya"; Gomez and Tran "Women's Land and Property Rights" 13-14.

305 Tapscott 2012 *FJHS* 40.

306 Land represents power and empowerment for those who control it, including the power to make decisions, economic power, political power and sexual bargaining power. Win 2016 <https://www.awfd.org>.



poverty and women's direct access to land and other productive assets significantly reduces the risk of poverty and helps to ensure women's welfare as well as that of their families.<sup>307</sup> In the same light, economic opportunities become more accessible when women have access and control over the land they use. This is because instead of engaging in subsistence production, women can engage more productively as farmers who can play a prominent role as agro-entrepreneurs.<sup>308</sup> Over and above this, women's secure property rights can be as important for men too, since secure land rights and productive inputs can translate into more efficient production on the land.<sup>309</sup> Thus, addressing gender inequalities in agriculture should be at the forefront in order to improve the food demands and to ensure household for security.<sup>310</sup> Similarly, because women are the main producers of food in their households and in the economy in general, then measures to improve their productivity must allow for women's access to and control over their land resources.<sup>311</sup>

---

307 Gomez and Tran "Women's Land and Property Rights" 8-10; Walker 2011 *Du grain a moudre* 248; Anon. 2015 <https://www.one.org>.

308 Archubault and Zoomers (eds) *Trends in Land Tenure Reform* 6; Cross and Hornby 2002 <https://www.gov.za>.

309 If women were to have strong land rights, inputs and productive services, food production would increase since women already cultivate the lands themselves. Similarly, substantial opportunities present themselves when women hold strong property rights. For example, the eradication of poverty, economic growth and development together with promotion of sustainable land use etc. Fredman 2015 <https://ohrh.law.ox.uk>.

310 When women possess a feeling of full access to and control over their land resources, they are more willing and able to make physical and financial investments to the land which may contribute to higher agricultural productivity. Access and control of land also implies that women gain improved social status which leads to their empowerment and greater influence over household decisions.

311 Owoo and Boake-Yiadom 2015 *JID* 918; Ossome *States of Violence* 12.

- Secondly, land makes women more efficient because they become economically productive; especially since they can access credit, technology and information.

This idea is substantiated by the credit that can be received by women who hold secure title to the land they use. These loans can improve female entrepreneurship and increase household income.

- Thirdly, by having access to land, women become economically empowered and so acquire the capacity to negotiate for more equitable relations with men and strengthen their ability to challenge existing social and political gender inequalities.<sup>312</sup> Thus, land gives rural women a sense of identity and rootedness within the village, defines social status and political power in the village and structures relationships both within and outside the household.<sup>313</sup> Also, their self-confidence and power improve as they have a platform on which they can bargain with their spouses, relatives, in-laws, employers and even Government agents.<sup>314</sup>

Archubault and Zoomers<sup>315</sup> explicate beyond the abovementioned reasons. Evidently, land access solidifies and recognises the identities of women from

---

312 Gomez and Tran "Women's Land and Property Right" 12-13. A growing body of research reveals the link between secure land and property rights and improved household food and nutrition security.

313 Ochieng *Opportunities and Challenges* 11; Archubault and Zoomers (eds) *Trends in Land Tenure Reform* 5; Owoo and Boake-Yiadom 2015 *JID* 917.

314 Cotula *Gender and Law: Women's Rights in Agriculture* 22. Given the high correlation between property and power, the effect of women's lack of access to land has been to create a sense of insecurity and subservience of women towards their male counterparts.

315 Archubault and Zoomers (eds) *Trends in Land Tenure Reform* 5.

ethnic minorities, while also establishing a sense of belonging.<sup>316</sup> Research has shown that women who have direct and secure access to land provides them with important psychological security and the independence from husbands and other male relatives. This will ultimately lead to improvements in the household decisions. These decision-making powers enable women to be better-positioned to avoid abusive relationships and to control sexual relations.<sup>317</sup>

#### 4.3.5 *Alternative approaches to women's marginalization*

##### 4.3.5.1 The feminist approach

In making the case for law reform, feminist lawyers contend that customary law rules discriminate against women; not only as daughters, but also as wives, widows and divorcees when it comes to access, control and inheritance of land.<sup>318</sup> The incongruities in the court decisions regarding women's claims are also not helping the situation.<sup>319</sup> Shivji<sup>320</sup> pointed out that women's land issues have nothing to do with access, instead the problem lay more on "control and access" since the evidence has that women there had access to land, for they were real producers or labourers in terms of statistics.

---

316 Archubault and Zoomers (eds) *Trends in Land Tenure Reform* 5; Owoo and Boake-Yiadom 2015 *JID* 917.

317 Fredman 2015 <https://ohrh.law.ox.uk>.

318 See Gomez and Tran "Women's Land and Property Rights" 13-14; Ochieng *Opportunities and Challenges* 13. Yngstrom 2002 *ODS* 225.

319 In *Obiero v. Opiyo* the Court indicated that the legislature did not intend to recognise customary law rights. The judge said "...had the legislature intended that the rights of a registered proprietor were to be subject to the rights of any person under customary law, nothing could have been easier than for it to say so". This decision was followed in *Esiroyo v. Esiroyo*. The effect is that a woman has no interest in registered land and unless she claims and proves that the land in question is held and registered as trust property, for the benefit of members of the family, she has no way of claiming a right to the land.

320 Men as clan and family elders and village leaders are in sole charge of decisions about allocation and disposal of land. Over and above this, the rules of inheritance and divorce practices discriminate against women.

Feminist movements critique the Millennium Development Goals (hereinafter the MDG's) by asserting that since the MDGs came into effect, it seems that women's human rights "have gone out of fashion". From their inception, these goals have been condemned as the "minimalist development goals" because they reduced the promise of Beijing from 13 areas of concern to a mere single goal.<sup>321</sup> Futilely therefore, the Beijing Platform for Action has been sidelined by governments and donors in favour of the MDG's.<sup>322</sup>

Alternatively, Wisborg<sup>323</sup> postulates that women have to fight their own battles and cannot simply put their faith in basic "human rights" approach to address their gender-specific concerns about commercial pressures on land, as these do not have the systemic discrimination against women at the fore. Thus, women must advance their access and control of land. Marriage under statutory law does not guarantee women an advantage in most cases. The laws are interpreted and biased by the prevailing cultural practices and customary law.<sup>324</sup> The result is that even where women have sought court interventions, they most often lose. Therefore, Walker<sup>325</sup> is of the opinion

---

321 Win 2016 <https://www.awfd.org>. Goal number three on the promotion of gender equality and empowerment of women. The Beijing Platform builds on the conferences held by women in Mexico (1975), Copenhagen (1980) and in Nairobi (1985) where women's discrimination was officially recognised and addressed. The 12 areas of concern include, women and poverty, education and training for women, women and health, violence against women, women and armed conflict, women and the economy, women in power and decision-making, institutional mechanisms for the advancement of women, human rights of women, women and the media, women and the environment as well as concerns on the girl child. <https://www.un.org> Bunch "Introduction" in Meillon and Bunch (eds) *Holding on to the Promise* 8.

322 Win 2016 <https://www.awfd.org>.

323 Daley 2011 <https://www.landcoalition.org>; Wisborg 2013 *FE* 35.

324 In terms of Article 68 of the Kenyan Constitution, there is a need to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage. Consequently, there is also the need to practice co-tenancy as entrenched in the constitution. For instance, when the husband dies, the parcel of land should automatically be transferred to the wife. Kimari and Maina *JECDSW* 261.

325 Walker *Du grain a moudre* 264; Moagi 2008 *INGOJ* 221.

that more work is needed to “theorise” women’s varied interests in land as well as teasing out policy implications therein. The word “gender” is critical, but it should not be sufficient if the goal of equitable access of land for women is to be achieved.

#### 4.3.5.2 The human rights approach

Women’s and the girl child’s human rights are inalienable, integral and indivisible dimensions of human rights. Thus, neglecting them not only hinders their rights as human beings, but also hinders their economic, social and environmental development. Gomez and Tran<sup>326</sup> strongly believe that

Just as “discrimination against women and girls impairs progress in all other areas of development,” gender inequality in secure rights to land and property impedes progress in achieving inclusive economic and social development, environmental sustainability, and peace and security.<sup>327</sup>

The human rights doctrine as enshrined in the International Bill of Human Rights<sup>328</sup> provides that all human beings should be empowered to claim civil and political rights, as well as economic, social, and cultural rights,<sup>329</sup> regardless of race, color, sex, language, religion, political affiliation, national or social origin, birth or other status. A “right to land,” is still not defined or codified in any international legal instruments, human rights covenants or declarations.<sup>330</sup> There is a myriad of conventions and resolutions adopted by

---

326 Gomez and Tran “Women’s Land and Property Rights” 11-13; Robinson “Women 2000” in *Holding on to the Promise* 14.

327 Gomez and Tran “Women’s Land and Property Rights” 11-13; Robinson “Women 2000” in *Holding on to the Promise* 14.

328 Article 2, Universal Declaration of Human Rights of 1948.

329 United Nations Fact Sheet 2; Wisborg 2013 *FE* 34. Everyone has human rights by virtue of their humanity and without distinction on the grounds of sex, race, colour, religion, language, national origin or social group.

330 Although the international development community may agree that rural poor people should not be excluded from land use, there are currently no international standards and no legal mechanisms to ensure accountability, enforcement, or regulation of land rights and access to land. Millennium Development Goals (MDGs) framework does not directly address women’s land and property rights. Goal 3 advocates for the

the United Nations which are meant to safeguard women's land rights. According to Fredman<sup>331</sup> a human rights approach begins by insisting that women are rights-bearers, not merely beneficiaries. This, in turn, carries with it correlative duties on states and other powerful actors instead of the traditional approach of human rights where they were viewed as protections against state intrusion on individual liberty.

The Convention concerning Indigenous and Tribal Peoples is the only internationally binding instrument on the rights of indigenous peoples.<sup>332</sup> Article 14 thereof relates to land and requires of states parties to identify lands that were traditionally occupied by indigenous peoples and guarantee control and protection rights. Nonetheless, this Convention has been criticized as falling short of explicitly recognizing access to land as a human right.<sup>333</sup> Opportunely, all states have signed the Universal Declaration of Human Rights and are parties to most United Nations human rights treaties which

---

Promotion of Gender Equality and Empowerment of Women but does not specify any target in relation to these rights. Gomez and Tran "Women's Land and Property Rights" 11-13; Fredman 2015 <https://ohrh.law.ox.uk>.

331 Fredman 2015 <https://ohrh.law.ox.uk>; Robinson "Women 2000" in *Holding on to the Promise* 15.

332 Convention 169 of 1989. There have been a number of resolutions in the past that advocated for women's property rights. For example, in 1998, the Commission on the Status of Women adopted its first resolution on women's housing and land rights, resolution 42/1 on 'Human rights and land rights discrimination, to provide for "secure land rights for the economic empowerment of women". During the early to the mid-2000s, the former United Nations Commission on Human Rights (now the Human Rights Council) also adopted a series of resolutions on women's equal *ownership* of, access to and control over land and the equal rights to own property and to adequate housing. (Resolutions 2000/13; 2001/34; 2002/49; 2003/22; 2005/25). The United Nations Conference on Sustainable Development held in June 2012 (Rio +20) also visibly raised the importance of women's land and property rights.

333 Although it would arguably be impossible to enforce a right to land, this is not distinct from other human rights, which in practice, often serve to set a shared goal more than resulting in a new reality. Fredman (Fredman 2015 <https://ohrh.law.ox.uk>) also believes that it is unfortunate that women's poverty (due to lack of access to land) is not treated as a human rights issue but a mere misfortune akin to illness.

goes to show that fighting this inequity and discernment is not a Western, liberal, or social-democratic consideration, but a universal principle.<sup>334</sup>

For rural poor people, access to productive land is an essential prerequisite for the realization of a range of human rights including access to food, livelihood, and shelter. Similarly, the Committee on World Food Security endorsed the Voluntary Guidelines on the Responsible Governance of Tenure of Land.<sup>335</sup> In terms of these guidelines gender equality in land tenure is viewed as critical to the strategies that reduce hunger and poverty and support sustainable development. They urge states to “ensure that women and girls have equal tenure rights and access to land...independent of their civil and marital status”.<sup>336</sup> These policies, legal and organizational frameworks for tenure governance must be non-discriminatory and must promote social equity and gender equality.

It has been contended that the core object of the adoption of the human rights approach is to ensure that the beneficiaries of development are aware that they are right-holders who are not subject to charity. In this way, they will be able to make legitimate claims for their rights from their governments.<sup>337</sup> In an effort to demonstrate how the Human Rights Based Approach (hereinafter the HRBA) to land matters is more supreme than the traditional approach, Crowley<sup>338</sup> opines that while international development agencies have largely embraced the notion that secure access in property promotes development through investment-friendly environments, they have

---

334 O’neill and Piron 2003 <https://www.odi.org>.

335 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.

336 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.

337 O’Neill and Piron 2003 <https://www.odi.org>; Robinson “Women 2000” in *Holding on to the Promise 20*.

338 Crowley 2003 <https://www.portalces.org>.

fallen short of promoting a rights-based approach to land access and control.<sup>339</sup> Consequently, studies have shown that in instances where land management takes the HRBA the results are outstanding.<sup>340</sup> Then again, one of the major flaws of the HRBA, is that since customary rules and customs differ from community to community,<sup>341</sup> the international standard criterion required by the human rights cannot be met.

For many years, as a way of dealing with gender discriminatory customary laws, some countries have entrenched policies in their national constitutions. This is done by forbidding discrimination generally except in personal law matters. In the same way, resort was taken to make customary law subject to the right to equality. It goes without saying that this line of reasoning is not only weak, but is also naïve; all the jurisdictions forming part of this study, have entrenched in their constitutions and legislation governing community land, the principle of gender equality, yet, in practice discriminatory practices still take place. According to Nedelsky,<sup>342</sup> rights work in practice and not as boundaries to protect autonomy, but to structure relationships of interdependence in an unequal world. It is not a coincidence that women predominate amongst the poorest in the world; poverty is in

---

339 IFAD "Improving Access to Land and Tenure Security" 29–33. The ideal HRBA as opposed to the traditional viewpoint, focuses on legislation that determines how changes in land policy impact the individual, rather than GDP or agricultural productivity. This highlights a two-directional relationship between land and human rights. On the one hand, meaningful enjoyment of land rights depends on other human rights, including rule of law and due process. On the other hand, especially for marginalized groups such as indigenous peoples, women, and the poor, land rights are a necessary condition for realizing basic human rights.

340 For instance, individuals empowered with the right to use, manage, and exploit property, achieve not only economic growth, but also make social, political, and environmental gains.

341 For example, each of Kenya's 42 tribes has its own governance structure and customary rules which govern access to and use of these lands. These customary rules and structures often exclude women from rights to land that are available to men and from community level decision making on land and property rights.

342 Claasens and Mnisi-Weeks 2009 *SAJHR* 495.



many respects a consequence of discrimination against women and gendered inequality.<sup>343</sup> In many countries, law significantly contributes to women's poverty and inequality, through express legal limitations and endorsements of cultural or customary discrimination.<sup>344</sup>

In a nutshell, the introduction of the MDG's has caused the human rights approach to lose traction and momentum since the focus has shifted from the former to the latter. Although genderising the land rights may be beneficial or critical, this approach cannot be reducible to an argument for women's land rights.<sup>345</sup> Likewise, it is not enough for states to entrench human rights provisions in the legislation and assume that their work is done. This discrimination on the basis of sex calls for a paradigm shift, wherein human rights activists and the feminist movements combine forces and must together advocate and fight for women's access to land.

The last section of the chapter looks into the dispute resolution mechanisms used under the communal land tenure system. Inasmuch the traditional method of dispute resolution has worked since time immemorial in the rural areas, the legislation of all three jurisdictions has seen it fit to complement it with alternative dispute resolution methods. These methods are not completely alien in the rural areas since some of them have been applied over time; new wine in old wineskins so to speak.

---

343 The African Union also endorsed the Framework and Guidelines on Land Policy in Africa which offers the highest formal recognition of women's land rights as both a human rights issue and a developmental imperative for the continent.

344 Fredman 2015 <https://ohrh.law.ox.uk>.

345 Walker *Du grain a moudre* 264; Jackson 2003 *JAC* 453; Moagi 2008 *INGOJ* 221.

## **4.4 *Dispute resolution***

### **4.4.1 *Introduction***

As indicated in the previous chapter, conflict over land resources continue to be defined by the exploitative agrarian structures that were established by the colonial scramble for Africa, particularly during the expansion of the world capitalist system around the turn of the 18<sup>th</sup> century. Consequently, most southern African countries' major source of conflicts remains focused on the basic social questions and political challenges of exclusion and inequalities derived from the control of resources. In this light, one of the chief goals of the United Nations (hereinafter the UN) is to sustain international peace and security through peaceful means including the settlement of international disputes.<sup>346</sup>

In resolving disputes at the global level, Article 33 of the UN Charter enjoins parties to first seek a solution to their dispute by negotiation, enquiry, mediation, conciliation, arbitration, resort to regional agencies or arrangements, or other peaceful means of their own choice. Fundamentally, the Charter offers a legal foundation for the use of alternative dispute resolution (hereinafter ADR) in resolving disputes at the international level.<sup>347</sup> On a continental level, the African Union (hereinafter the AU) advocates for peaceful co-existence of member states and their right to live in peace and security.<sup>348</sup> Article 2 (2) thereof establishes the Protocol on AU Peace and Security Council.

---

346 Preamble, UN Charter [date unknown] <https://www.un.org>.

347 According to UNDP, dispute resolution should give the underprivileged people opportunities to participate in the decisions that are most important to their life and link them to the mainstream of modern society. Such system should be easily accessible, cost-effective and expeditious in delivering justice.

348 Article 4 (i).

According to Amman and Duraiappah<sup>349</sup> many conflicts in numerous parts of the developing world can be traced to disputes over land ownership, land use and land deprivation. Odukwe<sup>350</sup> too believes that the unique nature of land and its many uses has made it a highly essential commodity in every society and, as such, it has been a commodity of very high dispute. In this regard, conflicts and related disputes are common and regular phenomena. Alternative dispute resolution methods as a technique for a peaceful co-existence amongst peoples eludes the escalation of tension while also enabling the community to achieve greater potential. Of greater concern is that "...conflict initiated by tussle over land often results in further losses on land and its related resources".<sup>351</sup> Yamano and Deininger,<sup>352</sup> rightly caveat that most of the prevalent land tenure systems in many countries are not designed to resolve land conflicts.

Over and above this, Byamugisha<sup>353</sup> opines that disputes over land in Africa range from those over boundaries to those over ownership of entire plots of land, from intra family or clan to inter family and clan disputes. A homogenous treatment of disputes in land is therefore unbefitting given the wide variety of disputes and their causes. It is clear that land disputes are an increasingly prevalent feature of life, thus Urmilla<sup>354</sup> believes they are exacerbated by a combination of low rates of land registration and unreliable land information.

- 
- 349 Amman and Duraiappah 2004 *EDE* 383; also Odukwe 2016 *IJSSHR* 166; Yamano and Deininger 2005 <https://www3.grips.ac.jp>.
  - 350 Odukwe 2016 *IJSSHR* 166; Amman and Duraiappah 2004 *EDE* 383; Foster "Boundary Disputes" 56; Peters 2004 *JAC* 272.
  - 351 Odukwe 2016 *IJSSHR* 166.
  - 352 Yamano and Deininger <https://www3.grips.ac.jp>.
  - 353 Byamugisha 2016 <https://www.jica.go.jp>. Mungai 2016 *SLR* 132.
  - 354 Urmilla 2010 *AJCR* 59.

Even though some of the conflicts are explicitly land conflicts, others cannot be identified as such *ex facie*, but for all intents and purposes, are. In this regard, land policy actions should be adopted in order to reduce land disputes in the first place, as this will strengthen judicial and formal institutions of land administration and their interface with the traditional institutions of land.<sup>355</sup>

#### 4.4.2 Conflict management

Odukwe<sup>356</sup> defines conflict as:

...some form of friction, disagreement, or discord arising within a group when the beliefs or actions of one or more members of the group are either resisted by or unacceptable to one or more members of another group. Conflict can arise between members of the same group, known as intra-group conflict, or it can occur between members of two or more groups and involve violence, interpersonal discord, and psychological tension, known as intergroup conflict.<sup>357</sup>

---

355 Urmilla 2010 *AJCR* 59; Odukwe 2016 *IJSSHR* 173; Mashamba *ADR in Tanzania* 4; Yamano and Deininger <https://www3.grips.ac.jp>. On the other hand expound that formal systems of dispute resolution have been in existence since colonization and post-independence yet land disputes still continue to aggregate all over African countries. Heck 2009 <https://www.hj2009per1tanzania.weebly.com>.

356 Odukwe 2016 *IJSSHR* 166.

357 Mashamba *ADR in Tanzania* 4; Urmilla 2010 *AJCR* 58; Odukwe 2016 *IJSSHR* 166. Conflict research examines conflicts according to the social level at which a conflict takes place: inner-personal, interpersonal, inner-societal and inter-societal/international. For example:

- Conflict can occur between households, neighbourhoods and neighbouring "communities" over land rights and boundaries, conflict between traditional and "non-traditional" local organisations in land management and dispute resolution and Inheritance-related conflict among family members.
  - Conflict between "newcomer" households and long standing residents.
  - Generational conflict over land use and appropriation of benefits.
  - Conflict between interest groups over appropriate land purposes.
- In this regard, Elfversson defines communal conflict as violent conflict between non-state groups that are organized along a shared communal identity. This does not include interpersonal conflicts as well as conflicts where the state is directly involved as a primary actor. Instead, the conflict is between groups that organize and mobilize along identity lines and use lethal violence to gain control over some disputed and perceived indivisible

The term conflict management then, refers to the various methods, mechanisms, and forums that can be employed to resolve, monitor, thwart or regulate conflicts.<sup>358</sup> To avoid confusion, Muigua<sup>359</sup> distinguishes between litigation and other forms of ADR. Litigation is classified under *dispute settlement* mechanisms while ADR mechanisms are classified under the *conflict resolution* ones. Settlement is, thus, an agreement over the issue(s) of the conflict which often involves a compromise.<sup>360</sup>

Resolution of conflicts on the other hand gives rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. Conflict resolution mechanisms are usually preferred to settlement for their effectiveness in addressing the root causes of the conflict and negate the need for future conflict or conflict management.<sup>361</sup> Adhiambo<sup>362</sup> strongly believes that conflicts among communities add to "human suffering, anguish and desperation, loss of lives and property". As such, appropriate mechanisms must be contrived to manage the conflicts effectively.

---

resource, such as land or local political power. Elfversson 2015 *JPR* 792; Mashamba *ADR in Tanzania* 6; Basu 2016 *JID* 735; Linden *From Constitutional Law to Reality* 13; Bottazzi 2016 *JPS* 981; Fukuyama 2006 <https://www.cddev.org>.

358 Urmilla 2010 *AJCR* 58; Chavangi *et al.* "Complications in land allocations"1-11; Adhiambo *Indigenous Conflict Resolution Mechanisms* 1; Lahunou *The Role of State Weakness in Customary Conflict Resolution* 14.

359 Kariuki and Karuiki 2015 <https://www.strathmore.edu>.

360 Kariuki and Karuiki 2015 <https://www.strathmore.edu>.

361 Muigua *Resolving Conflicts through Mediation in Kenya* 98. It has been a controversial issue whether ADR methods are complementary or alternative methods to dispute resolution. For instance, statutes and courts sometimes require disputants to employ ADR mechanisms in handling their disputes before going to courts, while in other instances, the courts send the parties away if they did not make any attempts to resolve their disputes or conflicts through ADR mechanisms before approaching the Courts. Chavangi *et al.* "Complications in land allocations"1-11.

362 Adhiambo *Indigenous Conflict Resolution Mechanisms* 1.

Mashamba<sup>363</sup> on the other hand explicates that conflict is not always a bad thing since it makes

...people aware of the problems, promotes necessary change, improves solutions to addressing them, raise morale, foster personal development, increases self-awareness and enhances psychological maturity.

Mashamba<sup>364</sup> supports this viewpoint by following Fisher *et al.* who assert that without conflict, one might imagine individuals would be stunted for lack of stimulation, that groups would fester or die and finally that societies would collapse under their own weight unable to adapt to changing circumstances and altering power relations. Nonetheless, this is not so, as it turns out, conflict is a necessary evil. The increasing pressure to use customary land for different transactions by individuals and lack of knowledge of land legislation, have left many community members susceptible to abuse on their property rights.<sup>365</sup> It is believed that community land governance institutions, if strengthened, can play the role of warding off conflict more effectively.<sup>366</sup>

#### 4.4.3 Categories of dispute resolution methods

As shown above, disputes are inevitable in any society. They occur, develop, and get resolved as a part of social evolution.<sup>367</sup> The unsatisfactory settlement of disputes is likely to hinder social development<sup>368</sup> and is a potential source of social instability. Effective resolution, therefore, requires an understanding of the nature of the subject matter.<sup>369</sup> Thus, the

---

363 Mashamba *ADR in Tanzania* 15; Muigua *Resolving Conflicts through Mediation in Kenya* 97.

364 Mashamba *ADR in Tanzania* 5.

365 Odukwe 2016 *IJSSHR* 173; Adhiambo *Indigenous Conflict Resolution Mechanisms* 1.

366 Odukwe 2016 *IJSSHR* 173.

367 Mashamba *ADR in Tanzania* 5; Basu 2016 *JID* 734; Blattman *et al.* 2014 *APSR* 101.

368 Justice systems provide a vehicle to mediate conflicts, resolve disputes, and sustain social order. Kariuki and Karuiki 2015 <https://www.strathmore.edu>; Chavangi *et al.* "Complications in land allocations" 1-11; Blattman *et al.* 2014 *APSR* 100.

369 Odukwe 2016 *IJSSHR* 173.

recognition of ADR and Traditional Dispute Resolution Methods (TDRMs) within legal frameworks are said to contribute towards economic, social, cultural and political development.<sup>370</sup> Their recognition magnifies the consortium of the devices that disputants can employ in their disputes.<sup>371</sup>

Broadly and simply speaking, dispute resolution methods can be classified into traditional and modernist approaches.<sup>372</sup> The institution of traditional leadership is ancient and prevalent across the entire African continent. Traditional dispute resolution mechanisms refer to all those conflict management mechanisms that African communities have used since time immemorial and passed from one generation to the other.<sup>373</sup> The fundamental thought in the traditionalists' argument is that indigenous African land tenure systems are malleable to changing economic and social circumstances.<sup>374</sup> It has been argued that even with the on-going changes, the indigenous land tenure system has not required radical reconsideration of the older tenure arrangements nor has it involved sentient decision by the community. Instead, the changes have come about as a result of adaptive responses to new circumstances.<sup>375</sup>

On the other hand, the modernist view is that land titling and registration are institutional means of land administration and land conflict management.<sup>376</sup> The ancestral roots of this thinking can be traced to the *laissez-faire* economic thoughts of Adam Smith and John Locke.<sup>377</sup> Regarding land conflict management, modernists have sustained that since land transactions are

---

370 Odukwe 2016 *IJSSHR* 173; Blattman *et al.* 2014 *APSR* 100.

371 Kariuki and Karuiki 2015 <https://www.strathmore.edu>.

372 Kariuki and Karuiki 2015 <https://www.strathmore.edu>.

373 Kariuki and Karuiki 2015 <https://www.strathmore.edu>.

374 Kariuki and Karuiki 2015 <https://www.strathmore.edu>.

375 Kariuki and Karuiki 2015 <https://www.strathmore.edu>.

376 Fred-Mensah 1999 *WD* 954.

377 Fred-Mensah 1999 *WD* 957.

documented in land registers to which references can be made, land disputes and litigation costs are reduced.<sup>378</sup> In-depth discussions of these concepts follow.

#### 4.4.3.1 Traditional dispute resolution method

##### 4.4.3.1.1 General traditional methods in Africa

Globally, the role of traditional dispute resolution mechanisms in the dispute resolution arena has been noted over time and academics and scholars alike posit that courts only deal with a portion of all the societal disputes that occur.<sup>379</sup> Terminology such as “African,” “community,” “traditional,” “non-formal,” “informal” and “customary” and “indigenous justice systems” are usually used interchangeably to define local and culture-specific dispute resolution mechanisms. This is somewhat a misnomer since traditional dispute resolution systems are not a feature common to Africa only;<sup>380</sup> it is resolutely embraced by different cultures and customs in and out of African communities. Therefore, recognition of customary law directly implies their efficacy in the enrichment of access to justice. Lately, the customary law systems have received strong legal patronage in the law and this is indication that they are critical in the enhancement of access to justice.<sup>381</sup> Mac Ginty<sup>382</sup> advances three reasons for this position:

---

378 Fred-Mensah 1999 *WD* 955.

379 Muigua [Date unknown] <https://www.kmco.co.ke>; Kariuki and Karuiki 2015 <https://www.strathmore.edu>; Meer and Campbell 2007 <https://www.lrs.org.za>; Ajiima *Making Kenya a Hub for Arbitration* 14. Although formal institutions generally receive the most attention, it is the social interactions, the shared unwritten rules of appropriate behaviour that shape this system. Blattman *et al.* 2014 *APSR* 100.

380 Muigua [Date unknown] <https://www.kmco.co.ke>; Kariuki and Karuiki 2015 <https://www.strathmore.edu>.

381 Adhiambo *Indigenous Conflict Resolution Mechanisms* 2; Lahunou *The Role of State Weakness in Customary Conflict Resolution* 8. The evidence is seen through the enactment of the *CLA*, *VLA* and the *CLTB* of Kenya, Tanzania and South Africa respectively. Accordingly, ADR and traditional justice systems reinforce the Rule of



- There is now a deeper understanding of conflict complexity and absence of unified recipe for conflict resolution by means of international organizations and coalitions.
- There is a greater interest in the topic of sustainable development and arguably profound role of local communities in the process.
- There is an increased importance of participation of local communities in the peace building process.

Since they enhance access to justice, traditional systems are a vital component of the rule of law which is a basis for justice and security.<sup>383</sup> This system accentuates harmony, humanness and togetherness over individual interests.<sup>384</sup> The customary land tenure system is communal in nature, hence no person can claim ownership of the land. Since any group of people living together are bound to have differences, mechanisms of resolving these disputes amongst community members had to be put in place.<sup>385</sup> The traditional approach commendably addresses the conflicts making it suitable for conflict management.<sup>386</sup>

---

382 Law and contribute to development: It has been presented that the ability of a state or a community to enact laws that govern behaviour, including the property rights protection and enforcement of contracts, is a measure of its developmental capacity. Mac Ginty 2008 *CC* 142; Fred-Mensah 1999 *WD* 952; Owasanoye "Dispute Resolution Mechanisms in *Alternative Dispute Resolution Methods* 18.

383 This view is expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts. Muigua [Date unknown] <https://www.chuitech.com>

384 Kariuki and Karuiki 2015 <https://www.strathmore.edu>; Adhiambo *Indigenous Conflict Resolution Mechanisms* 2; Owasanoye "Dispute Resolution Mechanisms in *Alternative Dispute Resolution Methods* 18.

385 Muigua [Date unknown] <https://www.kmco.co.ke>; Owasanoye "Dispute Resolution Mechanisms in *Alternative Dispute Resolution Methods* 18.

386 This presents a sharp contrast with the formal justice systems which seeks to settle the disputes without necessarily addressing the real cause of the conflict, thus creating a likelihood of re-emergence of the problem in future with even more severe consequences. Muigua [Date unknown] <https://www.kmco.co.ke>; Adhiambo *Indigenous Conflict Resolution Mechanisms* 1.

On the other hand, one of the major flaws against the traditional conflict resolution method like other ADRs is that the decisions can be appealed to the formal court systems.<sup>387</sup> This in itself could declare the system as ineffective and inconsequential. Similarly, Mac Ginty<sup>388</sup> argues that over-romanticizing indigenous peace-making could prove detrimental because of its likelihood to exclude and preserve power at hands of chiefly classes. Over and above this, customary conflict resolution and indigenous practices of peace-making could work only at a grassroots level thus making it difficult to duplicate elsewhere. It should be clear that communal land disputes are settled mainly by traditional mechanisms which also incorporate elements of ADR (mainly mediation and arbitration). Therefore, care must be taken since it is very easy to confuse these concepts. According to Muigua,<sup>389</sup> negotiation forms part and parcel of the traditional dispute resolution and together, they are all ADR techniques. It, thus, suffices to state that the two broad categories of ADR are the traditional dispute resolution method and other ADR methods which include mediation, arbitration and conciliation.

In a negotiation, parties meet to identify and discuss issues at hand so as to arrive at mutually acceptable solutions without the help of a third party.<sup>390</sup> Goldberg *et al.*<sup>391</sup> also define negotiation as "...communication for the purpose of persuasion". Negotiation offers parties maximum control over the process so as to identify and deliberate issues before them. In this way, they are empowered to arrive at a reciprocally satisfactory result without involving

---

387 Mashamba *ADR in Tanzania* 53; Adhiambo *Indigenous Conflict Resolution Mechanisms* 39.

388 Mac Ginty 2008 CC 142.

389 Muigua [Date unknown] <https://www.kmco.co.ke>.

390 Mashamba *ADR in Tanzania* 53; Adhiambo *Indigenous Conflict Resolution Mechanisms* 39.

391 Goldberg *et al. Dispute Resolution* 92.

third parties.<sup>392</sup> Negotiation specifically focuses on mutual welfare of the parties instead of their relative power or position. It is therefore concomitant to voluntariness, cost effectiveness, focuses on interests instead of rights, gives creative solutions and addresses root causes of the conflict.<sup>393</sup> This makes negotiation pertinent to daily life disputes that could otherwise be intensified by litigation. The goal to be achieved in any negotiation is to produce something better than the results that one can obtain without it.<sup>394</sup>

(a) Kenya

The traditional dispute resolution mechanisms are well entrenched in Article 159 of the *Constitution* of Kenya. Muigua<sup>395</sup> opines that where the traditional dispute resolution systems have been used in conflict management, they have been effective because they are not only closer to the people but are also flexible, expeditious, voluntary and cost-effective. This is reportedly the most widely used mechanism for dispute resolution Kenya. According to Maina,<sup>396</sup> it is not unusual to see people meeting informally and agreeing on certain issues and coming up with amicable solutions without resort to courts.<sup>397</sup> It is felt that whenever necessary and in appropriate cases the traditional courts should actually encourage parties to negotiate to reach mutually acceptable solutions and allow for the prompt resolution of their dispute. Additionally, there is an emergent inclination towards the

---

392 Mashamba *ADR in Tanzania* 53.

393 Mashamba *ADR in Tanzania* 53; Maina *Land Disputes Resolution in Kenya* 69.

394 Mashamba *ADR in Tanzania* 53.

395 Muigua [Date unknown] <https://www.kmco.co.ke>.

396 Maina *Land Disputes Resolution in Kenya* 69.

397 The land dispute tribunal included traditional institutions like elders courts, elders committees, neighbourhood groups and chief's institutions use customary approaches to address and settle disputes within families and communities. These traditional institutions are said to be more effective and are said to be adaptive to changing times and thus combine both traditional and modern approaches. Maina *Land Disputes Resolution in Kenya* 72.

promulgation of legislation that recognises traditional dispute resolution technique in Kenya.

Nevertheless, most Kenyan *Government* efforts to establish formally defined property rights mechanisms have been plagued by the existence of competing customary processes in dispute resolution.<sup>398</sup> The following section deals with these enactments briefly. Section 3(2) of the *Judicature Act*<sup>399</sup> recognises customary law as a source of law in the Kenyan legal system. This legislation was one of the first in Kenya, cementing customary law in the Kenyan legal system. It caveats that customary law is only applicable insofar as it is not repugnant to justice and morality.<sup>400</sup> This position is indirectly endorsed by the *Constitution*. Section 2(4) thereof states that any law, including customary law is invalid if it conflicts with the *Constitution*. In addition to the above, Article 60 (1) (g) is to the effect that one of the guiding principles of land policy is that land in Kenya must be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and encourage communities to settle land disputes through recognised local community initiatives consistent with the *Constitution*. This position is also acknowledged in one of the functions of National Land Commission which is to encourage the application of traditional dispute resolution mechanisms in land conflicts. Therefore, this provides an opportunity for the use of ADR and

---

398 Henrysson and Joireman 2009 *LSR* 40. Similarly, article 60(1) (g) encourages communities to settle land disputes through recognized local community initiatives consistent with the *Constitution*. In land conflicts, the National Land Commission is required to encourage the application of traditional dispute resolution mechanisms. Article 67(2) (f); Onyango 2014 *Sociology and Anthropology* 304.

399 Cap 8, Laws of Kenya 1967.

400 *The Magistrates' Act* [Cap 10, Laws of Kenya [Revised Edition 2012 [2010]]. Provides under s 17 thereof that a magistrate's court may call for and hear evidence of the African customary law applicable to any case before it.

TDRM in conflict management in the land sector and is meant to enhance access to justice.<sup>401</sup>

In the same way, upon the promulgation of the *Land Disputes Tribunal Act*<sup>402</sup> a system for selecting a group of elders from each district was created; from this selection the district commissioner chose a panel which would act as the land tribunal and hear cases regarding land, adjudicating them "in accordance with recognized customary law". The members of the tribunal were to be chosen from the local community since they would be familiar with the local customs.

(b) Tanzania

Lund *et al.*<sup>403</sup> endorse the view that the vital importance of land issues in Tanzania to social and economic development in Africa is indisputable. This is because land has become an increasingly limited resource in many parts of Africa, Tanzania included, hence a conflict prone resource. This implies that issues related to land rights and land conflicts have become even more exigent on policy agendas continentally. Kagwanja *et al.*<sup>404</sup> back this position by explicating that the question of the use and access of increasingly scarce land has been at the centre of festering conflicts between ethnic groups in East Africa. Alternatively, changes in land use and land access have been significant factors in a number of high-intensity conflicts, but it is not always the foundation of many land causes.<sup>405</sup>

Additionally, one of the core objects of the *VLA* as espoused by section 3 is to ensure that there is an established, independent, expeditious and just system

---

401 Kariuki and Karuiki 2015 <https://www.strathmore.edu>.

402 18 of 1990.

403 Lund *et al.* [Date unknown] <https://www.pure.diis.dk>.

404 Kagwanja *et al.* *Ethnicity, Land and Conflict* 32.

405 Urmilla 2010 *AJCR* 50.

for resolution of land disputes which will hear and determine land disputes without undue delay. In this light, traditional conflict resolution processes are believed to be part of “a well-structured, time-proven social system” geared towards reconciliation, maintenance and improvement of social relationships as they are acutely engrained in the customs and traditions of Africans. Consequently, some balance is restored and conflicts are resolved or eliminated.<sup>406</sup>

For each of the courts authorised to deal with land disputes in terms of section 50 of the *Courts (Land Disputes Settlements) Act*<sup>407</sup> (hereinafter the *Courts Act*), there are guidelines on how they must deal with customary law or traditional matters. For example, section 50 (1) of the *Courts Act* provides that in the exercise of its customary law jurisdiction a Ward Tribunal has to apply the customary law prevailing within its local jurisdiction. In the event that there is more than one law or principle, the law applicable should be that of the area in which the act, transaction or matter occurred.<sup>408</sup> Instead of giving a clear mediation procedure, section 8 of the *Courts Act* refers back to section 61 of the *VLA* which provides for mediation processes.<sup>409</sup>

---

406 Osei-Hwedie and Rankopo “Indigenous Conflict Resolution” in *Indigenous Methods of Peacebuilding* 33.

407 2 of 2002.

408 In terms of s50(2) the High Court and the District Land and Housing Tribunals are enjoined to recognize any rule of customary law on the grounds that it has not been established by evidence but may accept any statement thereof that appears to be credible and is contained in the record of proceedings. Similarly, subsection 3 thereof provides that where there is any dispute or uncertainty as to any customary law the High Court (Land Division) or the District Land and Housing Tribunal shall not be required to accept as conclusive or binding any evidence contained in the record, instead they should first determine the customary law applicable and give judgement thereon, in a manner that accords provisions of customary law to be established and certain.

409 S 13(3) outlines the guiding principles that must be employed in mediation: Regard must be had to the customary principles of mediation; principles of natural justice where customary principles do not apply and any other principles and practices of mediation in which members have received any training.

(c) South Africa

The communal land tenure will inexorably involve conflicts and disagreements between households and neighbourhoods due to its nature of commonage. Disputes may be discussed or resolved in formal and informal institutions and practices.<sup>410</sup> Van der Waal<sup>411</sup> rightly caveats against the standardization of rules in customary dispute mechanisms since there is a strong likelihood of differences in the practices and customs of different communities. Nonetheless, it has been argued that while these differences may appear immaterial to outsiders, they are expressions of local agency and autonomy that cannot be removed without undermining the collective action essential in the management of common property resources. Adhiambo<sup>412</sup> asserts that South Africa is one of the countries whose indigenous conflict management system is widely recognised and acknowledged throughout Africa.

In cognisance of this issue, section 45 of the CLTB deals with ADR methods of dispute resolution. Section 45(1) thereof requires of parties to a dispute to attempt to resolve a dispute “between themselves”. From this it can be inferred that this is the negotiation method of dispute resolution. Over and above this, similar to the Kenyan and Tanzanian position, disputes occurring in the communal areas are habitually resolved internally by the institution of traditional leadership before they can go through the formal courts channel.

Chapter 12 of the South African *Constitution* likewise, recognises the institution of traditional leadership in South Africa through section 211 (1). Also, the roles of traditional leaders are outlined as dealing with matters

---

410 Okharedia “The Emergence of ADR in South Africa” 1-2. Experience with the implementation of the CPA’s in KwaZulu- Natal has shown that linkages to and support from broader institutions are essential but dispute resolution is a key aspect of local autonomy and realising agency.

411 Van der Waal 2004 <https://www.ascleinden.nl>; Okharedia “The Emergence of ADR in South Africa” 1-2.

412 Adhiambo *Indigenous Conflict Resolution Mechanisms* 3.

relating to traditional leadership and observing customary law and the customs of communities.<sup>413</sup> Based on this recognition, the *TLFGA* was promulgated to resolve disputes in the rural communities. Chapter 6, section 21 of same encompasses a thorough account of the functions of traditional leaders.

In terms of section 21(1) (a), whenever a dispute or claim concerning customary law arises between or within traditional communities on a matter arising from the implementation of the *TLFGA*, members of that community and traditional leaders within the traditional community concerned must first seek to resolve the dispute internally and in accordance with customs. If that fails, the dispute must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules and procedures.<sup>414</sup> If a provincial house of traditional leaders is unable to resolve a claim as shown above, it must be referred to the Premier of the province concerned.<sup>415</sup> If the Premier route fails too and has not been resolved as provided, the dispute or claim must be referred to the Commission.<sup>416</sup>

---

413 Ss 211 and 212 of the *Constitution*; Rugege 2003 *LDD* 188.

414 S 21 (2) (a).

415 S 21 (2) (b).

416 S 21 (3). In terms of s 18(5) of the *CLARA* the Minister could not make a determination in any matters that related to land and rights therein, or to land under dispute until such dispute was finalised through mediation or other alternative traditional or non-traditional dispute resolution mechanisms. The CLTB has deviated from adopting the various ADR methods approach and recognises negotiation and mediation only in the resolution of communal land disputes. Only when either method fails, will the parties adjudicate the matter in the formal courts. S 45(5). When negotiation fails, s 45(2) of the CLTB requires of the parties to approach and institution of their choice between the communal land administration structures but makes no mention of the resolution technique to be used. This is a clear indication that the CLTB does not fully endorse ADR methods.



#### 4.4.3.2. Alternative dispute resolution methods

##### 4.4.3.2.1 Synopsis

Alternative dispute resolution is a mechanism of solving a dispute out of court. According to Mashamba<sup>417</sup> ADR refers to a collective description of process or mechanisms that parties can use to resolve disputes rather than bringing a claim through the formal court structure.<sup>418</sup> ADR methods originated in the United States around the 1970's as an ideological shift in conflict resolution from accusatorial forums of the courts to alternative forums in which mediation and negotiation became the preferred methods for dispute settlement.<sup>419</sup> The forefathers of ADR were desirous to study patterns of social ordering and were particularly concerned with the capacity of court and adversarial litigation to adapt to changes in social conditions.<sup>420</sup> Specifically, the binary nature of litigation is likely to limit its usefulness for complicated disputes that involve deep social conflicts. Thus, they acknowledged that different disputes required different types of processes and the law's function is to set out ideals and standards for civic participation as well as to provide means for settling disputes while also preserving social concord.<sup>421</sup>

Strengthening formal judicial institutions is without a doubt critical. It would be futile to neglect alternative forums and approaches including customary

---

417 Mashamba *ADR in Tanzania* 20.

418 Chavangi *et al.* "Complications in land allocations" 1-11.

419 Fred-Mensah 1999 *WD* 957; Odukwe 2016 *IJSSHR* 173; Mashamba *ADR in Tanzania* 20. Blattman *et al.* 2014 *APSR* 101.

420 Mashamba *ADR in Tanzania* 20; Okharedia "The Emergence of ADR in South Africa" 1-2; Schoeman *ADR Methods as a Tool* 18.

421 Odukwe 2016 *IJSSHR* 173; Schoeman *ADR Methods as a Tool* 18; Pretorius *Dispute Resolution* 4; Trollip *Alternative Dispute Resolution* 41. There are many other forms of ADR method including expert opinion, mini-trial, ombudsman procedures but this study will be confined to the most popular ones namely; arbitration, negotiation, mediation and conciliation since these are acknowledged by the national statutes dealing with community land. Kariuki and Karuiki 2015 <https://www.strathmore.edu>.

institutions and ADR mechanisms such as mediation, conciliation and arbitration to facilitate fair and accessible justice on land matters.<sup>422</sup> To say these are “alternative” dispute resolution is not to say they are inferior to litigation in the settlement of disputes.<sup>423</sup> In many rural communities, property dispute resolution processes are unclear or inaccessible due to lack of facilities, education, or even public sensitization.<sup>424</sup> The presence of multiple and overlapping legal systems further complicates the process of dispute resolution.<sup>425</sup>

Nonetheless, ADR prides itself for being a simple, quick, flexible and accessible dispute resolution system in comparison to litigation.<sup>426</sup> It emphasises win-win situations for both parties, increases accesses to justice, improves efficiency and is prompt. It is also a cost-effective means for dispute resolution that fosters parties’ relationships.<sup>427</sup> Similarly, Fred-Mensah<sup>428</sup> highlights the importance of reducing conflicts over land through the implementation of a functioning land registration and/or cadastral system<sup>429</sup> which need to be supported by additional preventive measures such as conflict resolution, land management and psychotherapeutic approaches.<sup>430</sup> Hence, it can safely be inferred that ADR mechanisms came

---

422 Byamugisha 2016 <https://www.jica.go.jp>. Other techniques include fact finding, expert determination and private judging.

423 Fenn *Introduction to Civil and Commercial Mediation* 50.

424 Henrysson and Joireman 2009 *LSR* 39.

425 Henrysson and Joireman 2009 *LSR* 39.

426 Byamugisha *Securing Africa’s Land for Shared Prosperity* 101; Blattman *et al.* 2014 *APSR* 104.

427 Muigua [Date unknown] <https://www.kmco.co.ke>; Kariuki and Karuiki 2015 <https://www.strathmore.edu>; Maina *Land Disputes Resolution in Kenya* 69.

428 Fred-Mensah 1999 *WD* 954; Chavangi *et al.* “Complications in land allocations” 1-11.

429 Alternative means of securing land tenure as well as curbing land disputes are discussed in chapter 5.

430 Urmilla 2010 *AJCR* 59. ADR relieves congested court dockets while also offering expedited resolution to parties. Second, ADR techniques give parties to disputes more control over the resolution process. The flexibility of ADR is also said to create

about as a result of the need for better quality dispute resolution processes which can in turn be attributed to lack of responsiveness and sensitivity of the judicial system. Also, there was a lack of participation for members of the community in the formal justice system. The win or lose mentality further blemished the already sour social relationships between the disputants at the end of litigation.<sup>431</sup>

Thus, it has been continually accentuated that, to attain secure tenure, a virtuous dispute resolution system has to be put in place. A good structure of resolution of disputes encompasses various types thereto.<sup>432</sup> Those that stand out include arbitration, mediation and conciliation. Fortunately, the *CLA*, *VLA* and the CLTB recognise two of these. This section firstly discusses the various types of resolution of disputes in Kenya, Tanzania and South Africa. The next part scrutinises the efficiency or lack thereof of those methods to determine how they can be improved to suit the needs of the communities in the respective jurisdictions.<sup>433</sup>

---

opportunities for creative remedies that could more appropriately address underlying concerns in a dispute than could traditional remedies in litigation.

431 Mashamba *ADR in Tanzania* 21.

432 Maina's (Maina *Land Disputes Resolution in Kenya* 17) analysis of the Tanzanian Land Acts and the existing local customs governing land indicate that there is need for an efficient formal system of solving land disputes in Tanzania as in Kenya. Land conflicts in Tanzania like Kenya are in profusion as the judiciary is slow and hardly accessible to people thus incapable of dealing with large number of cases.

433 In all three jurisdictions; Kenya, Tanzania and South Africa, ADR and traditional dispute resolution mechanisms are recognized by law. Article 159 of the Kenyan *Constitution* explicitly enjoins courts and tribunals in the exercise of judicial authority, to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. S 41 (3) of the CLTB likewise states that disputants must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before it approaches a court to resolve the dispute.

#### 4.4.3.2.2 Mediation

If the parties in a negotiation hit a deadlock, then they invite a third party of choice to help them resolve their matter and this becomes mediation.<sup>434</sup> Mediation is associated with same advantages as negotiation. In essence, mediation is a process close to negotiation since it is an assisted and facilitated negotiation carried out by a third party.<sup>435</sup> On the other hand, it suffers from its non-binding nature so that where compliance is required, one would have to resort to courts to obtain the same since it does not have enforcement mechanism but relies on parties' goodwill.<sup>436</sup> Mediation is ordinarily a voluntary process, except where the law explicitly dictates it. The parties agree to the process and they control the dispute resolution process.<sup>437</sup> Generally, disputants seek mediation because it is considered to be "cheap, flexible, adaptable, and effective" as a conflict management forum.<sup>438</sup> Mediation normally avoids overt display of power, winner or loser mentality, social scars, and resentment that are normally associated with adjudication. Mediators can be effective when they transform conflict resolution from state of confrontation to that of problem-solving with the ultimate objective of achieving a compromise through the use of the essential tools of ADR.<sup>439</sup>

In principle, mediators are hired, appointed or volunteer to facilitate the process. Nonetheless they should have no direct interest in the conflict and

---

434 Mashamba *ADR in Tanzania* 64; Adhiambo *Indigenous Conflict Resolution Mechanisms* 39.

435 Mashamba *ADR in Tanzania* 64.

436 Maina *Land Disputes Resolution in Kenya* 70; Schoeman *ADR Methods as a Tool* 18; Pretorius *Dispute Resolution* 8; Trollip *Alternative Dispute Resolution* 48; Faris *An Analysis of the Theory and Principles of ADR* 68.

437 Mashamba *ADR in Tanzania* 64; Pretorius *Dispute Resolution* 10; Faris *An Analysis of the Theory and Principles of ADR* 68.

438 Mashamba *ADR in Tanzania* 65; Pretorius *Dispute Resolution* 4; Trollip *Alternative Dispute Resolution* 48; Faris *An Analysis of the Theory and Principles of ADR* 68.

439 Mashamba *ADR in Tanzania* 64; Fred-Mensah 1999 *WD* 957-8.

its outcome as well as no power to render a decision. Therefore, mediators have control over the process of mediation but not its outcome.<sup>440</sup> The role of mediators in this regard is to help disputants to think in new and innovative ways, to avoid the pitfalls of adopting rigid positions instead of looking after their own interests, to level the discussions lest there is animosity and, finally, to steer the process away from negative outcomes and possible breakdown towards joint gains.<sup>441</sup> Therefore, a mediator should be a knowledgeable and experienced person in the subject matter of the dispute.

#### (a) Tanzania

The *Ward Tribunals Act*<sup>442</sup> was one of the first statutory enactments in Tanzania to recognise ADR, specifically mediation. It places limited judicial power unto ward tribunals and emphasizes that mediation should be used as much as possible to resolve disputes brought before them.<sup>443</sup> Similarly, the dispute settlement provisions in the *VLA* are enshrined in sections 60-62.<sup>444</sup> In terms of the *VLA*, any matter concerning village land has to be mediated upon by a duly appointed village council in order to assist the disputants to arrive at a mutually acceptable solution.<sup>445</sup> The village council is in turn responsible for establishing a village land council whose membership should

---

440 Mashamba *ADR in Tanzania* 64.

441 Mashamba *ADR in Tanzania* 64; Faris *An Analysis of the Theory and Principles of ADR* 68.

442 7 of 1985. Lawi 1997 *ASQ* 1.

443 Mashamba *ADR in Tanzania* 43.

444 As has been warned above, settlement of disputes is a misnomer since "settling" disputes does not achieve the intended object of alternative disputes techniques. The correct way is resolution of dispute which implies that the parties have chosen how best to resolve their dispute, after which it can safely be said it has been resolved and all the parties are satisfied instead of them "settling" to whatever decision is imposed on them.

445 S 60(1). The village land council in a mediation has to have resort to; any customary principles of mediation, natural justice if customary principles of mediation do not already provide for them and any principles and practices of mediation that the mediators could have received in their training. See s 61(4) (a)-(c).

consist of not less than 20 per cent females. All the members of the village land council must be nominated<sup>446</sup> by the village council and approved by the village assembly.<sup>447</sup> The convenor of the village land council is charged with the responsibility of appointing any member of the council to act as a mediator should any dispute regarding village land occur.<sup>448</sup> This goes against the very core principles of mediation. The basic understanding in mediation is that the disputants are allowed to choose their own mediator who will at all times appear to be neutral.

Mediation under the *VLA* is thus flawed in that it resembles formal court processes where one is not at liberty to choose who to preside over their dispute. In the same manner, a mediator who is a member of the village land council may only be excused of his role, if any of the disputants is a family member or has any interest in the dispute before him. Thus, a disputant's only ground for the application of a potential mediator's recusal would be to prove that the latter has a "direct interest" in the matter to be mediated upon.<sup>449</sup> As stated above, where the parties to a dispute are dissatisfied with the finding of the village land council, they may refer their dispute to a court having jurisdiction over the object of the dispute.<sup>450</sup>

---

446 S 60 (4) provides that the village council should have regard to the standing and reputation of a nominee in the village as a person of integrity and with knowledge of customary land law. Automatic disqualification to be elected or nominated as a village land council is if that person is not a resident of the village in question, a member of the National Assembly, a magistrate of the district where the village is situate, anyone under the age of 18, convicted persons and non-citizens of Tanzania. See s 60(5) (a)-(g) and s 5(2) *Courts (Land Disputes Settlements) Act*. S 5(1) *Courts (Land Disputes Settlements) Act*.

447 S 60(2) (a) and (b).

448 S 61 (2) (b).

449 S 61(5).

450 S 62(1). S 62 (2) lists the courts that are vested with exclusive jurisdiction in terms of the *VLA* and the *Land Act*. These courts can hear and determine all disputes, actions and proceedings concerning land (in descending order);  
 (a) the Court of Appeal;

In 2002 the *Courts Act*<sup>451</sup> was promulgated and its main object was to provide for the establishment of land dispute settlement machinery and for all matters incidental thereto.<sup>452</sup> Section 3 thereof provides that all land matters must be decided by a competent court having jurisdiction in the given area.<sup>453</sup> In so far as the procedure for the mediation processes is concerned, section 8 of the *Courts Act* points in the direction of section 61 of the *VLA*, the latter is silent in this regard. Section 61(2) provides for what the convenors have to do once they are made aware of eminent mediation process (appointment of mediators and convening a meeting), it does not show the actual technique that should be followed in the mediation process.

Thus, there is no clear method that has to be followed for mediation processes in Tanzanian land matters, hence the inference is that the normal mediation rules apply.<sup>454</sup> In a nutshell, both the *VLA* and the *Courts Act* do not give a clear picture on whether *other* ADR's are recognised since the former only mentions mediation and leaves out other techniques. As shown above, the *VLA* is silent on the procedure to be followed when mediating land disputes. The *Courts Act* is an even bigger disappointment since it deals mainly with "land disputes settlements" but fails to differentiate and employ the different methods of solving disputes.

- 
- (b) the Land Division of the High Court;
  - (c) the District Land and Housing Tribunal;
  - (d) the Ward Tribunal; and
  - (e) the Village Land Council. See s 9 of the *Courts Act*. See also s 3 *Courts Act*.

451 2 of 2002.

452 Preamble to the Courts (Land Disputes Settlements) Act 2 of 2002.

453 S 3 (2).

454 S 13 (3) and (4) shed some light in this regard and provide that the Tribunal in performing its function of mediation has to have regard to any customary principles of mediation or any principles and practices of mediation in which members have received any training.

(b) South Africa

None of the statutes in South Africa give a clear definition of what mediation is, instead they resort to what the process of mediation entails. In following More's and Berry's line of thought, Cousins<sup>455</sup> asserts that land policies must aim to strengthen institutional spaces for the mediation of competing claims in land. Consequently, he<sup>456</sup> recommends that there should be greater support for institutions and procedures that uphold mediation principles, more so at the community level. The CLTB like the *VLA* and *CLA* acknowledges mediation as an alternative dispute settlement method. In terms of section 45(2) of the CLTB, in event that the disputants cannot overlook and accept the conclusions they arrive at in a negotiation, the dispute should be directed to the traditional council, the CPA or the Household Forum for mediation. If the matter that is forwarded for mediation is not finalised within three months from its institution, the below-mentioned procedure must be effected.<sup>457</sup>

The DG is authorised to select and appoint a mediator in this regard.<sup>458</sup> The parties to a dispute may apply to the Minister and showcase their dissatisfaction with the previous findings and the Minister is then enjoined to designate a Department Official who has adjudication skills to help resolve the dispute.<sup>459</sup> Alternatively, the Minister has to appoint and *adjudication* committee which must be chaired by a person knowledgeable in law.<sup>460</sup> At this point, should either party not be satisfied with the conclusion of the

---

455 Cousins "Potential and Pitfalls of 'Communal' land tenure reform" 1-21; Faris *An Analysis of the Theory and Principles of ADR* 68.

456 Cousins "Potential and Pitfalls of 'Communal' land tenure reform" 1-21; Faris *An Analysis of the Theory and Principles of ADR* 68.

457 S 45(6).

458 S 45(3). Same sentiments expressed in the Tanzanian perspective apply. The basic rule of mediation is for the disputants to choose their own mediator but the legislation does not capture this very important principle.

459 S 45(4) (a).

460 S 45(4) (b). The use of the word "adjudication" in a mediation provision is wrong.



adjudication committee, he/she must then approach the formal courts for relief.<sup>461</sup> Similar to the *VLA*, the CLTB does not only omit the procedure to be followed in mediation, but it also imposes a mediator on the disputants, instead of leaving the appointment of the mediator to the disputants, to choose themselves, which goes against the very nature of a mediation process. Rycroft<sup>462</sup> strongly believes that mediation has not become successful in South Africa for the following reasons;

- Firstly, the core reason for failure in the mediation process is because it is left to the discretion of the public officials. Leading legislation endorsing this principle includes the *Restitution of Land Rights Act*,<sup>463</sup> where only the Chief Land Claims Commissioner can refer a dispute for mediation. *The Land Reform (Labour Tenants) Act*<sup>464</sup> also authorises the DG alone, to appoint a mediator for any land disputes. Correspondingly, the discretion to mediate a dispute in terms of the *Prevention of Illegal Eviction from and Occupation of Land*<sup>465</sup> rests with the municipality alone.
- Secondly, there is no provision in any of the statutes that provides for the remuneration of the mediators.
- Thirdly, the legislation often makes a mistaken assumption that there is a trained panel of mediators in all fields of law, on standby for any dispute that is referred for mediation. He<sup>466</sup> concludes therefore that there is a need for the institutionalisation and training of panels.

---

461 S 45(5).

462 Rycroft 2009 <https://www.usb.ac.za>.

463 22 of 1994 s 13 thereof.

464 3 of 1996 s 18(3).

465 19 of 1998 s 7.

466 Rycroft 2009 <https://www.usb.ac.za>.

In the same manner, the High Court Rule 37 (6) (d) requires of parties to report to the court if the issue being brought before the High Court has previously been referred for ADR by the parties. This measure is to ensure that the parties have considered the appropriateness of ADR methods to their dispute. Kotze,<sup>467</sup> reported that this Rule has for the most part been ignored by parties and practitioners alike.<sup>468</sup>

The case of *Brownlee v Brownlee*<sup>469</sup> is subsequently analysed to illustrate this Rule. This case dealt with a disputed divorce and both attorneys claimed that there were no benefits to be gained by either party were mediation processes to be invoked. While noting that there were indeed such benefits, the judge held that the legal practitioners ought to have advised their clients that mediation would have saved legal costs and time. Instead, because they stood to gain financially, they did not. Furthermore, had the clients been forewarned, they would not have abandoned such benefits.

The Court decided that both counsel forfeit service fees, save for taxation costs. Consequently, the *Brownlee* decision has cemented the following principles in the South African legal system:

- (i) Parties to a dispute are enjoined to consider the appropriateness of mediation.
- (ii) Disputes must be referred to mediation where there is a reasonable potential of mediation contributing to the settlement of disputes.

---

467 Kotze 2009 <https://www.ubs.ac.za>.

468 The South Gauteng High Court and the Western Cape High Court have gone as far as creating Practice Directives and Notes to deter non-observance of Rule 37.

469 25 August 2009 (Unreported) South Gauteng High Court.

(iii) Attorneys have a duty to advise their client to the benefits of mediation.<sup>470</sup>

(c) Kenya

The Kenyan *Civil Procedure Act*<sup>471</sup> defines mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties. This Act was amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process.<sup>472</sup> There is a court-mandated mediation in Kenya as in South Africa, but over and above this, Kenya also has a court annexed mediation wherein parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment.<sup>473</sup> Mediation is conducted in accordance with the Mediation Rules,<sup>474</sup> sub clause 4 which provides for an agreement between the parties to a dispute that it be recorded and registered with the court giving direction. This is to ensure that it is enforceable as if a judgment of that court thus not appealable. This is the correct way that a mediation process should go instead of having a mediator imposed on the parties to a dispute as in Tanzania and South Africa. Additionally, the Kenyan mediation procedure under the Mediation Rules is more effective than in Tanzania and South Africa since its decisions are final and cannot be appealed.

---

470 Kotze 2009 <https://www.ubs.ac.za>

471 Caps 21, Laws of Kenya.

472 This amendment of the Act required the setting up of a Mediation Accreditation Committee by the Chief Justice. The Environment and Land Court is established in terms of s 4 of the Environment and Land Court Act. As the name suggests, this court has jurisdiction to hear disputes relating to environment and land in Kenya.

473 Muigua 2015 <https://www.kmco.co.ke>.

474 GG 37448 of 18 March 2014.

In terms of section 40(1) of the *CLA*, parties to a dispute may agree amongst themselves that they will use mediation to resolve their dispute. This mediation may either apply in an informal or formal setting where the disputants will participate and also design the format of the settlement agreement.<sup>475</sup> The responsibilities of the mediator in this instance include:

- convening meetings and keeping records of the proceedings;
- establishing ground rules for the conduct of disputants as well as clarifying the facts and issues to be resolved; and
- finally, resolving the dispute.<sup>476</sup>

If and when an agreement is reached, the parties thereto must affix their signatures on the said agreement at the conclusion of the mediation.<sup>477</sup> This agreement will then be binding on the parties to the dispute, in so far as the principles of contract are concerned. According to Chavangi<sup>478</sup> a case in point where ADR would have been appropriate is the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.<sup>479</sup>

---

475 S 40 (2).

476 S 31 (3) (a)-(c).

477 4 of 1995.

478 Chavangi *et al.* "Complications in land allocations"1-11.

479 <https://caselaw.ihlda.org/doc.276.03>. In the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, the Endorois community was fighting against violations resulting from their displacement from their ancestral lands without proper prior consultations, adequate and effective compensation for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of their development as a people. On the contrary, the application of the ADR techniques was not given any priority. Instead, the court process was applied duly, which was long and very costly.

#### 4.4.3.2.3 Arbitration

##### (a) Kenya

The *Arbitration Act*<sup>480</sup> defines arbitration to mean any arbitration whether or not administered by a permanent arbitral institution.<sup>481</sup> Arbitration has been defined as a process subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choice.<sup>482</sup> The *Arbitration Act* governs the application of arbitration in Kenya. It covers the different aspects of the arbitral process including the preliminaries, general provisions, composition and jurisdiction of the arbitral tribunal, conduct of the proceedings, award and termination of arbitral proceedings, recourse to the High Court against an arbitral award and recognition and enforcement.<sup>483</sup>

Arbitration follows strict rules since the arbitrator is expected to make suggestions on the best way forward. The arbitrator has decision-making powers which render arbitral awards final.<sup>484</sup> Similarly, sections 39 through 42 of the *CLA* make provision for dispute resolution mechanism in respect of community land, particularly arbitration. In terms of section 40(1) of the *CLA*, the parties to a dispute may choose to invoke arbitration measures to resolve their dispute, in which case they will have to appoint an arbitrator of their

---

480 Cap. 49 Laws of Kenya (Revised, 2010). The *Arbitration (Amendment) Act* 11 of 2009 came into force in January 2010 to supplement the *Arbitration Act*.

481 S 2 and 3.

482 Muigua *Settling disputes through arbitration in Kenya* 112; Cheboror *ADR in Settling Land Disputes* 12.

483 S 12(9) of the *Arbitration Act* (as amended by s 8(1)(a)-(c) of the Amendment Act) provides that disputing parties are at liberty to choose the number of arbitrators they wish to have. Where the arbitration tribunal is to comprise of one arbitrator the parties should agree on who to choose but where the tribunal is to comprise of three arbitrators then each of the parties choose one arbitrator then the arbitrators agree on the third person to appoint. If the parties fail to appoint an arbitrator, the high court of Kenya is authorised to appoint one or give instructions as to an arbitrator's appointment.

484 Cheboror *ADR in Settling Land Disputes* 12; Muigua *Settling disputes through arbitration in Kenya* 112.

choice. If they cannot agree on an arbitrator, the appointment thereof will be governed by the *Arbitration Act*. The arbitral award is binding on the parties to the dispute.

(b) South Africa

The South African concept of arbitration owes its roots to English and Roman-Dutch Law.<sup>485</sup> A broad definition of arbitration describes it as an adversary process whereby an independent third party, chosen by the parties, makes an award binding on the parties after having heard submissions from them.<sup>486</sup> Arbitration in South Africa is governed by the *Arbitration Act*,<sup>487</sup> which outlines rules and guidelines for the successful application and enforcement of arbitration laws in South Africa.<sup>488</sup> Its object is to provide for the settlement of disputes and the enforcement of awards by arbitral tribunals. Nonetheless, for it to apply, the parties thereto must have agreed beforehand that they will follow such action if and when a dispute arose between them. In this regard the normal rules of contract apply. In the same way, the binding effect of arbitration awards is provided for in section 3 through 8 in the *Arbitration Act*.

Despite this binding nature of the arbitral awards, the formal courts have the authority to set aside arbitration agreements, to order a dispute referred to arbitration be retracted or it may also give an order to the effect that the arbitral award ceases to have effect.<sup>489</sup> While this step ensures accountability by arbitration tribunals it also undermines the authority of the arbitration tribunals as parties to an arbitration agreement may seek recourse in the

---

485 Faris *An Analysis of the Theory and Principles of ADR* 83.

486 Faris *An Analysis of the Theory and Principles of ADR* 68.

487 42 of 1965.

488 Article 16.

489 Mashamba *ADR in Tanzania* 15; Faris *An Analysis of the Theory and Principles of ADR* 78.

formal courts. Finally, The CLTB and the *TLFGA* are silent on the arbitration technique, therefore, the discussion is confined to mediation as discoursed above.

#### (c) Tanzania

As detailed and bulky as the *VLA* and the *Courts Act* are, there is no mention of arbitration as a means of dispute resolution technique in Tanzania.

#### 4.4.3.2.4 Conciliation

Conciliation involves a third party who is called a conciliator and is expected to restore damaged relationships between the disputants by bringing them together, clarifying perceptions and pointing out misperceptions. Conciliation is useful in reducing tension, opening channels of communication and facilitating continued negotiations.<sup>490</sup> This method of dispute resolution is not common in any of the jurisdictions of the study and as such, is not discussed any further.

### **4.5 Conclusion**

#### *4.5.1 Tenure security*

The land administration structure of communal land in South Africa is the land administration committee and is duly assisted by the household forum in its land administration function. This committee can either be a CPA or the institution of traditional leadership. In Tanzania the village council is entrusted with the land administration function and is answerable to the village assembly. Finally, the land administration function is carried out by the community land management committee. These institutions must carry their function in terms of the community rules.

---

490 Amman and Duraipappah 2004 *EDE* 383.

Over and above this, women's marginalization is not getting better, even with the promulgation of the most recent statutory enactments. Even with some legislation in place, customary practices continue to treat women as minors incapable of controlling their own land. As has been shown above, it may be erroneous to attribute this relegation to a single cause. Whatever the cause may be, one thing that every one of the authors has in common is that it needs to stop. A few of the principles that stood out within the legislation are discussed below.

#### *4.5.2 Women's access to communal land*

##### *4.5.2.1 Inheritance*

The KNLP, the TNLP and the South African Land Policy alike, emphasized over and over that women's tenure in land is insecure while also noting that there was conflict between constitutional and international provisions on gender equality as against customary practices which marginalizes women in relation to land access and inheritance. Yngstrom<sup>491</sup> rightly asserted that the problem of women's land insecurity is not one to be solved by institutional reform, but by repealing and replacing discriminatory laws. Similarly, these policies urged the law makers to repeal all discriminatory laws and replace them with those that acknowledge women as capable heirs to their husbands'/fathers' property. This implies that it should not matter whether a woman is married, has been married or never married; she is eligible for inheritance of land/property. Despite the recommendations of these policies, the *CLA*, *VLA* and *CLTB* have not incorporated the provisions that repeal customary practices of inheritance as invalid. The *CLA* makes provision for a widow to remain on her and her husband's property after his death, but only

---

491 Yngstrom 2002 *ODS* 25.



for as long as she stays unmarried. This implies that when she re-marries she loses the right of occupation. This is a beneficial provision, but it is still insufficient because it makes no mention of divorced and single women.

#### 4.5.2.2 Gender parity

A *prima facie* observation of the three statutes shows that gender equality is observed and respected in all three jurisdictions. These statutes require that women be treated with respect and on an equal footing with their male counterparts in all matters especially land matters. It is interesting to note that inheritance issues are mostly left to customary practices of each community. This is a negation in terms since most customary practices in rural communities do not observe gender equality and this is discrimination based on sex. What is worse is that even the lawmakers themselves are aware of these discriminatory practices. This is despite the standards set in section 20(2) of the *VLA*, section 3 of the *CLTB* and section 14 of the *CLA*.

#### 4.5.2.3 Female representation in decision-making bodies

It would seem that Tanzania and South Africa allow female representation on their village institutions. Despite Kenya having a very recent Act, it does not make provision for female representation on their land administration bodies. Specifically, section 15(1) makes provision that a registered community must have a community assembly that composes of adult members without recourse to the gender of those members.

A feature common to all three jurisdictions is that they remain faithful to the traditional dispute resolution method, especially when it concerns communal/community land disputes. Similarly, it becomes evident through the respective legislations that litigation is still not popular in rural communities. In as much as it can be concluded that all three statutes

observe alternative dispute resolution methods, different techniques are adopted by same. For example, it is clear that Tanzania's most preferred method of dispute resolution is mediation, while in Kenya arbitration takes precedence. In South Africa, it is not as clear as the CLTB touches briefly on all techniques. The *TLFGA* too, sheds no light in this regard. Conciliation on the other hand, seems not to be popular in all three countries. This could be attributed to the historical confusion between conciliation and arbitration since at some point in time these concepts were used synonymously.

One might point out that the lines between the techniques are very blurred, therefore, lawmakers often overlook the finer details; after all, they are not all lawyers. Moreover, it is very easy to confuse concepts when dealing with traditional dispute resolution techniques since they are infused with other ADR mechanisms. Clearly, this could prove beneficial or disastrous. The collective benefits come carrying the collective shortcomings of all techniques that are employed. As mentioned before, an effective dispute resolution system directly implies more secure tenure. Therefore, seeing that community land forms a majority part of land in Kenya and Tanzania but not in South Africa, there is a need to strengthen and improve dispute resolutions systems. With less than 20 percent of communal land in South Africa being occupied by about a third of the overall population (Black people), this implies that their tenure insecurity needs to be secured as matter of urgency.

The next chapter illustrates the different methods of securing land tenure. Despite South Africa, Tanzania and Kenya having chosen the statutory route for the protection of the communal land tenure, it is shown that the land rights protection techniques are different.

## CHAPTER FIVE

### ALTERNATIVE APPROACHES USED TO SECURE COMMUNAL LAND TENURE IN SOUTH AFRICA, TANZANIA AND KENYA

#### *5.1 Introduction*

In the foregoing chapter, the communal land tenure systems of South Africa, Tanzania and Kenya were analysed to show the resemblances or dissimilarities thereto. For each jurisdiction, the governing legislation was scrutinized insofar as it relates to tenure security, women's access to communal land as well as the resolution of disputes. In these discussions, community ownership of land commands communities to determine their membership and boundaries to ultimately be recognised as "owners" of the land. In the current chapter, the discussion looks into the different ways in which the communal landholding can be secured through formalisation.

The notion that there are different ways to establish land tenure security is universal. One school of thought expounds that land issues are complex, uncertain, ambiguous and constantly evolving.<sup>1</sup> As such, they contend that land relations should be organised by a decentralised system rather than having uniformity imposed on them. Conversely, opponents argue for a centralised and computerised land administration.<sup>2</sup> Thus, Mostert<sup>3</sup> acknowledges that the issue of communal land tenure security is convoluted and calls for a response from the angle of review and reform of the registration systems. For her<sup>4</sup> different systems of tenure need to be recognised in a way that acknowledges both their diversity of preferences and their common need for security of landholding. With the internet

---

1 Ntsebeza 2002 [https:// www.dlc.dlib.indiana.edu](https://www.dlc.dlib.indiana.edu); Agrawal 1999 *JDA* 35.

2 Mostert 2011 *PELJ* 92; Pienaar 2013 *JHSF* 21.

3 Mostert 2011 *PELJ* 94; Pienaar 2013 *JHSF* 21.

4 Mostert 2011 *PELJ* 94.

becoming such an integral part of life, there has been an increased need for electronic service delivery.<sup>5</sup>

Furthermore, land tenure security problems raise governance issues. It is trite that secure tenure and access to land are necessary for economic growth and social development.<sup>6</sup> Nonetheless, exertions meant to secure tenure, restore rights and enhance the negotiability of land have stemmed in tenure insecurity of vulnerable groups and further marginalisation of the poor.<sup>7</sup> At the same time, there is wide variation in understandings of land tenure rights and in priorities for rights recognition across actors and contexts.<sup>8</sup>

This chapter explores and assesses the different forms of securing tenure in communal land; different systems of land registration are scrutinized to determine if they are better-suited for the communal land tenure system. The communal legislation of the three selected jurisdictions namely, South Africa, Tanzania and Kenya is discussed in light of the intended land registration system that each follows. This is done by studying the registration techniques followed by each of these statutes. As has been shown in the preceding

---

5 In South Africa, there were ongoing investigations into the computerised land registration system since 1998 and this resulted in the Deeds Registries Amendment Bill whose objectives are to:

- Facilitate the enactment of electronic deeds registration provisions.
- Effect the registrations of large volumes of deeds as necessitated by the Government's land reform initiatives.
- Expedite the registration of deeds by decreasing the time required for deeds registration process. Pienaar (Pienaar *JHSF* 21) believes this system will enable conveyancers to utilize the paperless lodging and electronic verification of data (on cancellation or new registration of bonds).

6 Banda "Romancing Customary Tenure" in *The Future of African Customary Law* 314; Larson and Springer 2016 <https://www.iucn.org>; Torhonen 2004 *CEUS* 573.

7 Larson and Springer 2016 <https://www.iucn.org>.

8 Lengoiboni and Molendijk 2015 <https://www.itc.nl>; Lengoiboni *Pastoralists seasonal land rights* 15; Torhonen 2004 *CEUS* 547. Torhonen caveats that it is difficult if not impossible, to formulate a general, global concept of land administration since different systems have evolved over hundreds of years and reflect the culture and the society they serve.

chapters, communal land tenure is an extremely inimitable land tenure system and as such calls for registration systems just as unique.

#### *5.1.1 The foundations of secure property rights*



Figure 5.1.1. Illustrating the basic tenets of a secure land tenure system.<sup>9</sup>

---

9 Model by Heathcote "Land and Property Rights: Secured and Protected".

Conclusive title in land is guaranteed when rights therein are enforceable against third parties and are confirmed by the authorities in the event of being contested without due cause. Nonetheless, to secure such title, boundaries of the land in question must be clearly marked. To guarantee rights in land, the land in question must first be determined and ascertained although not necessarily by a land survey procedure. Furthermore, it has been shown that an effective land registration system is one which wards off land disputes. In respect of state guarantees, it is the duty of the state to guarantee landholder's rights, this can be done through legislation or regularization of informal land rights. Although legislation cannot singlehandedly secure land tenure, it goes without say that a legal framework is necessary for any registration programme to function and bring about the desired outcomes.<sup>10</sup>

Thus, the purpose of a formalised structure should not be the individualisation of communal land but the security offered by the information that is recorded and publicized. The existence of written documents significantly increase land tenure security. The documents must;

- be reliable and socially recognised;
- reflect legitimate rights;
- be accessible and reliable; and
- be up-to-date.<sup>11</sup>

---

10 Pienaar 2013 *JHSF* 24; Author unknown *Formalising Land Rights* 18; Lamour 2002 *PAD* 155.

11 Pienaar 2013 *JHSF* 24; Author unknown *Formalising Land Rights* 18; Lamour 2002 *PAD* 155.

## **5.2 Land formalisation through registration**

Formalisation of land rights in the context of property rights refers to the process of allocating legally recognized rights in land.<sup>12</sup> Its goal is to integrate informal sector actors into the formal sector through the provision of duly recorded and publicized information.<sup>13</sup> Formalisation through registration of land rights is not a new phenomenon. Back in the 1980's private titling of informal land tenure was promoted as the best way of securing and protecting land users from arbitrary dispossessions.<sup>14</sup> Towards the end of the 1990s there was a paradigm shift regarding land tenure policies in many African countries, Tanzania, Kenya and South Africa included. This move has placed attention on the already existing customary rights or interests under the communal tenure systems.<sup>15</sup> If this is to be attained, it must be guided by robust policy frameworks and led by effective implementing institutions.

Nonetheless, it must be forewarned that formalising land rights does not in any way guarantee secure land rights, although each process is supposed to contribute to the other.<sup>16</sup> Interpretations of formalisation can be categorized into narrow and broad views. The narrow view is best linked to the legalist school and importantly to the work of Hernando de Soto,<sup>17</sup> while the broader view directly involves the case of monitoring and enforcement. Of particular importance are the regulatory institutions that are mandated with the responsibility of monitoring and enforcing, thus, ensuring adherence to

---

12 Meinzen-Dick and Mwangi 2007 *LUP* 3; Bromley 2008 *LUP* 20; Zevenbergen 2002 <https://www.ncgeo.nl>.

13 Pienaar 2011 "Land Information" in *Acta Juridica* 259; Bienart 2017 <https://www.gga.org>; Ferreira-Snyman & Ferreira 2006 *SAYIL* 57; Botha 2008 *THRHR* 490.

14 Author unknown *Formalising Land Rights* 15; Krantz "Securing Customary Land Rights" 1-3; refer to s 2.1.1 in chapter 2.

15 Krantz "Securing Customary Land Rights" 1-3; Toulmin and Quan "Formalizing and securing land rights in Africa" 2-3.

16 Bromley 2008 *LUP* 20; Author unknown *Formalising Land Rights* 18.

17 Bromley 2008 *LUP* 20.

legislation. Speigel and Hilson<sup>18</sup> both concur that formalisation speaks not only to the presence of legislation, but to its activation and enforcement by authorities. Thus, the key qualification in formalisation is that it involves the activation and enforcement of legislation by authorities.

While formalisation of land rights can help protect against land invasions or competition for rights, this is not guaranteed and thus requires on-going vigilance, time and resources.<sup>19</sup> It is said to be a cost-effective way of providing rural communities with some basic tenure security over their territories, given the escalating global competition for land.<sup>20</sup> The implementation phase of formalisation is relatively easy and participative since the demarcation of community boundaries is based on the knowledge and agreements between community members.<sup>21</sup> Thus, this involvement is a process with strong empowerment potential and also a possible deterrent of inter-community conflict.<sup>22</sup> Over and above this, the formalisation technique encourages an integrated land use plan by having one administration system to deal with individual, communal and agricultural lands.<sup>23</sup>

Conversely, formalisation of land rights can also be used to undermine socially recognized rights in land and with the full power of the state, be an instrument of dispossession for purposes of private accumulation and, more

---

18 Speigel 2015 *SNRIJ* 551; Hilson 2015 <https://www.mdpi.com>.

19 Boone 2017 <https://www.wider.uni.edu>; Author unknown *Formalising Land Rights* 16; Bromley 2008 *LUP* 20.

20 Twomey 2014 <https://www.rsc.ox.ac.uk>; Maganga *et al.* 2016 *AJAS* 6.

21 Krantz "Securing Customary Land Rights" 3-6; Author unknown *Formalising Land Rights* 16.

22 Krantz "Securing Customary Land Rights" 3-6.

23 Krantz "Securing Customary Land Rights" 3-6; Bromley 2008 *LUP* 20. Hitherto, the formalisation policies have had very mixed results in both urban and rural areas: this could be attributed to reasons that they are rarely implemented nationwide and few land information systems are kept up to date. Of more concern is the fact that huge operations to formalise land rights can contribute to exclusion, especially when they are exclusively based on private ownership.



often than not, conflicts with ancestral or communal rights.<sup>24</sup> Thus, upholding the “new formalised rights” often means overriding the rights of those who claim ancestral rights as “original inhabitants” or first-comers, etc.<sup>25</sup> Similarly, leaving the land administration functions to be regulated by customary law, gives arbitrary powers to traditional leaders who do not always have the interests of the community members at heart.<sup>26</sup>

### 5.2.1 Models of formalisation

#### 5.2.1.1 The Plans Fanciers Ruraux model

The formalisation system follows the rural land use plans otherwise called the *plans fanciers ruraux* (hereinafter the PFR).<sup>27</sup> The PFR aims to formalise land rights through registration whether individual or communal, where customary systems are strongly upheld.<sup>28</sup> The PFR model essentially records or documents customary rights and interests in land as they exist on the ground. Nonetheless, the difficulty therein cannot go unnoticed given the complex nature of customary land rights. Their nestedness implies that all rights and interests in the land in question must be recorded as accurately as possible to avoid the risk of conflict at a later stage. In a nutshell, there is a great difficulty in capturing the knittedness of communal land rights, hence, also difficult to design a land administration system that is capable of

---

24 Maganga *et al.* 2016 *AJAS* 35; Byamugisha *Securing Africa's Land* 7; refer also to the arguments raised against *CLARA* in s 3.2 of chapter 3.

25 Boone 2017 <https://www.wider.uni.edu/>; Cousins and Hall 2011 <https://www.africaportal.org>.

26 Bennett *et al.* 2013 *LUP* 30; Pienaar 2011 “Land Information” in *Acta Juridica* 248; Cross “Reforming land in South Africa” 105-106. *Tongoane* and *Bakgatla-ba-Kgafela* cases; ss 3.4.2 and 3.5.1 chapter 3.

27 The model first started in West Africa and has slowly gained popularity throughout Africa.

28 Krantz “Securing Customary Land Rights” 3-6; Chauveau and Collin “Changes in Land Transfer Mechanisms” in *Changes in customary land tenure systems in Africa* 66.

incorporating their diversity.<sup>29</sup> In this light Pienaar<sup>30</sup> suggests that an affordable and accessible register of communal land rights should follow the following guidelines:

- It should be a computerised register of persons, households and families, and rights exercised by them within a cadastrally defined or surveyed piece of land.<sup>31</sup>

By determining the rightful right (interests) holders, the land information process becomes easier because in that way the system establishes who has what interests in what land (property). In this light, Pienaar<sup>32</sup> suggests a model that combines land information and a registration system following at a later stage if necessary. A land information template is used to develop a model that documents and records communal land tenure in its multi-dimensional context. Once the recordable components of common property are identified, a corresponding database template, in relation to a specific unit of land, must be created with information relating to all right or interest holders.

- The system must provide for complex, overlapping, fragmented use rights associated with communal land tenure by recognising secondary and more distant right-holders.<sup>33</sup>

Not all communal land rights or interests are clearly defined. Thus, those that are not recognised at a national level but accepted by local communities must also be protected.

- The communal rights, even when registered, must be exercised in group context according to generally accepted rules, e.g. inheritance rules, alienation only with consent of the group and limitations imposed by the

---

29 Krantz "Securing Customary Land Rights"15-16; Pienaar 2011 "Land Information" in *Acta Juridica* 248.

30 Pienaar 2011 "Land Information" in *Acta Juridica* 267.

31 Pienaar 2011 "Land Information" in *Acta Juridica* 267

32 Pienaar 2011 "Land Information" in *Acta Juridica* 268; Nkambwe [Date unknown] *IAPRSSIS* 115.

33 Pienaar 2011 "Land Information" in *Acta Juridica* 267

group, or the administrative system in which the rights are being exercised.<sup>34</sup>

The abovementioned concept aligns well with the fit-for-purpose approach in land formalisation. When the rights that exist at the ground level are documented, it is easier to retain the status quo.<sup>35</sup>

- The land information system should form a separate part of the central land registration system so that information of these rights will be accessible whenever a search is conducted in the land register.<sup>36</sup>

A decentralised land administration is easier to manage in that all the transactions that take place within the community are available to whoever needs them. Likewise, all matters incidental to the running of the common property can be altered if need be.

- Information on the limitation of the rights by group members or the administrative system in which the rights are exercised must be recorded.<sup>37</sup>

#### 5.2.1.2 The statutory or legislative model

Sundet<sup>38</sup> concurs that the first stage in formal recognition is to get the legal framework in place to establish the right in general terms, thus allowing specific communities to apply for recognition under the new legislation. Nevertheless, Pienaar<sup>39</sup> expounds that legislation on its own is not adequate to obtain secure land tenure; a more satisfactory result can be obtained by formalising through an additional and suitable information and recording system. This reform requires overcoming resistance to indigenous and community rights from multiple arenas.

---

34 Pienaar 2011 "Land Information" in *Acta Juridica* 267.

35 Pienaar 2011 "Land Information" in *Acta Juridica* 258; See also arguments against *CLARA* in chapter 3.

36 Pienaar 2011 "Land Information" in *Acta Juridica* 267.

37 Pienaar 2011 "Land Information" in *Acta Juridica* 267.

38 Sundet 2006 [https://www. /landportal.info](https://www.landportal.info).

39 Pienaar 2013 *JHSF* 24.

Formalisation has previously prioritised private individual rights over collective rights; this can sever the web of multiple legitimate and distinct claims of the marginalised and impact sustainability where collective governance is a better fit with the management needs of ecosystems and resources.<sup>40</sup> Thus, some governments opt for the recognition of customary land rights through the promulgation of laws which vest “ownership” over such land in the institution of traditional leadership, which holds it on behalf of the communities. Yet, because of the wide powers that the traditional leaders were given in land matters, most have abused these powers for personal benefit.<sup>41</sup> In an effort to deter these practices, the focus shifted from traditional authorities to village institutions (structures) wherein the former have little or no say in how the land will be administered. The Kenyan *CLA*, the Tanzanian *VLA* and the South African CLTB endorse this aspect of the model in that the communal land is vested in the village bodies (institutionalized land boards) that can administer land on behalf of all community members.<sup>42</sup>

#### 5.2.1.3 The communal model

As has been emphasized in the preceding sections, there have been paradigm shifts in the land tenure systems over the years. In the World Bank’s recent land tenure report, it was recommended that the communal land tenure systems be revisited. It would seem that the retention of communal tenure

---

40 Boone 2017 <https://www.wider.uni.edu>; Pienaar 2011 “Land Information” in *Acta Juridica* 259.

41 Bennett *et al.* 2013 *LUP* 30; Pienaar 2011 “Land Information” in *Acta Juridica* 248; *Tongoane* case.

42 S 15(1) of the *CLA* provides for a community assembly to be responsible for all the land administration functions to all registered communities. In terms of s 8 of the *VLA*, the land administration of village land is left to the village council. In the same light, s 28 of the CLTB recognises any institution (CPA, traditional leadership or any other entity) that the community members select to oversee the land management functions. Knox *et al.* [Date unknown] <https://www.usaid.gov>.

may be an alternative means of evaluating land formalisation systems.<sup>43</sup> Formalisation of land rights is presumed to erode the nestedness of communal land rights.<sup>44</sup> Wily<sup>45</sup> is of the view that formalising the content of communal land tenure changes it. She<sup>46</sup> opines that despite official interest in preserving “native law and customary tenure,” formalisation leads to a narrowed interpretation of the customary tenure. The search for individual landowners and the redrawing of community boundaries creates new rights and conditions of access that become the subject of considerable dispute.<sup>47</sup>

Contrary to popular belief, the communal land tenure often persists even in areas where formalisation has been introduced. This was conflicting with what Okoth-Ogendo<sup>48</sup> initially assumed namely that registration was bound to overcome communal tenure. This view changed after he<sup>49</sup> discovered that indigenous law, including those principles that define the structure and content of the commons, do not succumb easily to suppression or subversion.

While most countries in Sub-Saharan Africa have the legal framework in place to document land rights, only about 10 per cent of occupied rural land is registered. Nonetheless, numerous governments have promulgated legislation

---

43 Byamugisha *Securing Africa's Land* 55; Chauveau and Collin “Changes in Land Transfer Mechanisms” in *Changes in customary land tenure systems in Africa* 67;

44 In Kenya, an investigation in areas where individual registration has been implemented concluded that people were reluctant to use land as collateral because “mortgaging the land is mortgaging the ancestors”.

45 Wily “Customary Tenure” 5.

46 Wily “Customary Tenure” 5. Pope “Indigenous-law Land Rights” in *Pluralism and Development* 322.

47 Wily “Customary Tenure” 5. A further discussion on the alternative means of securing tenure in land follows in chapter 5.

48 Okoth-Ogendo 2003 *UNLJ* 110; Pienaar 2011 “Land Information” in *Acta Juridica* 248; Fairley “Upholding Customary Land Rights” 2-3. Okoth-Ogendo described this notion using a metaphor that, indigenous law/ practices that have been regarded as “dangerous weeds,” simply went underground where they continued growing regardless of the overlay of statutory law that was originally designed to substitute it.

49 Okoth-Ogendo 2003 *UNLJ* 110; Pienaar 2011 “Land Information” in *Acta Juridica* 248; Fairley “Upholding Customary Land Rights” 2-3.

that recognizes communal land tenure, hence are now in a position to embark on the task of registering communal lands.<sup>50</sup> The allocation and management of individual plots within the communal tenure system, could be left to community institutions of land administration, with the option to transition to more formal systems of registering individual land rights as the need arises.<sup>51</sup>

Human rights advocates on the other hand endorse registration as means to legally empower marginalised ethnic groups and indigenous peoples at risk of territorial encroachment and dispossession. This blurring happens because calls for legal empowerment by formalising property rights almost always also call for the formalisation of existing rights and assume that these rights are thereby strengthened and enhanced.<sup>52</sup> This is an attempt to reverse the historical marginalisation through the formalisation of and respect for the legitimate rights of indigenous peoples and communities to the resources that they depend on for their livelihoods. Recognition, in this context, implies a legal process aimed at formalising, through law or *de jure* processes, rights that are already being held through customary, informal or *de facto* mechanisms.<sup>53</sup>

---

50 The South African Government through the CLTB, the Tanzanian Government via the VLA and Kenya in terms of the CLA. Tanzania and Kenya have already started the process.

51 Byamugisha *Securing Africa's Land* 55; Ntsebeza 2002 <https://www.dlc.dlib.indiana.edu>; Agrawal 1999 *JDA* 35.

52 Boone 2017 <https://www.wider.uni.edu>; Cousins and Hall 2011 <https://www.africaportal.org>.

53 Larson and Springer 2016 <https://www.iucn.org>; Byamugisha *Securing Africa's Land* 22.

### 5.2.2 *The deeds registration system*

#### 5.2.2.1 South Africa

Mostert<sup>54</sup> justly agrees with Cousins who asserts that the "titling approach" does not appropriately address the demands placed on South Africa's land reform (customary land). She<sup>55</sup> also believes that alternative to titling is the recognition of different forms of tenure that have crystallised under customary law, but reinforce them statutorily. It has been argued that the "tenure" route in South African land reform circles provides greater security of title.<sup>56</sup> Similarly, the approach to customary tenure reform has mostly focused on conversion and privatisation through title registration. Banda<sup>57</sup> strongly believes that the conversion route has failed dismally; this is because of the continued presentation by African governments of reconstructed customary tenure<sup>58</sup> as an effective partner to neo-liberal land reforms:

...This approach results in misrecognition of customary tenure and contributes to the lack of interest in emerging empirical evidence on the potentialities of the living customary tenure as an effective partner.<sup>59</sup>

Secondly, Banda<sup>60</sup> opines that the World Bank is influenced by a lack of understanding of customary tenure, hence its commitment to an inappropriate theoretical framework in marketing neo-liberal land reforms. According to her,<sup>61</sup> affirmation<sup>62</sup> of existing indigenous tenure systems is

---

54 Mostert 2011 *PELJ* 90; Cousins 2007 *JAC* 282.

55 Mostert 2011 *PELJ* 90; Cousins 2007 *JAC* 282.

56 Mostert 2011 *PELJ* 90; Cousins 2007 *JAC* 283.

57 Banda "Romancing Customary Tenure" in *The Future of African Customary Law* 327.

58 Also known as "the shadow;" the shadow concept is a model of customary tenure constructed by colonial authorities and adopted by post-colonial states.

59 Banda "Romancing Customary Tenure" in *The Future of African Customary Law* 314.

60 Banda "Romancing Customary Tenure" in *The Future of African Customary Law* 314.

61 Banda "Romancing Customary Tenure" in *The Future of African Customary Law* 314.

62 Affirmation approach reform entails reforms that aim at recognizing and incorporating local tenure arrangements in an attempt to correct inequitable access to land and enhance tenure security without disturbing the underlying framework that generates them.

more sensible than the transformation<sup>63</sup> thereof. By seeking to transform and change the underlying generative framework of customary tenure as advocated by the World Bank, will only result in “deconstruction and non-recognition” of customary tenure while also guaranteeing their inadequacy and failure.<sup>64</sup> It becomes clear from this reasoning that affirming (securing) rights is a more viable route for rural communities than transforming (titling) rights and introducing alien concepts to the rural people.

The titling versus tenure debate is not unique to South Africa. Mostert<sup>65</sup> argues that the standard against which the success of the registration system is measured is not if it is legally or technically sophisticated. The system must just ensure adequate security as well as protection of rights. Similarly, its fulfilment of the publicity function should be efficient, uncomplicated, expedient and affordable.<sup>66</sup> Mostert<sup>67</sup> draws from Cooke's cogent argument that commercial tension between the safety and marketability of land translates into the legal question of whether land law should tend towards dynamic security or static security.<sup>68</sup> Furthermore, the current South African land registration system does not provide for the registration of communal land rights. Therefore, official information on communal land tenure is insufficient and unreliable.<sup>69</sup> Pienaar<sup>70</sup> worries about the status of communal

---

63 Transformation approach on the other hand involves reforms that aim at replacing local tenure arrangements to correct inequitable access to land and enhance security by restructuring the underlying generative framework.

64 Banda “Romancing Customary Tenure” in *The Future of African Customary Law* 314.

65 Mostert 2011 *PELJ* 93.

66 Mostert 2011 *PELJ* 93.

67 Mostert 2011 *PELJ* 91.

68 Dynamic security represents those movements towards a simplification of the types of interests that may be held in land: a simplification of “title” to land. Static security, conversely, represents an emphasis in land law on the protection of all existing rights and interests in land. Banda and Cooke’s concepts are very similar despite the different jargon, namely; static security directly translates to Banda’s affirmation principle while the dynamic system translates to the transformation principle.

69 Pienaar 2013 *JHSF* 20; Baker [Date unknown] <https://www.conecta-realty.co.za>.

70 Pienaar 2013 *JHSF* 20.



land rights in South Africa because they are labelled as “weak” or subservient and there is no proper official information on the rights or right holders available. This position is attributable to two facts, *viz*

- that communal land has not been surveyed easily; and
- the communal land tenure is incapable of individualizing land rights, which is a prerequisite or registration of rights in the deeds registry offices.

A globally accepted distinction in the registration of land is that which is between registration of deeds and registration of title.<sup>71</sup> But, various scholars have warned about the oversimplification of the differentiation, especially in the South African perspective.<sup>72</sup> South Africa recognises two property regimes namely, common law (Roman-Dutch Law) land ownership (individualised and co-ownership) and communal land tenure.<sup>73</sup> Although not set in stone, the latter is for the most part in the rural areas of the country, while the former is mostly in the urban part of the country or in areas where organised agriculture takes place. It goes without saying, therefore that a one-size-fits-all registration approach will not be suitable. The individualised common law ownership (co-ownership and limited real rights) follows a combination of the

---

71 Zevenbergen “Overselling the Mirror and Curtain Principles” 4-6; Carey-Miller and Pope *Land Title* 53; Badenhorst *et al. The Law of Property* 213; Baker [Date unknown] <https://www.conecta-realty.co.za>. The deeds registration owes its roots to the American legal system while the title registration system first started operating in Australia.

72 Inasmuch as the distinction between these systems is blurred, it is argued that their unique differences can be attributed to quality of information obtained from each. The enhancements made to information management like better investigations by registrars and the creation of parcel-based registers in deeds registries could render them vague from the title registration system. It is suggested therefore, that, in future it would be more beneficial to differentiate between “positive and negative” systems instead of the current “deeds and titles” systems.

73 Pienaar 2011 “Land Information” in *Acta Juridica* 239. There are two forms of property registration in South Africa; individualized land rights and urban fragmented property holding; Tlale *Property Regulation in South Africa* 26.

Dutch and English law system of registration. For communal land rights, no system of registration has been approved yet.<sup>74</sup>

Registration of deeds originally referred to a process whereby deeds were recorded on face value, without regard to thorough investigations or referencing to the applicable cadastral systems.<sup>75</sup> This has been amended in South Africa, resulting in a system of registration of title by way of deeds, after a thorough investigation of the transfer of rights by the deeds registry staff. A deeds registration system is one evidenced by a deed document which records an isolated transaction. Being a negative system, it is neither proof of the legal rights of the parties involved nor evidence of legality of the transaction, but evidence that a particular transaction between parties happened and was registered.<sup>76</sup> Carey-Miller and Pope<sup>77</sup> simplify this concept by asserting that the "registration of deeds label" is attached to systems which are mainly concerned with the recordation of rights in land (also known as the negative system).

---

74 Pienaar 2011 "Land Information" in *Acta Juridica* 238; This position can be attributed to various reasons, but, for purposes of this chapter, those that stand out include the lack of publication, lack of suitable information and recording systems as well as adoption of foreign models, detached from the norms and customs of societies. It is important to note that the *CLARA* attempted to fill this lacunae, but with its abrupt termination, these rights remain in limbo. The reason for this is that either the land has not been surveyed properly or the individualisation of land-use rights in communal property is not possible. Hunt 2004 DPS 173; Haramata *Book Review* 39.

75 Badenhorst *et al. The Law of Property* 213. Inasmuch as the deeds are registered on face value, the South African deeds office has taken it upon itself to verify the veracity and authenticity of documents presented before it. More recently, the information and documentation is required to conform to the cadastral information. Van der Walt and Pienaar *Introduction to the Law of Property* 137; Baker [Date unknown] <https://www.conecta-realty.co.za>.

76 Henssen 1995 *ITCJ* 1; Baker [Date unknown] <https://www.conecta-realty.co.za>; Maina *Registration of Title to Land* 26.

77 Carey-Miller and Pope *Land Title* 53.

The South African negative registration system implies that the veracity of the registered information is not guaranteed,<sup>78</sup> hence, no protection is given even to *bona fide* acquirers. This is because in South Africa there are several ways in which real rights can be vested (transferred) without notice at the deeds registry; this transfer usually occurs through operation of law. For example, a marriage in community of property automatically gives rights to the other spouse, but the deeds documents do not reflect such passing of ownership.<sup>79</sup> There are generally two modes of acquiring ownership and limited real rights to immovable property in South Africa, these are, original and derivative acquisition. Original acquisition takes place without the involvement of the previous owner of the property.<sup>80</sup> The system is negative because the correctness of the content of the deed is not verified by the authorities responsible. Alternatively, derivative acquisition occurs when the transfer of property is carried out by means of a deed of alienation or

---

78 *Cape Explosives Works Ltd v Denel (Pty) Ltd* 2001 3 All SA 321 SA 569 (SCA); Carey-Miller and Pope *Land Title* 55; Pienaar 2011 "Land Information" in *Acta Juridica* 241.

79 The case of *Knysna Hotel CC v Coetzee NO* [1998 2 SA 743 (SCA)] illustrates the principle of prescription and the negative system of registration in South Africa. In this case, spouses were married in community of property and the said property was a hotel called the Knysna Hotel (registered in their common estate). The parties X and Y divorced and were sequestrated with each party represented by their own trustee. X's trustee sold the entire property (without Y's authority) in 1990, with a balance that would be paid at a later stage. After four years, the same trustee demanded the outstanding balance but the appellants (Knysna Hotel CC) claimed that the matter had prescribed since extinctive prescription occurs after three years. In an effort to approbate and reprobate the respondent claimed that the prescription had not lapsed since when he sold the hotel in 1990, he did not have authority to sign off Y's portion of the hotel which act was only ratified by the latter's trustee in 1993. Thus, according to him, the transaction only took place in 1993. The Court held that the transaction took place in 1990 and was registered then, since the deeds registration office was not aware that X's trustee did not have authority to act on both parties' authority. Thus, because of the negative registration system, the deeds office could not guarantee the correctness of the registered documents but relied on the information presented before it. Van der Walt and Pienaar *Introduction to the Law of Property* 138; Carey-Miller and Pope *Land Title* 54; Baker [Date unknown] <https://www.conecta-realty.co.za>.

80 Pienaar 2011 "Land Information" in *Acta Juridica* 241; Badenhorst *et al. The Law of Property* 235–238; Baker [Date unknown] <https://www.conecta-realty.co.za>.

obligatory agreement (sale exchange or donation) which both parties to the transaction must sign followed by a deed of transfer based on the deed of alienation. Thus, the transfer requires full participation of the parties involved.<sup>81</sup>

South Africa is reputed to have one of the most accurate deeds registration systems in the world.<sup>82</sup> It differs from others in that, most requirements that are normally regarded as part of the title registration procedure are incorporated so as to preserve the precision and consistency of the registered data.<sup>83</sup> Some of these characteristics include:

- Registration of deeds and transfer of real rights can only occur if the documents and the transactions comply with all the legal and statutory provisions.
- A prominent feature of the title registration system is to have the property surveyed and the cadastral map linked to the deed upon application for registration. This is a requirement under the South African deeds system that the property description in the deed should be linked to a cadastral map kept by the surveyor-general.

---

81 The subjective intention of the owner or entitled person to transfer ownership or real rights, as embodied in the real agreement, is a requirement for the actual transfer of such rights. Carey-Miller and Pope *Land Title* 53, 100.

82 Maina *Registration of Title to Land* 18; Baker [Date unknown] <https://www.conecta-realty.co.za>; Pienaar (Pienaar "Land Information" in *Acta Juridica* 263) is of the opinion that the success of any registration system should not be dependent upon its legal or technical sophistication but its protection of land rights. The recording of these rights should be efficient, simple, quick, secure and cost-effective.

83 Pienaar 2011 "Land Information" in *Acta Juridica* 241; Badenhorst *et al. The Law of Property* 235–238; Baker [Date unknown] <https://www.conecta-realty.co.za>. The only circumstances or conditions that influence the certainty and reliability of the deeds registration system in South Africa can be attributed to; death, marriage in community of property, expropriation, statutory vesting, insolvency, prescription and abandonment. Baker [Date unknown] <https://www.conecta-realty.co.za>.

- The registration of transactions has to follow the sequence of preceding legal acts and all simultaneous transactions are linked and are therefore registered simultaneously.
- The registers kept in the various deeds registries are largely computerised.<sup>84</sup>
- The inspective duties of the deeds registries that are meant to corroborate the accuracy of the registration system, a principal feature of title registration, is followed in the South African deeds system. Pienaar<sup>85</sup> suspects that this is why the South African procedure is somewhat sluggish, cumbrous and costly.

It is interesting to note that under the CLTB, registration, transfer as well as surveying costs are to be borne by the Minister of Rural Development and Land Reform with the money appropriated in Parliament for this purpose. Whether this will be carried out in practice remains to be seen. That being said, this is praiseworthy since the costs associated with registration are often a major concern for the poor. Under normal circumstances, the deeds system is not very accurate, but in the case of South Africa (as shown above), characteristics of the titling system have been infused, such that Simpson<sup>86</sup> has concluded that indeed South Africa follows a title registration system. He<sup>87</sup> argues that the only reason the system is categorised as “deeds” is not the fact that the registration proves title, but because the document of transfer is duly registered. This does not make any real difference in practice since the registrar is required to satisfy himself that a deed is in order before

---

84 Ss 99 and 100; Pienaar 2011 “Land Information” in *Acta Juridica* 243.

85 Pienaar 2011 “Land Information” in *Acta Juridica* 243.

86 Simpson *Land Law and Registration* 105; Zevenbergen *Land Registration Systems* 62.

87 Simpson *Land Law and Registration* 105.

he accepts it for registration. This is even more so because a registered deed has the effect of a certificate of title.<sup>88</sup>

#### 5.2.2.1.1 Registration of communal land under *CLARA*

In Cousins's<sup>89</sup> view there was a misfit between *CLARA* and the existing "communal" tenure insofar as it predicted a "one-size-fits-all" approach that transferred title to "communities" as juristic entities, while individual members became holders of a deed of communal land right. Thus, how the nature and content of those rights were to be indicated, remained obscure. In the same light, Cousins<sup>90</sup> found fault with a number of principles enunciated in *CLARA*:

- First, he indicates that titling could damage or destroy nested rights various members of the community have to resources on the land, because it compelled exclusivity and individualised decision-making.<sup>91</sup>
- Secondly, he adds that *CLARA* did not adequately address the full range of existing situations, needs and problems in relation to security of communal land rights.

He<sup>92</sup> concludes by suggesting that an alternative approach should be explored and it should be one that seeks to secure existing rights of occupation and use without requiring transfer of private ownership.<sup>93</sup> What

---

88 Simpson *Land Law and Registration* 105; Zevenbergen *Land Registration Systems* 62.

89 Cousins "Characterising Communal Tenure" 126.

90 Cousins 2005 *SLR* 488.

91 Cousins 2005 *SLR* 492.

92 Cousins 2005 *SLR* 511.

93 In his example, he refers to the Tanzanian Land Acts of 1999 which recognize and protect existing occupation and use of communal land. The Acts also give the right holders the status of property rights without requiring their conversion to Western notions of private ownership. This way, strong statutory rights are vested in the people who occupy the land and the law allows them to further define and record

should be central issue, according to Pope,<sup>94</sup> is determining the content of customary rights and preventing further homelessness where strong claims outweigh weak claims, to ensure that tenure reform leads to social development. Likewise, Cousins<sup>95</sup> points out that the *CLARA* “combined elements of titling and recognition of customary tenure” but, in so doing, gave legitimacy to the “worst of both worlds”.<sup>96</sup> Instead, the challenge with this notion is that there are no mechanisms to guarantee accountability to individual community members.

Tenure security is often obtained by strong community structures as long as the community functions properly and sufficient land is available.<sup>97</sup> Pienaar<sup>98</sup> observes that in most instances the conversion from communal land tenure to individualised land ownership by a land titling programme benefits a selected few and leaves the poor worse-off.<sup>99</sup> Thus, *CLARA* introduced a disruption of the social structure of the community by individualising communal land tenure, as one of the most important support mechanisms for the members thereof.<sup>100</sup> According to Torhonen,<sup>101</sup> it is not entirely accurate to say that a land register should at the very least be updated to reflect inter-family alienations and land parcel mutations.<sup>102</sup> To her,<sup>103</sup> in terms of

---

these rights at the local level. To him, this is an ongoing balancing act between group and individual rights at different levels of social organization.

94 Pope 2010 *LDD* 9; Torhonen 2004 *CEUS* 573;

95 Cousins “Characterising Communal Tenure” 126.

96 Cousins made a practical example that an individual will have a “secondary and poorly defined right to land, and ownership will vest in a large group ...represented by a structure ...that will exercise ownership on behalf of the group”.

97 Pienaar 2009 *PELJ* 33.

98 Pienaar 2009 *PELJ* 33.

99 Pienaar 2009 *PELJ* 34.

100 Pienaar 2009 *PELJ* 33; Pienaar 2011 “Land Information” in *Acta Juridica* 259; *Tongoane* case.

101 Torhonen 2004 *CEUS* 573.

102 The classic steps of systematic registration are adjudication 114 of rights, demarcation of boundaries, survey of the extent and documentation for registration. Torhonen 2004 *CEUS* 572.

sustainable development, land tenure and land registration have to promote development irrespective of the field one is working from.<sup>104</sup>

#### 5.2.2.1.2 Registration of communal land under the CLTB

Section 12 of the CLTB will provide for the registration of communal land. In terms of sub-section 1 thereof, the communal land must be registered in the name selected by the community. Likewise, where communal land has been subdivided, the subdivided portion thereof must be registered in the name of the community member who has been in occupation of that land.<sup>105</sup> Nonetheless, before communal land can be registered in terms of both the *Deeds Registry Act*<sup>106</sup> (hereinafter the *DRA*) and the CLTB, some conditions must be met. Despite the “ownership” of communal land passing to the community in terms of section 11 of the CLTB<sup>107</sup> and based on the commonage of property, it must be a registered condition that communal land cannot be sold, bequeathed, leased, burdened or disposed of without a written agreement that is endorsed by a minimum of 60 per cent of the households in that community.<sup>108</sup> A similar process applies with regard to sub-divided portions of communal land.<sup>109</sup>

---

103 Torhonen 2004 *CEUS* 546.

104 Clarke 2009 *Law, Environment and Development Journal* (LEAD) 145. From a fiscal perspective, land registration is necessary for taxation purposes while from a legal perspective registration of land is seen as means of protecting the poor from third party interference (secure tenure)

105 S 12 (2), 11(2) (a) read with s 18 (1) (2) CLTB.

106 37 of 1967.

107 As has been previously explained in the previous chapters, ownership contemplated by the CLTB is not the common law (freehold) ownership.

108 S 13(a) CLTB read with s 63 of the *DRA*.

109 S 13(b). With regard to sub-divided portions, land cannot be alienated to a person who is not a member of that community without a first option acquire such to the members of the owner’s family, members of the community or the State. This would then imply that community members can alienate communal land within themselves without any hindrance from the authorities.



Moreover, Beinart<sup>110</sup> rightly points out the confusion under section 29 (1) (c). In terms of this provision, an institution chosen by the community as the land administration body, must establish and maintain registers and records of land rights in communal land. From this provision, it is unclear if the communal land registration is centralised or decentralised. For one, any land registration in South Africa is in terms of the deeds registries (centralised governance), nonetheless, the responsibility of the upkeep and maintenance of registers is placed on the local institutions (decentralised governance).

#### 5.2.2.2 The South African deeds registration process

The Electronic Deeds Registration System Bill<sup>111</sup> (hereinafter the EDRSB) is a new creation of the deeds registries. As the name implies, it aims to provide for electronic deeds registration and any other matters connected therewith. While noting that, there is a need to link the cadastral information system in order to improve efficiency and accuracy of the South African land information system; the EDRSB takes no cognizance of the communal land registration system anticipated in the of the CLTB. The process of registration is carried out by a conveyancer who lodges relevant documents at the deeds registry on behalf of his client.<sup>112</sup>

These documents must comply with the section 20 of the *DRA*. After lodgement, the documents are controlled, dated, linked and then examined. This is to ensure that all the relevant information is included in the documents. This process is repeated further by the examiner in chief as a measure to ensure that none of the documents were overlooked. Thereafter, once all the concerns regarding the documents are clarified, the deeds are

---

110 Beinart 2017 <https://www.gga.org>.

111 GN 216 in GG 40686 of 15 March 2017.

112 S 15 CLTB and s 15 *DRA*.

"...executed, numbered, stamped and dated,"<sup>113</sup> with the final step being to computerise such documents. Nevertheless, the following prerequisites must be met before this process takes place.<sup>114</sup>

(a) Map or general plan

It is very difficult, if not impossible, to have an efficient land registration without dividing the land into units that can be surveyed in a general plan.<sup>115</sup>

A good diagram must contain the description of the land unit, the extent of the boundaries<sup>116</sup> and any other conditions that may burden the unit (servitudes already in existence or those to be registered). The *Land Survey Act*<sup>117</sup> also sets out specific instructions that must be followed when surveying land units. The *DRA* also requires that the map or diagram should be drawn by a qualified surveyor and be approved by the surveyor-general.<sup>118</sup> Without necessarily getting into the meticulous layout of a general plan, section 17 (1) of the CLTB prescribes an outline that a general plan of communal land should follow. Provision for plans will be required to include:

- (i) the economic, social, environmental as well as the sustainable development and infrastructure investment for the community;
- (ii) a summary of where crop fields, pastures, water ways, wood lands will be;
- (iii) the provision of economic, social and other services that will benefit the community; and

---

113 S 20 *DRA*.

114 Baker [Date unknown] <https://www.conecta-realty.co.za>; Badenhorst *et al. The Law of Property* 206; Carey-Miller and Pope *Land Title* 126.

115 Badenhorst *et al. The Law of Property* 206.

116 Reg 28(4); Beinart (2017 <https://www.gga.org>) believes that the geographical extent of the community should be made a requirement in terms of the CLTB. The word "community" is only described in terms of the shared rules amongst people and not the actual boundaries of the community.

117 8 of 1997.

118 S 43 *DRA*; Baker [Date unknown] <https://www.conecta-realty.co.za>.

- (iv) plans of portions of residential, agricultural, industrial and commercial areas.

(b) Obligatory and real agreement

Like any valid contract, the obligatory agreement (sale, exchange or donation) must be between parties with legal capacity to contract. This agreement must create rights and obligations on the contracting parties. For there to be obligations thereto, there must be an object of the agreement and an intention to transfer and receive exercised by the transferor and transferee respectively of the so called real agreement.<sup>119</sup>

(c) Deed of transfer

In terms of section 16 of the *DRA*, transfer of ownership in land from one person to the other happens only through a deed of transfer that has been attested to by the registrar of deeds.<sup>120</sup> In the same light, other real rights in land can be conveyed through a deed of cession attested to by a notary public and registered by the registrar of deeds. By amendment to this important provision, *CLARA* provided for the transfer of “new order rights” through a deed of communal land.<sup>121</sup>

In this light, section 25 of the CLTB renders juristic personality on a community that has been issued with a deed of communal land. Without so much as going in to the details on the nature of the title, section 18 of the CLTB vaguely describes a community in whose name communal land is registered as the owner of such communal land and a person in whose name a subdivided portion of communal land is registered as the owner of that

---

119 Carey-Miller and Pope *Land Title* 222; Mbhele *The South African Law of Contract* 13; Lotz *et al.* (eds) *Business Law* 57.

120 Carey-Miller and Pope *Land Title* 82; Baker [Date unknown] <https://www.conecta-realty.co.za>

121 S 16 C *DRA*.

subdivided portion of communal land. It should be cautioned at this point that the heading of section 18 of the CLTB reads "title to communal land,"<sup>122</sup> and this might be misleading to anyone who is not aware that the South African system is a negative system of registration of title by way of deeds.

#### (d) Supporting documents

Different transactions will require different documents depending on the agreements the property is bound by. Therefore without giving an irrefutable number of supporting documents needed at the deeds registries, three main documents are worthy to mention: documents that serve as proof of payment of taxes, those lodged as proof of matters of fact or law as well as agreements of transfer between parties.<sup>123</sup>

#### (e) Linking transactions

In the event that different transactions affecting the same piece of land exist, the transferor must link those transactions by endorsement to which he/she and the transferee must affix their signatures. This endorsement must state clearly that the land in question has been transferred to another party. Once this is done, the registrar must also sign it, failing which, the registration might be deemed incomplete.<sup>124</sup> This is done to ensure that no duplication takes place and no doubt exists about the currency of a deed.

---

122 According to Carey-Miller and Pope (*Land Title* 82) ownership in land can only exchange hands when there is a valid title deed for the unit to be transferred. Nonetheless, because a title deed is created by derivative transfer, it does not apply.

123 Carey-Miller and Pope *Land Title* 110; Baker [Date unknown] <https://www.conecta-realty.co.za>

124 S 3(1) (v); Badenhorst *et al. The Law of Property* 228; Carey-Miller and Pope *Land Title* 93-94.

(f) Sequence of relative causes

In terms of section 14 (1) (a) of the *DRA*, transfers of land and cessions of real rights must follow the sequence of the successive transactions in pursuance of which they are made. This means that ownership or real rights must have vested in the person who is transferring rights to the next party.<sup>125</sup> Thus, the registered owner of the land and no other person must be involved in the transfer of the land.

*5.2.3 Title registration*

Registration of title refers to the maintenance of an authoritative record of the rights in relation to clearly defined units of land existing at any point in time (also known as the positive system of registration). This means that registration of title carries a guarantee of unimpeachability.<sup>126</sup> Despite the fuzziness in the differentiation of registration systems, Badenhorst *et al.*<sup>127</sup> assert that the deciding factor is whether registration acts as a warranty of title in the person registered as the holder of a right or not. Thus, if it does guarantee title in the person, it is a registration of title. The converse is true in the event that one's rights in property are not assured.

---

125 An exception to this rule will be where the property in question is bequeathed to A and B subject to a usufruct in favour of C, in this case s 14(1)(a) does not apply unless the usufructuary also redistributes the usufruct; s 14(1)(b)(iii). Badenhorst *et al* *The Law of Property* 227; Evans *A critical analysis of problem areas in respect of assets of insolvent estates of individuals* 231; Carey-Miller and Pope *Land Title* 126.

126 Nevertheless, this unimpeachability does not imply that the state will always guarantee the registered title. A real right in land can only be acquired through registration. Notwithstanding, the South African law does not guarantee the unimpeachability thereof. The derivative acquisition of ownership in this regard is incompatible with all systems of absolute registered title since there is no warranty of the validity of title in a system that relies on the transferor's intention. Carey-Miller and Pope *Land Title* 53, 100; Badenhorst *et al. The Law of Property* 213; Pienaar 2011 "Land Information" in *Acta Juridica* 242.

127 Badenhorst *et al. The Law of Property* 238.

Furthermore, title registration fixes and gives legal effect to land rights and relationships and its prerequisites usually involve "...investigation, survey and registration as well as the creation of an ongoing system that manages dealings in existing registered titles".<sup>128</sup> Lamour<sup>129</sup> believes that title in land is partly a process of transfer in that it often extends the reach of legislation to include new places and new objects. In the same light, De Soto<sup>130</sup> expounds that title registration is a process of discovery and recognition. He<sup>131</sup> unwaveringly believes that extra-legal arrangements already exist and are neither to be superseded nor ripped off. In a nutshell, since land owners know the boundaries of their land, titling thereof is a matter of registering their interests in land and allowing the title to be used for collateral.

#### 5.2.3.1 Types of title registration

##### 5.2.3.1.1 Cadastre 2014

States that have reportedly succeeded in the timeous nationwide programs of land registration, and, at low cost, have mostly done so using simple cadastral surveys; these produce regular graphical cadastral index maps to delineate, adjudicate as well as to register land systematically.<sup>132</sup> In 1994, the International Federation of Surveyors<sup>133</sup> established visions and proposals through which developing countries would secure their land tenure through titling/registration. Consequently, the visions were created based on the registration systems of developed countries, which mainly focused on the

---

128 Lamour 2002 *Public Administration and Development (PAD)* 153.

129 Lamour 2002 *PAD* 153; Author unknown *Formalising Land Rights* 32.

130 De Soto *The Mystery of Capital* 48; further discussions to follow.

131 De Soto *The Mystery of Capital* 48.

132 Wayumba *Impacts of Different Land Registration Systems* 6; Byamugisha *Securing Africa's Land* 48; Pienaar 2011 "Land Information" in *Acta Juridica* 263.

133 The FIG highlighted the main functions of a registration system, such as enabling taxation, improving land sales, and facilitating land management among others.

automation and cadastral systems.<sup>134</sup> As is usually the case in underdeveloped and developing countries, the visions have not reached many countries for various reasons.

South Africa follows the cadastral system. The cadastral basis of the register and the way information is recorded in South Africa contribute to the establishment of a comprehensive account on land relations. A measure of publicity and security of tenure is ensured when all the role players perform their functions in the registration process. The White Paper introduced wide-ranging amendments in land laws. The rationale behind this paradigm shift was to broaden the basis of the cadaster so that it included more than the traditional “real rights” in land.<sup>135</sup>

- 
- 134 Pienaar 2011 “Land Information” in *Acta Juridica* 263; Wayumba *Impacts of Different Land Registration Systems* 9; The visions were phrased in statement forms namely:
- Statement 1: Cadastre 2014 will show the complete legal situation of land, including public rights and restrictions. In most countries, cadastres do not fully show the “complete legal situation of land” especially as regards informal and communal land rights.
  - Statement 2: The separation between “maps” and “registers” will be abolished.
  - Statement 3: The Cadastral mapping will be dead! Long live modeling.
  - Statement 4: ‘Paper and pencil – cadastre’ will have gone. In most developing countries, land registration systems are still based on “paper and pencil” and are yet to be computerised. Thus, contemporary registration systems may not adequately guarantee land tenure security for all as was envisioned in “Cadastre 2014”; Pienaar 2011 “Land Information” in *Acta Juridica* 263.
  - Statement 5: Cadastre 2014 will be highly privatized. Public and private sector are working closely together.
  - Statement 6: Cadastre 2014 will be cost recovering. Wayumba *Impacts of Different Land Registration Systems* 9.
- 135 Pienaar 2011 “Land Information” in *Acta Juridica* 265. Although not all the recommendations proposed by the White Paper have not all been realised, it is clear that rights in terms of the two tenure systems can be recorded in terms of the computerised land recording system.

#### 5.2.3.1.2 Development of Spatial Data Infrastructures

Spatial data infrastructure (hereinafter SDI) "...is a key component of land administration infrastructure".<sup>136</sup> It is fundamentally about facilitation and coordination of the exchange and sharing of spatial data between stakeholders from different jurisdictional levels in the spatial data community. A major challenge of developing SDI in countries that observe customary land tenure is how to include its defining components. This is because technical aspects of SDI have been developed based on "Western" concepts which are not congruent with components of communal tenure.<sup>137</sup> Access challenges include

- who owns the information;
- whether the people allow information to be shared;
- whether some political control may be lost by sharing the information; and
- how the costs can be recovered.

Pienaar<sup>138</sup> believes that this method of registration is with amendments better suited for communal land recordation, but what should first be prioritized is a computerised land information system within a demarcated piece of land. He<sup>139</sup> caveats that the boundaries of communal land may change from time to time depending on the land use agreements, but this should not deter the

---

136 Pienaar 2011 "Land Information" in *Acta Juridica* 265; Wayumba *Impacts of Different Land Registration Systems* 12.

137 Pienaar 2011 "Land Information" in *Acta Juridica* 265; Wayumba *Impacts of Different Land Registration Systems* 12.

138 Pienaar 2011 "Land Information" in *Acta Juridica* 265. Badenhorst *et al.* *The Law of Property* 194.

139 Pienaar 2013 *JHSF* 26; Pienaar 2011 "Land Information" in *Acta Juridica* 267. Owing to the flexible nature of communal land tenure and the boundaries in turn, the changes that communal boundaries are subjected to include the seasonal uses of the land, changed needs of the families etc.



stakeholders. He<sup>140</sup> makes detailed recommendations<sup>141</sup> but concludes that this can only be recorded by a computerised land information system, specifically developed to record communal land rights. Of all the registration systems across the globe, Pienaar<sup>142</sup> believes that Ventura and Mohamed's model could be the most suitable for the communal land tenure. This suggested model focuses on the development of a conceptual prototype that documents and records communal land tenure in its multi-dimensional form. This way, recordable components of communal property are compiled in relation to all the individuals who possess rights and interests therein. Existing land deeds, surveys, aerial photographs or any other form of demarcation can be used in this system; with communal land any data (obtained through demarcation based on descriptions of spatial elements) showing the uses of property by the communities is acceptable.<sup>143</sup>

#### 5.2.3.1.3 Pro-poor / fit for purpose land administration

More recently, in view of the fact that existing models of land titling were insufficient, there has been a paradigm shift towards a system that meets the needs of people and their relationship to land. This is otherwise referred to as the "fit-for-purpose" land administration. Zevenbergen *et al.*<sup>144</sup> opine that challenges still exist in the capturing of communal land tenure registration, while conceding to the numerous contemporary efforts undertaken to

---

140 Pienaar 2013 *JHSF* 26; Pienaar 2011 "Land Information" in *Acta Juridica* 265.

141 Pienaar 2011 "Land Information" in *Acta Juridica* 267. See 5.2.1 chapter 5.

142 Pienaar 2011 "Land Information" in *Acta Juridica* 269; Ventura & Mohamed 1998 *The Land* 4.

143 This model is an illustration of a computerised land information system that can be kept by the deeds registry or administrative bodies. Advocates argue for the latter since any changes taking place within the community can be updated without having to use non-existent resources in travelling far distances to do such updates.

144 Zevenbergen *et al.* 2013 *LUP* 596; Chauveau and Collin "Changes in Land Transfer Mechanisms" in *Changes in customary land tenure systems in Africa* 7; Enemark *et al.* "Fit-For-Purpose Land Administration" 44-45; Lengoiboni and Molendijk 2015 <https://www.itc.nl>.

develop pro-poor land tools. The pro-poor land management tools concentrate on the technical gaps associated with unregistered land in both rural and urban areas. The fit-for-purpose land registration system is based on evidence gathered from investigations which seek to determine a number of factors such as grassroots affordability, preventive justice, sporadic or systematic implementation, state affordability, transparency etc.<sup>145</sup> It is one of the first registration system proposals that have attempted to capture the “complex layered tenure” of communal land. The development team of the collaborators<sup>146</sup> of this initiative proposed a move towards capturing land information by enabling community definition and recordation of existing tenure in use.

This tool’s central focus is flexibility.<sup>147</sup> Essentially, the elements in the fit-for-purpose approach are:

- flexible in the spatial data capture approaches to provide for varying use and occupation;
- inclusive in scope to cover all tenure and all land;
- participatory in approach to data capture and use to ensure community support;
- affordable for the government to establish and operate, and for society to use;
- reliable in terms of information that is authoritative and up-to-date;

---

145 Wayumba *Impacts of Different Land Registration Systems* 13.

146 This approach is a collaboration between the Global Land Tool Network (GLTN) and the United Nations Human Settlements Programme (Un-Habitat).

147 Lengoiboni and Molendijk 2015 <https://www.itc.nl/>; Pienaar 2011 “Land Information” in *Acta Juridica* 265. For example, a fit-for-purpose approach to mapping allows for ‘continuum of accuracy’. As such, aerial photos can be used to derive general boundaries of parcels at first registration. Accuracy can be incrementally improved over time using sophisticated precision tools when the need arises.

- attainable in relation to establishing the system within a short timeframe and within available resources; and
- upgradeable with regard to incremental upgrading and improvement over time in response to social and legal needs and emerging economic opportunities.

In around the 2000's, the pro-poor land registration proposed the concept of a "continuum" of land rights which recognises that there are multiple dimensions of land tenure; these include, but are not limited to, "social tenure relationships, occupancy, usufruct, informal rights, customary rights, indigenous right and nomadic rights". In this light, the "Social Tenure Domain Model" (hereinafter STDM) was developed as a tool that could capture some of these social aspects of tenure.<sup>148</sup>

In terms of section 12(2) of the *VLA* and section 18 (1) of the *CLA*, Tanzania and Kenya follow the title registration system. The types of title registration above do not imply that a titling system of a country must follow a particular one; as in South Africa, the models can be combined as a way of optimizing their efficacy.

#### 5.2.3.2 Tanzania

In the case of Tanzania, certificates of customary right of occupancy are proof of title but do not bestow ownership rights in a freehold sense, since all land in Tanzania is constitutionally held in trust by the President.<sup>149</sup> A multitude of researchers were optimistic that the Tanzanian land laws could

---

148 Lengoiboni and Molendijk 2015 <https://www.geotechrwanda2015.com>; Park *et al.* "Fit-for-Purpose Land Administration" 11-12. The model is still being tested and improved upon. In this regard, there is still room for investigations on the current nature of communal tenure, which may be obtained by observing commonalities of how communal tenure has changed in different registration systems.

149 S 3 *VLA*; Maganga *et al.* 2016 *AJAS* 35. Bromley believes that titles, in whatever form, are much like currency and must have the full backing and recognition of those issuing them.

expand local democratic control over land management since the village would be elected, open to local participation and easier for villagers to monitor and sanction.<sup>150</sup> Instead, Shivji<sup>151</sup> feared that the registration of villages and user-rights would greatly enhance the power of the state at the expense of communities. Thus, Stein and Cunningham<sup>152</sup> concur that registration of village lands in Tanzania has protracted state powers "...by solidifying state control over lands not included in the village circumscriptions".<sup>153</sup>

Although researchers can never agree on one description of "land grabbing" they at least agree that the investor interest in African land has sky-rocketed since the 2000's.<sup>154</sup> To name but a few, Harvey<sup>155</sup> calls it "accumulation by dispossession" where private wealth and power are expanded through dispossessing the public of their wealth or land. Maganga *et al.*<sup>156</sup> call it dispossession through formalisation and Twomey<sup>157</sup> describes it as displacement and dispossession through land grabbing, etc.

An essential feature in any title or deeds registration system is to have information documented and kept safe for future reference. In 2003 a joint

---

150 Palmer 1999 [www.mokoro.co.uk](http://www.mokoro.co.uk); Manji 2001 *TWQ* 330; Goldman *et al.* 2016 *JPS* 780.

151 Shivji *Accumulation in an African Periphery* 60.

152 Stein and Cunningham 2015 [https:// www.ascleiden.nl](https://www.ascleiden.nl); Shivji *Accumulation in an African Periphery* 60; Author unknown *Formalising Land Rights* 26.

153 Stein and Cunningham 2015 [https:// www.ascleiden.nl](https://www.ascleiden.nl). The delimitations of village territories have made available lands falling outside the limits to allocate to outside investors. Formalisation is believed to create opportunities for elite capture by more powerful players, external or internal to a community, who obtain rights to lands that had previously been under the customary control of the community. This is particularly true when formalisation involves titling where there are multiple, overlapping rights.

154 Edelman *et al.* 2013 *TWQ* 1518; Hall 2011 *RAPE* 194; Toulmin [Date unknown] [https:// pubs.iied.org](https://pubs.iied.org).

155 Harvey 2004 *Socialist Register* 65.

156 Maganga *et al.* 2016 *AJAS* 23; Wisborg 2013 *JAEF* 34.

157 Twomey 2014 <https://www.rsc.ox.ac.uk>.

effort between the Tanzanian, Norway Government and the Institute of Liberal Democracy (De Soto Institute), instigated a programme best known by its Kiswahili acronym MKURABITA.<sup>158</sup> The objective thereof was to build and create a legal and institutional framework from the bottom up by facilitating the transformation of real estate and business assets in the informal (extra-legal) sector to formal entities.<sup>159</sup> In this way, the regulatory framework would reflect the realities on the ground; a move which was predicted to be both politically acceptable and institutionally feasible to implement. The programme did not gain momentum as was expected since its inception in 2003 and an unnoticeable amount of titles had been issued by 2005. By 2008 the Ministry of Lands in conjunction with local village councils had mapped about half of Tanzania's villages.<sup>160</sup>

Over and above the MKURABITA programme, in 2004 the Tanzanian Government initiated one of the biggest land formalisation projects in an attempt to protect rural land rights of peasant farmers. As previously mentioned in the preceding chapters, the only right in land in Tanzania is a right of occupancy. Hence, the said formalisation brought about issuance of rights of occupancy.<sup>161</sup> In the same year certificates of customary rights of occupancy were introduced to recognize individual rights to village land (in

---

158 MKURABITA is an acronym of *Mpango wa Kurasimisha Rasilimali na Biashara za Wanyonge Tanzania* (which translates to the Programme to Formalise the Property and Business of the Poor in Tanzania). This programme, is divided into three phases:  
 1. The Diagnosis phase (completed in 2005);  
 2. The Reform Design phase (started in 2005 was expected to finish in 2007); and  
 3. The Implementation phase, (was due to start in 2007). Salema 2007 <https://www.povertymonitoring.go.tz>; Sundet 2006 <https://www.landportal.info>.

159 Schreiber 2017 <https://www.successfulsocieties.princeton.edu>; Bienart 2017 <https://www.gga.org>.

160 Schreiber 2017 <https://www.successfulsocieties.princeton.edu>.

161 Maganga *et al.* 2016 *AJAS* 4; In Tanzania, anyone who has occupied land for many years is entitled to customary rights of occupancy and is eligible to register that right and obtain a certificate of customary right of occupancy. Entitlement to the right does not require certification *per se*, nonetheless, registration affords the ability to use the certificate as collateral for credit. Byamugisha *Securing Africa's Land* 55.

perpetuity), but subject to conditions.<sup>162</sup> While it is usually the governments which instigate formalisation and titling projects, it was startling to see different stakeholders advocating for formalisation and the reasons behind their advocacy. Maganga *et al.*<sup>163</sup> believe that the donors behind the Tanzanian formalisation (donor organisations led by the G8)<sup>164</sup> motivate formalisation for, not only the promotion of foreign investment, but also the reduction of conflict which in turn protects land users from land grabs.

Likewise, the Southern Agricultural Growth Corridor of Tanzania was launched by the Tanzanian Government in conjunction with the World Economic Forum and other multinational agro-processing companies. Its main object was to fortify food security, moderate poverty and reduce susceptibility to climate change by facilitating the development of profitable agricultural businesses in “clusters” along the southern corridor,<sup>165</sup> to achieve economies of scale, synergies and increased efficiency. To achieve this object, investors were needed since they had the capacity to provide inputs and the ability to connect smallholders to domestic and global markets. Thus, general land was earmarked for this purpose. The Government stated its intention to assign a portion of general land to investors since it was available and unoccupied.<sup>166</sup>

---

162 Village holdings are limited to 50 acres and can only be allocated to people recognized as villagers by the village assembly (all voting adults). The process of issuing CCROs started in Mbozi district, Mbeya region and has since spread across Tanzania.

163 Maganga *et al.* 2016 *AJAS* 5; Byamugisha *Securing Africa's Land* 2.

164 The G8 countries are United States of America, Germany, United Kingdom, France, Japan, Italy, Canada and Russia.

165 Tanzania's Southern Corridor stretches west from Dar es Salaam through Morogoro, Iringa and Mbeya to Sumbawanga.

166 Maganga *et al.* (2016 *AJAS* 60) dispute that there is land available for foreign investment since Tanzania's population has grown fivefold from 9 million people before independence to 46 million after independence. According to them, this qualifies as the greatest land grab in history dubbed as “formalisation”.

Additionally, the G8 donors have for some time received backlash from researchers in the donee countries.<sup>167</sup> Thus, as a way of reinventing themselves, they reaffirmed and expanded their commitment to strengthen property rights as a matter of priority.<sup>168</sup> The G8 donors noted that increasing security of land rights and transparency of land governance would foster participation among citizens, contribute to government's accountability and strengthen the climate for responsible investment. To this end, the United Kingdom entered into a partnership with the Government of Tanzania and it was named the "Tanzania-G8 Land Transparency Partnership" (hereinafter the TLTP).

The TLTP's objectives are as follows:

- (a) to enhance transparency and benefits of large scale land deals;
- (b) to clarify and improve institutional implementation of existing legal and policy frameworks; and

---

167 This was confirmed by the DG of the National Commission for Land Planning and Management (Gerald Mango), by urging Tanzanians to desist from the misconception that foreign investors were a threat to the country but to be rest assured that they are *sent to specific areas where there was enough land for the purpose*. With that said, SAGCOT plans to allocate large tracts of land to investors who will set up contract farming with local producers in return for seeds, fertilizer and credit. Opening up a 1/3rd of most productive part of country.

168 Maganga *et al.* 2016 *AJAS* 9. For example, Cote d'Ivoire revised its land laws to facilitate agricultural private investment, much to the pleasure of the foreign investors. To reciprocate, eight foreign companies were to invest over US\$ 800 million (for which large amounts of land were to be expropriated). It has been reported that the "free land" which has been made available for investors has included grazing and bush areas used by agro-pastoralists, pastoralists and hunter-gatherers. This is evidenced by a large number of court cases between government authorities on the one side and local pastoralist/agro-pastoralist communities who feel their rights are being violated on the other as do the many cases of eviction of pastoralists from areas across Tanzania; Askew *et al.* 2013 *Africa* 125; Walsh 2012 *JEAS* 305; Maganga *et al.* 2007 "Contested Identities" in *Conflicts over Land* 98.

- (c) to regularise land tenure and to develop low-cost and accurate delivery of village and individual land titles.<sup>169</sup>

Emphasis has been placed on the third object, *viz.* experimental land titling. This is believed to play a great role in the reduction of land disputes.<sup>170</sup> Nonetheless, these efforts are failing to accomplish their intended purposes. Atwood<sup>171</sup> on the other hand, is of the opinion that formalisation can create, rather than reduce uncertainty and conflicts over land. Lanjouw and Levy<sup>172</sup> also appreciate these conflicts as outcomes of confusion and increased insecurity that occurs when shrouding a formal state formalisation program onto a long-standing and well-understood customary property rights system.<sup>173</sup> Consequently, in 2013, a five member parliamentary commission was appointed to scrutinize the reasons of the land disputes that were spiraling out of control in Tanzania.<sup>174</sup> In its report, the committee established the following weak points underlying the land disputes:

- (i) no comprehensive mechanism to deal with land problems;
- (ii) weak implementation and enforcement of the law;

- 
- 169 Locke *et al.* "A Proposed Land Tenure Support Programme for Tanzania" 3-7; The then (2013) Minister of Lands blurted that this exercise would identify villages with extra land in which big plantations can be established, so that there would be a *clear list that will be made available to investors*.
- 170 Locke *et al.* "A Proposed Land Tenure Support Programme for Tanzania" 3-7; Byamugisha *Securing Africa's Land* 55; Fairley "Upholding Customary Land Rights" 5-7.
- 171 Atwood 1990 *WD* 662; Formalization has been promoted as a mechanism for achieving peace and security of tenure. Nonetheless, evidence points to it being a driver of conflict and dispossession. Despite these conclusions, the committee called for further formalization to achieve the desired target, only 10% of which had been realized. Accordingly re-surveying and re-formalisation continue to date.
- 172 Lanjouw and Levy 2004 *WMLR* 891; Maganga *et al.* 2016 *AJAS* 33.
- 173 Residents may not know which system will apply in a given situation. Instability that results from titling programs can cause conflict in the formalization process. Proponents warn that an increase in conflicts is to be expected during the formalization process as boundaries are being permanently set, exposing any latent claims or disputes.
- 174 Around 850 land disputes are filed annually in Tanzania, making it the highest number in comparison to other cases that are brought before formal courts. Maganga *et al.* 2016 *AJAS* 23;



- (iii) multiple and contradictory legal regimes;<sup>175</sup> and
- (iv) ineffective leadership.

Alternatively, Place and Migot-Adholla<sup>176</sup> argue that disputes are inevitable under any tenure regime. This is because of the high population pressure coupled with few opportunities outside of agriculture. They<sup>177</sup> conclude, therefore, that registration programs do not have a significant or direct impact on the overall number of disputes.

#### 5.2.3.2.1 The titling procedure in Tanzania

##### (a) Identification and delimitation

The first step of formalisation is the “identification and delimitation” of outer boundaries of the community land in question. This process results in a village land certificate being awarded to the village. The commissioner of lands is responsible for registering village land with a certificate of village land granted to the village council. When this happens, all members of the community are deemed to be “co-owners” of the land and gain possessory rights as well as the right to partake in any decisions involving the land. The village council then has the power to allocate, manage and register individual rights only after receiving a certificate of village land provided their functions do not conflict with any national laws and the Tanzanian *Constitution*.<sup>178</sup>

---

175 Maganga *et al.* (2007 "Contested Identities" in Conflicts over Land 98) criticize the government for not having a standardized approach to recruiting investors, who are currently accommodated through both the Tanzania Investment Centre and the Ministry of Lands.

176 Place and Migot-Adholla 1998 *Land Economics* 365.

177 Place and Migot-Adholla 1998 *Land Economics* 365.

178 Byamugisha *Securing Africa's Land* 58; Schreiber 2017 <https://www.successfulsocieties.princeton.edu>.

According to Loure<sup>179</sup> mere possession of a certificate of village land is inadequate for the protection of pastoral community members. The village land certificate only safeguards the outside boundaries of village land instead of protecting land-use rights within those boundaries. Inasmuch as land-use planning is critically important, internal zoning or demarcation still needs to be effected. In this light, by 2011 the national land ministry concluded that pastoral communities could register their communal lands under communal occupancy certificates.<sup>180</sup> After which the village assembly would decide whether to seek a communal occupancy certificate in order to protect grazing land within the boundaries identified by the certificate of village land.

In terms of a day to day report compiled by Schreiber,<sup>181</sup> the MKURABITA team usually drew a map of the village and a formal deed plan (survey diagram). Thereafter, the surveyors would send the deed plan to the commissioner of lands, where officials organized a certificate of village land.<sup>182</sup> Subsequently, the residents of villages that had received formal certification of the village land could further apply to register their own parcels.<sup>183</sup>

---

179 Loure is a lawyer and land rights activist who headed the *ujamaa* community resources team.

180 In terms of s 13 (6) and 21 (1) of the *VL4*, the village council is responsible for the upkeep and maintenance of the communal land register.

181 Schreiber 2017 <https://www.successfulsocieties.princeton.edu>.

182 By 2017, more than 11,000 of Tanzania's approximately 12,500 villages had mapped their outer limits, and about 13% of villages had also adopted land-use plans. Of the approximately 6 million households located within rural villages, about 400,000 also had obtained individual title documents. In addition to the boundary record held at the national level, the land commissioner issued copies of the certificate to both the village council and the relevant district office.

183 Schreiber 2017 <https://www.successfulsocieties.princeton.edu>. In practice, this proved to be more daunting than anticipated, not only are some residents unaware of these rights but even few village councils are aware of such, let alone the procedure to invoke in issuing individual occupancy certificates.

One of the challenges that were encountered was that some councils were for some reason or the other, hesitant about titling. Nevertheless, their decision could be vetoed by the village assembly for a vote if a minimum of 50 people applied to the village council for registration. This, in turn, meant that if the village assembly was not in favour of the registration programme, because of its supreme decision-making powers, the land titling could not proceed. Some challenges were met during the titling programme, for the most part, because there is no national registry in Tanzania; each district and its individual villages had to build and manage their own local registries.<sup>184</sup> This could have been avoided by creating and adopting the e-filing system which requires no physical storage. The "paper and pen system" usually occupies huge amounts of space unnecessarily. Despite the *VLA*'s attempt to include women on adjudication committees and tribunals, cultural barriers still persisted and defeated the whole object. In reality, women did not own any occupancy certificates or have any say in land-use management decisions.

#### (b) Land use plan

In 2007 the Tanzanian Government passed the *Land Use Planning Act* (hereinafter *LUPA*).<sup>185</sup> According to its preamble, its objects include the provision of procedures for the preparation, administration as well as the enforcement of land use plans and any other matters incidental thereto.<sup>186</sup> In terms of section 13 (1) of the *VLA*, the village council shall recommend to the village assembly what portions of village land shall be set aside as communal village land and for what purposes. The *LUPA* also recognises the village

---

184 Lukuvi Tanzania's Minister of Lands, Housing, and Human Settlements Development. He announced further that his ministry was in the process of integrating the land information management system that will incorporate all title documents, including customary occupancy certificates into a unified single national register.

185 10 of 2007.

186 See also s 4(a)-(i) of *LUPA*.

council as the land use planning authority in the villages.<sup>187</sup> Moreover, subject to approval by the village assembly, the village council's functions include:

- (i) preparing thorough land use plans;
- (ii) ensuring that the objectives of the *VLA* are accomplished;
- (iii) ensuring beneficial usage of village land;
- (iv) preserving village land resources including forests and wildlife; and
- (v) reviewing and evaluating village land applications in order to advice the village assembly accordingly.<sup>188</sup>

According to Schreiber,<sup>189</sup> after the land had been identified and delimited, the village council displayed a map of the proposed property boundaries and posted it publicly for two weeks to ensure that there were no objections. In the absence of objections, the village council submitted the plan to the village assembly for approval.<sup>190</sup> Thereafter, the chairperson signed and issued three copies of the certificates; one copy for the owner, one kept for storage in the village land registry and the last copy went to the district registry. In

---

187 S 22(1) *LUPA*. The *LUPA* has created challenges in Tanzania since, its legal framework prescribes a number of additional steps and formal requirements for the registration and approval of land use plans, thus making it more expensive and laborious than the more streamlined process of land use zoning described in the *VLA*. Consequently, this can hold back the actual process of securing land rights as pressures and interests over land increases. Ujamaa community Resource Team 2014 <https://www.ujamaa-crt.org>.

188 S 22(3)(a)-(f); Unlike in South Africa, in the preparation of land use plans by the village council, the *LUPA* (s 28) gives a thorough account of what the land use plan should encompass. These include but are not limited to the historical features of the land and preservation of old paths where possible etc.

189 Schreiber 2017 <https://www.successfulsocieties.princeton.edu>. By early 2017, Tanzania's land ministry had mapped and issued certificates of village land to about 11,000 of the country's 12,500 villages. From 2008 to 2017, about 13% (1,640) of Tanzania's villages also adopted land-use plans and bylaws for managing shared resources.

190 S 34 and 35 *LUPA*.

Tanzania, unlike South Africa, the occupiers of the land are responsible for the payment of the cost associated to the registration.<sup>191</sup>

Still, it is inaccurate to base the effectiveness of the *VLA* by the number of titles issued since it is only an outcome. The *VLA* automatically formalised the use rights of rural people who had been in occupation of a plot of land for longer than 12 years but failed to place a legal obligation on people to obtain their documents. The certificates of customary occupancy are significant, but if people are aware of their rights and feel secure in their tenure, why should they feel the need to obtain formal certificates? Especially, because the law does not make it compulsory.

#### (c) Certificate of customary right of occupancy

Any member of a village, family unit or a group of persons may apply to the village council for a customary right of occupancy. This right extends to a person who has been divorced from any such person, for a period not exceeding two years. Similarly, a person or people who are not ordinarily resident in the villages are eligible to apply for a customary right of occupancy.<sup>192</sup> This application should be signed by the applicant(s), supported by a declaration relating to any other land in Tanzania and attached to any document or fee that has been prescribed by the village council, then submitted to the village council.<sup>193</sup>

Within the 90 days that the village council has to determine the application for a customary right of occupancy; firstly, they must endorse that such application follows the standard procedure, secondly, take cognizance of the equality clause in section 3 and finally, determine if the applicant(s) already

---

191 Costs varied across the country; in the case of land transfers, updating a certificate cost about US\$35, and it was the buyer's responsibility to pay for the endorsement.

192 S 22(1) and (2) of the *VLA*.

193 S 22 (2) (a) - (e) of the *VLA*.

occupy village land which has already been granted a customary right of occupancy etc.<sup>194</sup> From this point, the village council has an option to either grant or reject the application. Still, in the event that the council refuses the application, they must furnish clear reasons for that refusal.<sup>195</sup> If accepted, the applicant(s) is issued with a certificate of customary right of occupancy in terms of section 25 of the *VLA*.

#### 5.2.3.3 Kenya

The enforcement of the KNLP and Kenyan *Constitution* introduced a paradigm shift in management of communal lands. In terms of the KNLP, a clear categorisation of land and a guaranteed management framework for communal lands were invoked.<sup>196</sup> Together, the Constitution and the KNLP provide clear frameworks for securing community land rights, access, use and ownership. In the same light, Kenya's *CLA* opened the door to high degrees of secularisation of the "registered groups" that can extract land from domains formerly managed by county councils as "Trust Lands". These lands can be registered and titled as "community lands" held corporately by a group of named members.<sup>197</sup>

Although Kenya has a diverse system of registration, there are currently three deeds registration systems and two title registration systems.<sup>198</sup> Community land in Kenya follows the title registration system,<sup>199</sup> governed by section 3 (c) of the *LRA* in conformity with section 63 (1) of the Kenyan *Constitution*.

---

194 S 22 (2) (a), (c) and (e) of the *VLA*.

195 S 22(4) of the *VLA*.

196 Otieno "Land Use Planning" 2-3; Maina *Registration of Title to Land* 27.

197 According to s 12 of the *CLA*, community land maybe held:

(a) as communal land;

(b) as family or clan land;

(c) as reserve land; or

(d) in any other category of land by the *CLA*.

198 Maina *Registration of Title to Land* 27; Otieno "Land Use Planning" 3-4.

199 Lengoiboni and Molendijk 2015 <https://www.itc.nl>.

Moreover, in terms of section 5(2) of the *CLA*, over and above the recognition of all customary (community) land rights, they must be adjudicated and documented to allow registration processes to take place. Upon the registration of such land, the county government is under an obligation to release money payable for compulsory acquisition.<sup>200</sup>

#### 5.2.3.3.1 Steps to formalisation of land rights in Kenya

In Kenya the land registration system is conducted in two main systems: the deeds registration and title registration systems.<sup>201</sup> The deeds registration system was the earliest form of registration introduced by the Colonial government towards the end of the 19th Century. The *Land Registration Act* (hereinafter the *LRA*) was promulgated to revise, consolidate and rationalize the registration of title to land as well as to give effect to the principles and objects devolved government in land registration and connected purposes.<sup>202</sup> Over and above the *LRA*, the *CLA* requires of any community that claims an interest in or right over community land, should register such land. When that happens, the notice must be circulated in a national publication to invite the community members with interest so as to allow an election for the

---

200 S 6(3) *CLA*.

201 Over time, there have been different types of title in Kenya depending on the land legislation of the time; for example, grants were offered under *Registration of Titles Act* Cap 281 (which has since been repealed) and a county council grant under *Trust Land Act* Cap 288. Certificate of title: grant issued as a result of subdivision without change of user, certificate of lease: title under the *Registered Lands Act* Cap 300 (repealed) for lease hold land, sectional title for title for a unit within a building. Nonetheless, the *Land Registration Act* consolidates the above several titles into the "Certificate of Title" or Certificate of lease. A Certificate of title is issued for freehold land while a Certificate of lease is for leasehold land. Maina (*Registration of Title to Land* 19) believes that inasmuch as they *LRA* harmonized the previous land registration legislation, it has failed to offer a secure and efficient land title registration regime in Kenya.

202 This Act has repealed all the previous Kenyan land registration legislation save for the *Registration of Documents Act*, s 7(d) of which, stipulates that parcel files containing the instruments which support subsisting entries in the land register and any filed plans and documents must be georeferenced.

community land management committee.<sup>203</sup> The committee is tasked with responsibility of creating a name for the community, submitting a register of members, compiling of minutes of the meetings, rules and regulations, etc.<sup>204</sup>

(a) The adjudication process

In terms of the *Land Adjudication Act*<sup>205</sup> (hereinafter the *LAA*) an adjudication report is conducted to provide for "...the ascertainment and recording of rights and interests in community land and for purposes connected therewith". The process of adjudication must be conducted by a duly appointed adjudicator chosen by the cabinet secretary.<sup>206</sup> In preparing an adjudication record, the adjudication officer must satisfy himself that any community recognised under customary law, exercised rights in land and those rights should be recognised as ownership rights under the land legislation in question.<sup>207</sup> An adjudication record must comprise of the following:

- the number of the parcel as it appears on the demarcation map;
- the name and description of the owner (can be an individual or a community); including the any restrictions if any; and
- the location where the land has been set apart (evidenced by Gazette).<sup>208</sup>

After the verification of this information, the form is signed by the owner(s), the chairman and the executive officer of the committee and cannot be amended subject to the provisions of the *LAA*. At this point the adjudication

---

203 S 7 (2) *CLA*. To ensure a wide coverage for the public invitation, even electronic media must be resorted to. S 7(3).

204 S 7 (6) *CLA*.

205 *Land Adjudication Act* Cap 284 (Revised 2016).

206 S 11(2) *CLA* read with s 4, 9 and 10 *LAA*.

207 In this case the *CLA*; S 23(2) (b) *LAA*.

208 S 23 (3) (b) (i)-(iii) *LAA*. In terms of s 24 *LAA* a combination of the demarcation map and the adjudication record is called an adjudication register.



officer must deliver the duplicate record to the Director of Land Adjudication and place a notice that the record has been completed and must be inspected for veracity.

All the costs payable for the adjudication process are borne by all the people whose names appear on the adjudication register and are determined by the Director of Land Adjudication.<sup>209</sup> Upon adjudication, the title relating to community land must be issued and registered in the name of a community, a clan or family or a community association. At any time during the adjudication of land, a surveyor and demarcation officer may enter at any reasonable time onto the adjudication area for the purpose of demarcating of surveying such land.<sup>210</sup> A notice of intention to survey should be issued publicly for a period of sixty days.<sup>211</sup> Its contents must include

- the name of the community;
- the land to be adjudicated;
- an invitation to all interested parties (those with either claims or overriding interests in the land); and
- specific area(s) of land to be a community land registration unit.<sup>212</sup>

Subsequent to the issuance of a notice, the cabinet secretary must cause the land in question to be surveyed.<sup>213</sup> Registration must then follow in conformity with provisions of the *LRA* and the *CLA*.

---

209 S 32 *LAA*.

210 S 17 *LAA*.

211 S 8 (5) (e).

212 S 8 (5) (a)-(d).

213 S 8 (6) of the *CLA*; In terms of s 8(2) of the *CLA*, the cabinet secretary is not only responsible for documenting, mapping and developing the inventory of community land but also ensuring that such processes are transparent, participatory and affordable.

(b) Land use plan

The overall goal of the Kenyan Land Use Policy is to provide legal, administrative, institutional and technological framework for optimal use and productivity of land related resources in a sustainable and desirable manner. The policy recognises that agriculture and livestock are the key activities in the rural area and, as such, encourages the Government to re-establish an enabling environment to facilitate these activities.<sup>214</sup>

A registered community may submit a plan for the development, management and use of community land administered by it, whether on request by the county government or out of its own accord. In this plan, consideration must be had to environmental impact plans, values of the Constitution and conservation, environmental issues relevant to the development etc.<sup>215</sup> upon the approval of the plan, the registered community must develop, manage and use the land in accordance with the plan as approved. In the same light, section 13 (3) of the *CLA* provides that a registered community may reserve special purpose areas including areas for farming, settlement, community conservation or any other purposes as may be determined by the community.<sup>216</sup>

(c) Issuance of a certificate of title

Furthermore, section 10(1) of the *CLA* and section 8 of the *LRA* gives a thorough account of the contents of a community land register. A community land register must comprise of details covering the following:

---

214 Draft National Land Policy Kenya May 2016.

215 S 19 (2) (a)-(f) *CLA*.

216 See s 13 (3) and 29(1) *CLA*.

- a cadastral map that shows the extent of the land to be registered as well as the areas of common interest;<sup>217</sup>
- the name of the registered community;
- a register of the names of the community members;
- user or uses of the land; and
- any other documents the Registrar may request.

Only when the abovementioned prerequisites are met can the Registrar issue a certificate of title or a certificate of lease.<sup>218</sup> The certificate of title issued upon registration is considered by courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the land, subject to the encumbrances, easements, restrictions and conditions endorsed in the certificate.<sup>219</sup> Nonetheless, it seems the *LRA* overlooked the issue of issuing only one certificate of title per unit of land.<sup>220</sup> Having one copy given to the owner leaves the land registration system fragile since it may, for some reason or the other, get lost and there will not be any duplicates. Nonetheless, section 33 provides that in instances where a certificate is lost or destroyed, the proprietor may apply to the Registrar for a replacement certificate, provided the former can give satisfactory evidence that justifies the destruction.

It is interesting to note that in Kenya, although a member of the community may, subject to endorsement by the registered community, apply for exclusive use and occupation of the land, such land may never be issued with

---

217 S 15 (2) of the *LRA* requires the parcel boundaries on the maps to be geo-referenced and surveyed according to standards set by the *LRA* and any other related legislation.

218 S 8(2) *LRA*.

219 S 18 (1) of the *CLA* read with s 24 (a), (b) and 26 of the *LRA*.

220 S 30 (2) (a) of the *LRA*.

a title.<sup>221</sup> It goes without saying, therefore, that the entitlement in such land may never be superior to community title. This non-allocation of individual title is to preserve the natural nestedness of the communal land rights. Although a customary right of occupancy is available for any member of the community, since individual certificates of title are not permissible under the *CLA*, this means that both women and men cannot hold individual title in land.

#### 5.2.3.4 Consequences of titling

It goes without saying that the identification of land-titling effects is a daunting task since it typically faces the problem that formal property rights are endogenous. What is clear is that land tenure security cannot be attributed to a single formalisation or registration programme; it is a culmination of different factors.<sup>222</sup> Although titling has great potential to increase investment and productivity, there are several prerequisites that must be met before this can be achieved.<sup>223</sup> Thus, "...titling should... fit within a broader strategy of rural development". Deininger and Binswanger<sup>224</sup> emphasise that "...titling is not a panacea for achieving a wide variety of divergent goals at the same time". When creating titling policies, the objectives thereof must be clear on whether they aim to improve credit access, increase tenure security or activate land markets.

---

221 S 27(1) and (2) *CLA*. A member of the community who has been given the land entitlements is required to:

- (i) Pay a premium or fees determined by the registered community.
- (ii) Develop the land subject to the governing land use laws.
- (iii) Desist from leasing the land to outsiders.
- (iv) Put the land into lawful use.
- (v) Surrender the land back to the community if the latter so requires. See s 27(4) (a)-(e).

222 Maina *Registration of Title to Land* 16; Gray and Gray *Elements of Land Law* 976.

223 Maina *Registration of Title to Land* 17; Deininger and Binswanger 1999 World Bank Research Observer (*WBRO*) 250.

224 Deininger and Binswanger 1999 *WBRO* 250; Maina *Registration of Title to Land* 17;

#### 5.2.3.4.1 Title deed/ certificate

A title deed must *prima facie* divulge all the material particulars affecting the title in land; this is otherwise referred to as the “mirror principle”.<sup>225</sup> Likewise, an observation of the title deed should be adequate and must pursue no further historic investigation; this is called the “curtain principle”. In this light, whatever is registered is guaranteed to be certain. Nonetheless, the mirror and curtain principles are not as clear cut in practice. For example, it is not necessary or required by law that most short term rights in land be registered, more so from land interests that owe their origin to indigenous or customary systems. Hence, a transaction involving these type of rights does not visibly “mirror” the situation. Moreover, when a right holder dies, his property is transferred to his heirs automatically. Nonetheless, registers are seldom updated timeously. The mirror principle would thus work effectively in an ideal world where the transfers are reported immediately, where there are no conflicts between competing claims and where there are efficient and transparent procedures in the registration offices. Sadly, this is not so in practice.

With regard to the curtain principle, there must be no need for further investigation beyond the register. Nevertheless, after a transaction has been recorded, the concern is that the document’s (deeds) security is not guaranteed. This has led some countries, South Africa included, to the system of upgrading their technologies that allow e-filing.<sup>226</sup> This will not only

---

225 Wu 2008 Melbourne University Law Review (*MULR*) 672; Zevenbergen Overselling the Mirror and Curtain Principles” 1; Maina *Registration of Title to Land* 16.

226 The Deeds Registration System Amendment Bill 2016; Pienaar 2013 *JHSF* 20; Badenhorst *et al. The Law of Property* 213;

keep the underlying documents for verification but will also make them easily accessible.<sup>227</sup>

Consequently, to ensure and verify that they are transacting wisely, the buyers have somewhat had to lift the curtain.<sup>228</sup> All these concepts are illustrated so ardently and unrealistically, that Zevenberg<sup>229</sup> believes that they have been exaggerated and as a result, fail to live up to their “standards”. This leads him to the conclusion that with such high demands on operating a functional land titling system, it is only logical that the “mirror and curtain principles” must not be used officially in the land titling system. This is because they weaken important parts of the proclaimed advantages of title registration over deeds registration.

#### 5.2.3.4.2 Investments, land markets and economic development

Without dwelling too much on the economic benefits, various researchers<sup>230</sup> maintain that formalising property rights kindles economic development. They<sup>231</sup> posit that producers can use their titles as security to obtain credit, and can therefore invest. Proponents of titling view it as a means of legal empowerment of the poor that can protect smallholders’ and pastoralists’ rights of access to land and other land-based resources.<sup>232</sup> The often anticipated legal empowerment given by titling is also promoted by those

---

227 Pienaar 2013 *JHSF* 20; Zevenbergen *Overselling the Mirror and Curtain Principles*” 1-2.

228 Principle similar to lifting the veil in company law. Zevenbergen *Overselling the Mirror and Curtain Principles*” 1-2.

229 Zevenbergen *Overselling the Mirror and Curtain Principles*” 1-2.; Pienaar 2011 “Land Information” in *Acta Juridica* 242; Maina *Registration of Title to Land* 16.

230 Author unknown *Formalising Land Rights* 26; Boone 2017 <https://www.wider.uni.edu>; Banda “Romancing Customary Tenure” in *The Future of African Customary Law* 314; Larson and Springer 2016 <https://www.iucn.org>.

231 Author unknown *Formalising Land Rights* 26; Boone 2017 <https://www.wider.uni.edu>; Banda “Romancing Customary Tenure” in *The Future of African Customary Law* 314; Larson and Springer 2016 <https://www.iucn.org>.

232 Boone 2017 <https://www.wider.uni.edu>.

who push for the market-enhancing and aggregate growth-promoting commodification of property rights. According to Galiani and Schagrodsky,<sup>233</sup> the absence of formal property rights constitutes a severe limitation for the poor. This proposition is in line with De Soto's capitalist theory which has been severely criticised.<sup>234</sup>

Critics express concerns that this theory fail to recognise greater complications which arise during the formalization process, especially those of competing claims in land.<sup>235</sup> The theory has also been critiqued for its failure to recognise the widely differing opportunities and capabilities of those currently excluded from the formal legal system, therefore it fails to offer tenure security to the poorest.<sup>236</sup> Finally, De Soto's theory falls short of recognizing that land markets are not driven solely by efficiency objectives and that farm investments and innovations have occurred on land held under indigenous tenure systems before, and land titling has had little impact on farm credit supply.<sup>237</sup>

Alternatively, it has been shown that the link between possession of property titles and having access to credit is weak, both in the rural and urban land context. This is because many rural areas have no banks and those that do exist are usually reluctant to take the risk of lending to small producers.<sup>238</sup> The fact that secure tenure and land access are necessary for development is

---

233 Galiani and Schagrodsky 2010 <https://www.depeco.econo.unlp.edu>.

234 The results of their study suggested that land titling is an important tool for poverty reduction but not through the shortcut of credit access and entrepreneurial income, but through the slow channel of increased physical and human capital investment.

235 Hunt 2004 *DPR* 174.

236 Hunt 2004 *DPR* 174; Haramata *Book Review* 39.

237 Hunt 2004 *DPR* 174; Haramata *Book Review* 39.

238 Author Formalising Land Rights 26; Boone 2017 <https://www.wider.uni.edu>; Cousins and Hall 2016 <https://www.researchgate.net>; Maganga *et al.* 2016 *AJAS* 66.

not under dispute.<sup>239</sup> Nonetheless, efforts to protect tenure, restore rights and improve the negotiability of land have led to tenure insecurity of vulnerable groups, and further marginalisation of the poor.<sup>240</sup> Thus, secure tenure has a potential to attract investment and to enhance rural livelihoods. This makes tenure security a key ingredient to achieving economic growth and reducing poverty in rural communities.<sup>241</sup>

Thorough economic probes on family farming further contest the nexus between titles and investment on the following grounds:

- The insecurity of "informal" rights is often over-estimated, which means that formalisation has limited impacts. Global players and donors always exaggerate the intensity of insecure landholding in the rural areas. Nonetheless, more often than not, they are looking out for their investment and other economic interests.
- As Gilbert<sup>242</sup> suggested, formalisation of property rights through titling can weaken indirect land by restricting their operations or makes renting land more expensive.

---

239 Banda "Romancing Customary Tenure" in *The Future of African Customary Law* 314; Torhonen 2004 *CEUS* 572.

240 Banda "Romancing Customary Tenure" in *The Future of African Customary Law* 314. Mostert (Mostert 2011 *PELJ* 91) therefore caveats that preferring "tenure" over "titling" when it comes to livelihoods and shelter also raises some issues. The tenure and title debate is vital for recognition of the existence and validity of the parallel systems of common law title and customary tenure only. The Constitutional Court's directive that customary tenure be treated as equivalent in status to conventional land title raises an alarm that customary tenure rights holders may be restricted to engaging with customary law only, unless the law provides for the conversion of tenure arrangements within the communal, rural setting to individual title of the kind espoused by the prevalent deeds registration system (S 39 of the South African Constitution. See also *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).

241 Banda "Romancing Customary Tenure" in *The Future of African Customary Law* 315. However, the granting of credit often results in individualisation and loss of land, as well as the disruption of traditional communities

242 Gilbert 2002 *IDPR* 3.



According to Boone,<sup>243</sup> land titling is the recording or documenting of land rights that have been determined to exist through the process of adjudication.<sup>244</sup> Land titling initiatives were introduced to modernize land tenure regimes and address a range of perceived problems including, but not limited to low productivity of land and labour, low rates of investment, low rates of utilization of purchased inputs like fertilizer and improved seeds and the small size of production units which in turn led to limited economies of scale.<sup>245</sup> During the 1990's the World Bank and other major global players have been consistent advocates of land registration and titling.<sup>246</sup> They claimed that individualization of control and disposition of land creates private property that can be bought, sold and mortgaged according to market logics and incentives.<sup>247</sup>

#### 5.2.3.4.3 Reduction of land conflicts

Struggles over land are the common source of many inter-community and inter-state conflict. Land recordation has been shown to reduce the number of dispute since they are used as proof of ownership in land. These records play such a huge role in dispute resolution because, as shown above, they contain information about who owns the land, what rights they have, cadastres, maps, boundaries, survey records, etc.<sup>248</sup> In turn, regular updates

---

243 Boone 2017 <https://www.wider.uni.edu>.

244 Land adjudication: is the process of determining/ascertaining what rights exist on the ground. The rights identified to exist are the rights that are recorded. After adjudication comes the processes of land demarcation which defines the boundaries within which the rights exist and surveying of the boundaries through mapping.

245 Boone 2017 <https://www.wider.uni.edu>. Most of the independent governments made very similar choices around the 1960s, 1970s, and 1980s either explicitly in land law or implicitly by upholding and reproducing the existing land regimes.

246 S 2.1.1 chapter 2.

247 Boone 2017 <https://www.wider.uni.edu>.

248 Manirakiza The Role of Land Records in Land Administration 17; Paaga 2013 *IJHSS* 263.

on the (communal) land register go a long way in reducing land conflicts.<sup>249</sup> For precision purposes, when demarcation and surveys services are conducted, all the adjacent land occupiers are involved to ensure that there are no future conflicts of encroachment.

### **5.3 Conclusion**

There are many land securing mechanisms in the world, the most common being registration. The current South African land registration system does not provide for the registration of communal land rights and this means that there is a huge gap of insecurity amongst communal land holders. Because South Africa uses a negative system of registration (this means that the veracity of the registered information is not guaranteed), the legislation devised in this regard must not only beware of the complexity of communal rights but also be mindful of this registration system. Inasmuch as the CLTB has espoused most principles of the South African land registration system, it still blurs them. There is hope for growth and development, nonetheless. Another issue of interest is the simultaneous registration of individual and communal land; if not approached with caution, the CLTB may end up in the same position as *CLARA*.

In the case of Tanzania, certificate of customary right of occupancy are proof of title but do not bestow ownership rights in a freehold sense, since all land in Tanzania is constitutionally held in trust by the President. Tanzania being the darling to most International Organisations, has piloted more certificates of title since the inception of the MKURABITA which to date has seen to just under half of rural individual titles. Resort must be taken to the numerous

---

249 Paaga 2013 *IJHSS* 263; Hull *et al.* 2016 *SAJG* 75; Fairley "Upholding Customary Land Rights" 19-20. A comprehensive study of the land disputes is dealt with in chapter 4.

statutes that must be followed in the issuance of community and individual land title, namely the *VLA*, *LUPA* and the *LAA*.<sup>250</sup>

Kenya has overcome the worst land conflict in the near 2000's, nonetheless, it rebuilt itself with the most detailed and elaborate land legislation promulgated after 2010. Its Constitution recognised and protects the community land system and mandated the Parliament to enact legislation to that effect. From this mandate, the *CLA* was enacted in 2016. Although much of its implementation is still in infancy stage, some principles enshrined therein are noteworthy. Amongst all three jurisdictions, Kenya is the only country that does not issue individual title to communal landholders. What may be contentious, though, is the use of three deeds registration systems and the two title registration systems, which may be very confusing to right holders and other external parties like banks and financial institutions.

---

250 The MKURABITA<sup>250</sup> programme facilitated the land formalisation project in Tanzania through the use of the electronic devices called the Mobile Application to Secure Tenure (MAST). These devices allowed the researchers to map and record village lands in mobile phones. Although subject to improvements, this can easily be adopted by the South African *Government*. Although much can be learnt from the Tanzanian communal land tenure system, as expressed above, the greatest challenge and threat to land tenure security in Tanzania is the issue of land grabs. Tanzania is one of the African countries most prone to land grabs which are usually disguised as investments while in actual fact their land is slowly being encroached upon.

## **CHAPTER SIX**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **6.1 *Overview***

The foregoing chapter dealt with the comparisons between the formalisation approaches used for the protection of communal land tenure rights in South Africa, Tanzania and Kenya. As with the other chapters, the discussions were aligned to three issues namely, tenure security, women's access to communal land and dispute resolution. Thus, it was illustrated that it is not important what system or approach is adopted as long as the primary objective of securing tenure is achieved. In this chapter therefore, conclusions and recommendations are given based on the aforementioned enquiries. In retrospect, an overview of the focal points of the research as presented by the research questions, hypothesis and assumption as well as the objectives are reintroduced. This is done not only to ensure that the objectives have been realized, but to also test the veracity or negation thereof.

In this light, the main research question of this study was as follows:

- (a) Is land tenure secure in the areas that practice communal landholding in South Africa, Tanzania and Kenya?

The ancillary research questions were:

- (i) Is land tenure security feasible for members of the rural communities of South Africa?
- (ii) Are women's rights and access to communal land observed in South Africa, Tanzania and Kenya?
- (iii) Does a proper resolution of disputes system guarantee a level of land tenure security?

To further facilitate the study, the following hypotheses were made:

- (a) Land tenure is insecure in the communal landholding areas of South Africa, Tanzania and Kenya.
- (b) Women are treated as second class citizens with little to no rights in communal land.
- (c) An effective and proper dispute resolution system is necessary for land tenure security.

In this light, the assumption was as follows:

- (a) Communal land tenure security is realizable in the rural areas also for women.
- (b) Suitable alternative dispute resolution techniques are available for rural communities.

Therefore, in view of the research questions and the hypothesis, the aims and objectives of this study were:

- (a) to scrutinise the history of the South African communal land tenure insecurity, women's access to land and the dispute resolution
- (b) to determine if the communal land tenure system of South Africa is secure for the rural poor;
- (c) to analyse the communal land tenure policies, legislation and case law in relation to land tenure security, women's access to communal land and resolution of disputes;
- (d) to compare the communal land tenure systems in South Africa, Tanzania and Kenya relating to communal land tenure security, women's access to land as well as dispute resolution; and
- (e) to distinguish between the communal land tenure formalisation approaches adopted in South Africa, Tanzania and Kenya.

## **6.2 Tenure security**

Secure tenure in land is a necessity for all individuals of South Africa, Tanzania and Kenya. Yet, for some rural communities this is only an ideal that seems far-fetched. For one to say their tenure in land is secure, they must not only be able to enjoy such property without interference from third parties, but also be able to enjoy the fruits of the labour and capital invested in the land. Despite the numerous precedents that have been set by the courts to proclaim that customary law and, in turn, customary tenure, enjoys the same status as all other sources of law, customary land rights are still treated as inferior to their private land rights counterparts. Dealing with the communal land tenure system requires of the Parliament to fully appreciate that communal land and resource rights are embedded in a range of social relationships. Consequently, rights and access to the land and other resources are derived from an accepted membership in a community.

### **6.2.1 South Africa**

Land is not only central to rural livelihoods, but it is also a symbol of power amongst communities. Inasmuch as the communal or customary land rules are not a new creation, their codification is. Hence, it is this codification (Communal Land Rights Act hereinafter *CLARA*) that previously infuriated some rural communities of South Africa for not capturing the rules that existed on the ground accurately.<sup>1</sup> Practically, in a communal land system setting, land and land resource rights of a community are held through social relationships and units ranging from families, clans and tribes. Membership therein is determined by birth, allegiance to a group, residence or just acceptance by other members of

---

1 S 3.5 chapter 3.

the community.<sup>2</sup> It is these characteristics that set the communal land tenure system apart from the Western law property concepts.

Furthermore, land tenure insecurity shaped a huge part of the Black people's history in South Africa. A culmination of colonial and apartheid laws and rules declared it illegal for Blacks to own land.<sup>3</sup> Nonetheless, with the Interim *Constitution* and later the South African *Constitution* came about some noticeable changes. Although some of the previously disadvantaged groups could hold land, the landholding was confined to specific areas of the country. It is against this background that the prevailing communal land tenure insecurity currently exists in the rural areas of South Africa.<sup>4</sup> With a majority of the population of South Africa living in the rural areas, this implies that their land tenure is insecure.

Although not without fault, the Communal Land Tenure Bill (hereinafter the CLTB) presents hope for the rural communities of South Africa. In relation to objective (c) which is to compare the communal land tenure systems in South Africa, Tanzania and Kenya relating to communal land tenure security, women's access to land as well as dispute resolution; the Government of South Africa has since been on a mission to secure rural land rights through its various land reform policies and legislation. Despite the provisions of the *Constitution* to this end, these efforts have proved futile thus far; the very first attempt to secure communal land tenure was aborted before it could even be put into operation (*CLARA*). By the same token, since the *CLARA*'s revocation the Department of Rural Development and Land Reform has worked on policies that gave life to the CLTB.

The CLTB has its own shortcomings but, once enacted, it will be the governing legislation entrusted with safeguarding communal land rights

---

2 S 2.2.1.1.1 chapter 2.

3 S 2.2.1.1.1 chapter 2.

4 S 2.2.1.1.1 chapter 2.

and interests in the South African rural communities. In this light, the CLTB will vest "ownership" of communal land in the communities in terms of section 5 (b). These "ownership" rights will vest the communities with the rights of use, lease, alienation or *any other right relating to property*<sup>5</sup> on the community members as contemplated by section 10 and 11 (b) of the CLTB. Furthermore, it was contended that the CLTB will seek to address some of the issues raised by its predecessor *CLARA*. In this light, the case of *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*<sup>6</sup> was a necessary evil in spite of the money that was wasted on the promulgation of *CLARA*. Thus, credit is owed to the communities that stood at the forefront to fight for their land rights. There is a vast improvement, even so, the CLTB presents its own predicaments. While acknowledging that some communities have secure tenure in their land, the CLTB fails to foresee the dilemma that lies ahead, that Communal Property Associations, whether *inter se* or with traditional authorities, are prone to disputes.<sup>7</sup> Conversely, whether CPA's can administer their functions as expected by the law, remains to be seen.

Additionally, inasmuch as the CLTB has espoused most principles of the South African land registration system, it still blurs them. There is hope for growth and development, nonetheless. Another thought-provoking issue is the simultaneous registration of individual and communal land, which, if not approached with caution, may end up in the same position as *CLARA*. Put in a nutshell, in terms of section 2 (a) (i) and (ii) the CLTB will provide for secure tenure in communal land by converting all insecure landholdings into secure land tenure rights as well as transferring ownership to those communities.<sup>8</sup>

---

5 The discussion on *interests* follows below.

6 2010 ZACC 10.

7 S 3.4.3 chapter 3.

8 S 4.2.2.1 chapter 4.



In the same light, another avenue that will accommodate the complexity of communal land rights is the registration of individual "land interests" instead of "land rights". Section 20(2)(a) of the CLTB will authorise the Minister to institute a land rights enquiry before making a determination on whether to transfer ownership to a community and thereafter award comparable redress. This enquiry must determine the nature and extent of competing or conflicting land rights and *interests* and whether those are secure enough. Moreover, the land administration body that the community chooses to regulate the land is responsible for the promotion of development rights and *interests* of the community and its members. Whether the choice of the word "interests" is just a matter of semantics or is purposeful will be evident with time.

All the same, the "interests" approach could be the answer to many issues since it will encapsulate even the most "informal of the already informal" communal land interests. The reality of having all communal land interests recognised and registered is almost unfathomable! Finally, it is entirely erroneous to proclaim that development of a land registration system magically renders tenure in land secure. Nonetheless, all concerns considered, a *level* of communal land tenure security will be achieved under the CLTB.

In chapter 4, it was emphasised that secure land tenure espouses three critical aspects of tenure security namely the breadth, duration and assurance. In terms of the breadth aspect of tenure security, section 5(1) of the CLTB will require of the Minister to determine the *location and extent* of land in respect of which insecure land tenure must be converted into ownership. A member of the community is any person who is born into that community or a person who assumes membership of a community and lives permanently in that community irrespective of his gender, ethnic, tribal, religious, or racial identity. With regard to the

duration aspect, as any other owner, once the communities have been conferred as owners of the community land, they are entitled to own that land indefinitely, even for future generations. Section 9 (b) of the CLTB will authorise the Minister to transfer these ownership rights to communities. In connection with the ownership principle, the assurance component of tenure security guarantees the owner of land to enjoy that land without interference from third parties. Thus, section 18 of the CLTB confers title on the communities.<sup>9</sup>

According to objectives (d) and (e)<sup>10</sup> there are many land securing mechanisms in the world, the most common being registration. The current South African land registration system does not provide for the registration of communal land rights and this means that there is a huge gap of insecurity amongst communal land holders. Because South Africa uses a negative system of registration, the legislation devised in this regard must not only beware of the complexity of communal rights but must also be mindful of this registration system. The issue of communal land tenure security is convoluted and calls for a response from the angle of review and reform of the registration systems. Different systems of tenure need to be recognised in a way that acknowledges both their diversity of preferences and their common need for security of landholding. With the internet becoming such an integral part of life, there has been an increased need for electronic service delivery. Hence the communal land registration system should also be seen as advancing with the electronic land information recordation<sup>11</sup>

---

9 S 4.2.5 chapter 4.

10 To compare the communal land tenure systems in South Africa, Tanzania and Kenya relating to communal land tenure security, women's access to land as well as dispute resolution and to distinguish between the communal land tenure formalisation approaches adopted in South Africa, Tanzania and Kenya respectively.

11 S 5.1 chapter 5.

### 6.2.2 Tanzania

Around the late 1960's a majority of the Tanzanian people were resettled from the rural areas into the planned villages. This was called the villagisation programme. Its object was to improve the human conditions through *ujamaa* which directly translates into African socialism. The land tenure insecurity problems stemmed from these efforts by the Tanzanian Government which was then led by President Nyerere. The *ujamaa* project was purportedly carried out without any consultation or consent of the villagers which they felt it failed in its mission to protect their land tenure.<sup>12</sup> Furthermore, section 9 of the Tanzanian *Constitution* (as amended) reinforced the *ujamaa* programme.

In 1995 the Tanzanian Government then adopted the Tanzanian National Land Policy which was meant to govern land tenure, use and administration. Its overarching objectives were to promote a secure land tenure system, equitable distribution of and access to land by all citizens of Tanzania as well as sound land information.<sup>13</sup> Shortly after the implementation of the policy, the *Land Act* and the *Village Land Act* (hereinafter the *VLA*) were promulgated. The *VLA* vested village land in village assemblies whose primary responsibility is to oversee the overall management of village land by the village councils. In Tanzania, village land is all land that is not general or reserved land as governed by the *Land Act*.<sup>14</sup> Village land renders a customary right of occupancy unto the landholders. There are two types of rights of occupancy, namely a deemed right of occupancy and a granted right of occupancy.<sup>15</sup> To acquire these rights, a village first has to get a certificate of village land in the

---

12 S 4.2 chapter 4.

13 S 4.2.1.1.2 chapter 4.

14 S 4.2.1.1.2 chapter 4.

15 S 4.2.2.3 chapter 4.

manner prescribed by the *VLA*.<sup>16</sup> This application must include the boundaries that must be agreed upon by the villagers and neighbouring villages. Thereafter, the land must be adjudicated and mapped and the approval thereof results in a certificate of village land being issued to that particular village. Finally, with a copy of the certificate of village land in hand the community is thereby eligible to apply for a certificate of occupancy.<sup>17</sup>

In the same light, section 22 (1) and (2) of the *VLA* requires any member of the village, family unit or a group of persons to apply to the village council for a customary right of occupancy including anyone who has been divorced from any such person, for a period not exceeding two years. This also includes a person or people not ordinarily resident in the villages. Accordingly, section 1 of the *VLA* vaguely defines a customary right of occupancy as a right of occupancy created by means of the issuing of a certificate of customary right of occupancy; it also includes a deemed right of occupancy. Thus, a right of customary occupancy is two pronged namely, deemed right of occupancy and allocated right of occupancy (evidenced by a certificate). Moreover, in terms of section 18 of the *VLA*, a certificate of customary right of occupancy (hereinafter a CRRO) is proof of title but does not bestow ownership rights in a freehold sense, since all land in Tanzania is constitutionally held in trust by the President. Tanzania, being the darling to most International Organisations, has piloted more certificates of title since the inception of the MKURABITA, which to date has seen to just under half of rural individual titles. Resort must be taken to the numerous statutes that must be followed in the

---

16 S 5.2.3.2 chapter 5.

17 S 5.2.3.2 chapter 5.

issuance of community and individual land title, namely the *VLA*, *Land Use Planning Act* (hereinafter *LUPA*) and the *Land Adjudication Act*.<sup>18</sup>

Additionally, a CCRO renders the holder(s) with rights capable of being of indefinite duration, subject to any conditions which are set out in section 29 of the *VLA* or any other conditions which the village council determines, capable of being assigned to a citizen or a group of citizens and inheritable and transmissible by will. As indicated by sections 7 and 33 of the *VLA* and *LUPA* respectively, for a village to be registered as an owner of village land, there must be clear boundaries which have been demarcated and agreed upon as village. Similarly, a CCRO cannot be traded or sold because such transactions can only occur if an entire group agrees with it. In turn, the communal nature of the CCRO inhibits subdivision of land. This generates an additional layer of secure tenure in land security to what can be provided through certificates of village lands or land use plans. Furthermore, a customary right of occupancy may be granted for an indefinite period to a person or group of persons who qualify to be called village members.<sup>19</sup>

Membership of a community is conferred if a person is ordinarily resident in a village or is recognised as such by the village council. Like in South Africa where a CCRO cannot be traded or sold without permission from all villagers, villagers enjoy unrestricted use and occupancy of the property and this is evidenced by a certificate of customary right of occupancy. Despite the fact that one cannot conclusively assert that land tenure is secure, it can safely be inferred that because the village “owns” an identified piece of land (object), for an indefinite period of time and

---

18 S 5.2.3.2 chapter 5.

19 S 5.2.2.2.1 chapter 5.

possess tangible proof of title, then a *degree* of tenure security has been achieved on the Tanzanian village land.<sup>20</sup>

### 6.2.3 Kenya

Kenya overcame the worst land conflict in the near 2000's and this resulted in insecure land tenure for many Kenyan citizens. Nonetheless, it was shown to have rebuilt itself with the most detailed and elaborate land legislation promulgated after 2010. The most notable of these legislation is the Kenyan *Constitution* which categorises land into three classes, namely public, community and private land. Over and above this, chapter 5 of this *Constitution* exclusively deals with land and the environment.<sup>21</sup> In terms of this chapter, community members are guaranteed secure tenure in the land they hold. One of the governing principles in it is that the land must be held, used and managed in an efficient and sustainable manner. To avoid the abuse of power by the officials, section 61 of the Kenyan *Constitution* has vested all Kenyan land in the Kenyan people collectively. For purposes of this study, what is more profound is the provision that vests community land in communities based on similar ethnicity and culture.<sup>22</sup>

Likewise, the Kenyan *Constitution* recognises and protects the community land system and mandated the Parliament to enact legislation to that effect. From this mandate, the *Community Land Act* (hereinafter the *CLA*) was enacted in 2016. In terms of section 1 of same, community land is defined as land held by groups in terms of the *Land (Group Representatives) Act*, land held in trust by county governments on behalf of the communities and finally the land that is lawfully transferred to communities. The *Group Representatives Act* in turn delineates a group as

---

20 S 5.2.2.2.1 chapter 5.

21 S 4.2.2.2 chapter 4.

22 S 4.2.2.2 chapter 4.

a tribe, clan, family or other group of persons whose land is governed by customary law and belongs to such members in common. Only three land tenure types are valid under the *CLA* namely customary, freehold and leasehold. All citizens of Kenya are therefore entitled to acquire and own property, whether *individually* or in association with others. However, despite the granting of individual land use, individual title on community land is not permissible under the *CLA* in terms of section 27 (2) of the *CLA*.<sup>23</sup>

Additionally, for a community to acquire a communal title in community land, the Cabinet Secretary must ensure that the process of demarcation, surveying and mapping has been conformed to. Thereafter, the prescribed cadastral map must be presented to the Registrar for registration of the village as a community. Membership in the community vests in persons who are Kenyans and share common ancestry, similar culture or unique mode of livelihood, geographical space and ethnicity amongst other things. When this happens, the community is conferred with a certificate of title which serves as *prima facie* evidence of ownership and renders a customary right of occupancy to the community.<sup>24</sup> The certificate of title also serves as an assurance that the person(s) named as proprietor(s) of the land is the absolute and indefeasible *owner* of the land, subject to the encumbrances, easements, restrictions and conditions endorsed in the certificate. The certificate serves as an assurance to third parties or any other outsiders.<sup>25</sup> In terms of section 14 (1) (b) of the *CLA*, a customary

---

23 S 5.2.3.3.1 chapter 5. This makes Kenya the only country amongst the three that does not issue individual title to communal landholders. In terms of this provision individual use and occupation of community land is permissible but cannot be "tiled". Thus, this is a contradiction that might reduce land tenure security and therefore calls for an amendment.

24 S 4.2.3.1 chapter 4.

25 S 5.2.3.3.1 chapter 5.

right of occupancy confers community members with the right use and enjoyment of the land for an indefinite duration.<sup>26</sup>

Kenya formalises its community land rights through title registration. Although registration does not guarantee land tenure security, each process contributes greatly to the other. The goal of formalising land right is to integrate the informal land sector in to the formal one through the provision of duly recorded and publicised land information.<sup>27</sup> It is said to be a cost-effective way of providing rural communities with some basic tenure security over their territories, given the escalating global competition for land. Even so, formalisation of land rights also undermines socially recognized rights in land. It is usually used as an instrument of dispossession for purposes of private accumulation and conflicts with ancestral or communal rights.<sup>28</sup>

#### *6.2.4 Final analysis on communal land tenure security*

In a nutshell, the South African, Tanzanian and Kenya communities are vested with the following rights after their registration as communities:

- right to protect the land;
- right to use the land;
- right of usufruct and
- right of inheritance (only explicitly provided for in the Kenyan *CLA*).

Consistent with objectives (a) and (b)<sup>29</sup> it has been argued that, common to South Africa, Tanzania and Kenya community land rights derive from

---

26 The *CLA* deemed it necessary to explicitly mention that customary land rights will be adjudicated and recognized in the same manner as their freehold and leasehold counterparts, that is, in terms of law, all rights are equal.

27 S 5.1.1 chapter 5.

28 S 5.2 chapter 5.

29 To scrutinise the history of the South African communal land tenure insecurity, women's access to land and the dispute resolution and to determine if the



indigenous property law based on customary rules and practices. For this reason, it is a juridical content as it is an integrated social system. It was argued that the central basis of community land is anchored on two foundations, i.e. power and control. Also, communal land tenure acknowledges multi-layered rights; from the clan, political leadership, family and individual level. As argued in chapter four,<sup>30</sup> the nature of communal land tenure cannot be detached from social relationships, membership in a social unit, access, control and inclusivity. Accordingly, the tenure security question needs to determine who owns what interest in what land, the probe deserves to be answered in the context of multi-layered rights. As was argued, the tenure security probe all boils down to the breadth, duration and assurance of land rights irrespective of the land tenure system. Thus, the conclusions that follow are based on these principles.<sup>31</sup>

### **6.3 Women's access to communal land**

#### *6.3.1 Background*

It has been intermittently emphasised that land is central to rural livelihoods. Hence, women being majority caretakers of the homesteads must have secure tenure in the land they use. Nonetheless, these same women are often ostracized in relation to communal land, either against their male counterparts or *inter se* (between their different categories, married and unmarried, widowed and children or no children, male children or female children). The international, continental and regional standards collectively strive for societies not to discriminate against

---

communal land tenure system of South Africa is secure for the rural poor respectively.

30 S 4.2.3 chapter 4.

31 S 4.2 chapter 4.

women in land matters. In relation to objective (c) and (d),<sup>32</sup> it was revealed that women's marginalization is not getting better even with the promulgation of the statutory enactments. With all the legislation in place, customary practices continue to treat women as minors incapable of controlling their own land.

As shown in chapter 4, it is erroneous to attribute this relegation to a single cause, but whatever the cause may be, one view that everyone has in common, is that it must come to an end. Likewise, there are a number of opinions from different schools of thought; those that stood out for purposes of this research were the feminist and human rights approach. In making the case for law reform, feminist lawyers contend that customary law rules discriminate against women; not only as daughters, but wives, widows and divorcees when it comes to access, control and inheritance of land. Others have argued that women's land issues have nothing to do with access. Instead, the problem lies more on "control and access" since the evidence has shown that some women have access to land, for they were real producers or labourers in terms of statistics.

Alternatively, the core object of the adoption of the human rights approach is to ensure that the beneficiaries of development are aware that they are right-holders who are not subject to charity. The human rights activists assert that land is an important tool in bringing about social change in the sense that it is a way to social justice through remedying the prejudice women suffered. Thus, taking a stance in the land issues is not only imperative but must go beyond "land welfarism".

---

32 To analyse the communal land tenure policies, legislation and case law in relation to land tenure security, women's access to communal land and resolution of disputes and to compare the communal land tenure systems in South Africa, Tanzania and Kenya relating to communal land tenure security, women's access to land as well as dispute resolution respectively.

The prevalent land grabs, in turn, bring about changes in land and that affects women. In this chaos, women are urged to play an aggressive role and not just a passive one. The “scramble for land” does not only target women’s landholding, but in their already little to non-existent landholding, this leaves them struggling for more land and security.<sup>33</sup> In this way, it is believed that they can make legitimate claims for their rights from their governments. Since marriage under statutory law does not guarantee women an advantage in most cases, it has been argued that women have to fight their own battles and cannot simply put their faith in a basic “human rights” approach to address their gender-specific concerns about commercial pressures on land, as these do not have the systemic discrimination against women at the fore. Thus, women must advance their access and control of land. One of the major flaws of the human rights-based approach is that since customary rules and customs differ from community to community, the international standard criterion required by the human rights cannot be met. This discrimination on the basis of sex calls for a paradigm shift, wherein human rights activists and the feminist movements combine forces and must together advocate and fight for women’s access to land.<sup>34</sup>

### *6.3.2 South Africa*

#### *6.3.2.1 Gender parity*

In the main, the South African women’s land rights are more insecure than those of men and are often seen as “secondary” in character, given that women’s access to land is obtained only via their husbands or other male relatives. Prior to the promulgation of the communal land tenure legislation in South Africa, women were vulnerable and had no voices in any of the land administration institutions. This, in turn, implied that they

---

33 S 4.3.1 chapter 4.

34 S 4.3.5 chapter 4.

were not involved in any decisions that affected them and their land use. After apartheid, however, there have been paradigm shifts in women's landholding in South Africa. South African women have been reported to control more land than they previously did. It has been contended that this change has not been triggered by any law or land reform measures, but is an outcome of unplanned local negotiations between women and land authorities. It goes without saying that ordinary community members must be consulted and involved in processes that define and develop custom through legislation. This was not the case with the promulgation of *CLARA*, hence one of the reasons for its untimely revocation.

#### 6.3.2.2 Inheritance

In many South African rural communities, women are not allowed to inherit their families' property and this happens whether married or unmarried. For unmarried women, their fathers property traditionally revolves to the uncles of the family, while for the married women, the brothers of the deceased husband claim their brother's property. Nonetheless, legally, the case of *Bhe and others v The Magistrate, Khayelitsha and Others*<sup>35</sup> brought about a welcome change to the South African legal system. In this case, an application was made on behalf of the two minor daughters of Miss Bhe and her deceased partner. It was submitted that the impugned provisions and the customary law rule of male primogeniture unfairly discriminated against the two children since it prevented them from inheriting the estate of their late father.

In deciding on the unconstitutionality of the discriminatory provision, the judge concluded that it was in breach of the rights to equality in section 9(3) and dignity in section 10 of the South African *Constitution*, thus had

---

35 2005 1 SA 580 (CC) S 1.2.2 chapter 1; See also *Shibi v Sithole and Others* (Case CCT 69/03) where Ms Shibi was prevented from inheriting the estate of her deceased brother.

to be struck down. Furthermore that it was inconsistent with the *Constitution*, since the procedures differed and were treated differently with black people's estates as against those of white people. The judge also decided that the African customary law rule of male primogeniture was unconstitutional insofar as it was applied in relation to the inheritance of property. This practice discriminated unfairly against women and illegitimate children.

#### 6.3.2.3 Female representation in decision-making bodies

Contrary to the provisions of the *CLARA* on women which allocated only 30 per cent composition in leadership positions of the traditional institutions, the CLTB has advanced women in that, half (50 per cent) of all leadership positions are now available to women. It remains to be seen how the communities react to these changes. However commendable this is, these efforts are likely to be futile if communities choose the traditional leadership as their land administration institution. Women are most likely to be side-lined since the institution in itself is patriarchal. In this light, it is up to the Director-General and the Department as a whole to oversee that the provisions of the law are carried out to the letter.<sup>36</sup>

### 6.3.3 Tanzania

#### 6.3.4.1 Gender parity

To rectify the past injustices of women's marginalisation, the Presidential Commission of Tanzania was authorised to "modernise tradition as opposed to imposing modernization on tradition"<sup>37</sup> that prohibited women from inheriting and controlling land.<sup>38</sup> Nonetheless, it was argued that inasmuch as gender equality with men was vital, it was not an ideal goal to strive for as long as the land rights of the entire community were under

---

36 S 3.6 chapter 3 and 4.3.3 chapter 4.

37 S 4.3.3.2 chapter 4.

38 S 4.3.3.2 chapter 4.

threat, otherwise the equality would be equality in landlessness. Thus, if both men's and women's land tenure is under threat, to whom would the women be enforcing their rights against?

The Tanzanian National Land Policy also identified the problem that the women's land rights were inferior to the men's because of the discriminatory customary practices. Based on this discovery, the policy recommended that women could thereafter acquire and own land in their own right. This development was later encapsulated by section 20(3) of the VLA.

#### 6.3.4.2 Inheritance

Despite the developments suggested by the Tanzanian National Land Policy that women could own and acquire land in their own right, the issue of inheritance was left to be governed by the customs and traditions of the clans, regardless of this being against the constitutional provisions. Notwithstanding, the Tanzanian case law has shown that some women have claimed and become successful in their land claims. For instance, in the case of *Epharahirim v. Holaria Pastory*<sup>39</sup> one of the discriminatory customary practices of Tanzania was overruled. In this case, a woman had inherited land from her father and sold it to someone outside the clan. The uncles were infuriated by this and approached the court claiming that under the Haya custom women could not sell land. The High Court invalidated the discriminatory norm on the basis of the principle of non-discrimination on the basis of sex, as affirmed in the Bill of Rights. It further held that Haya women could sell land on the same conditions as Haya men, thus the disputed land sale valid.

---

39 Unreported Primary Court (Civil Appeal) 70 of 1989.

#### 6.3.4.3 Female representation in decision-making bodies

Tanzania is one of the first of a few African countries to explicitly establish women's rights in land through legislation. It was through the introduction of the *V/LA* where 33 per cent female representation on the land administration institutions was rendered mandatory. This was a measure intended to address the lack of female representation on decision-making bodies in Tanzania. Although this is not a satisfactory representation, it was a start which now calls for eminent amendment. It is believed that women who are elected into the village council are unlikely to demonstrate particular support for women's land claims. All the same, it does not make sense to have females in representation institutions only to have them side with other females, otherwise, the object of equity and equality would completely defeated. The cases that come before the village council must be decided on their own merit.<sup>40</sup>

On the contrary, having women on land boards does not change the underlying norms and behaviours since power relations still privilege men and women find it difficult to make progressive decisions that protect the rights of other women. By doing so, they face an uphill battle, in terms of resistance and backlash from men board members. This is because most social claims are decided on the basis of kin or patron-client alliances instead of the foundation of alliances of gender or class. Thus, the solution to women's insecure tenure lies not with institutional reform, but with a change in family and inheritance legislation.<sup>41</sup>

---

40 S 4.3.3.2 chapter 4.

41 S 4.3.3.2 chapter 4.

### 6.3.4 Kenya

#### 6.3.4.1 Gender parity

The Kenyan National Land Policy advocated for equal treatment of men and women in land matters. It also noted that a rescission of discriminatory laws was needed as matter of urgency. This, in turn, called for implementation of appropriate legislation to ensure women's rights in land. In the same light, the *Constitution* of Kenya advocates for the protection of the vulnerable, women included. One of the overriding principles in the *Constitution* is the equal treatment and opportunities between men and women of Kenya. Refreshingly, in terms of the *Land Registration Act*,<sup>42</sup> a piece of land owned by a person married in community of property is presumed to be owned by both spouses, unless it is explicitly provided that the spouse is acquiring that land in his own name.

Nonetheless, in the event that only one name appears in the title, but the other spouse can prove that they have contributed in whatever manner towards the betterment of productivity, then that spouse is deemed to have acquired an interest in that property.<sup>43</sup> Although there are laws and constitutional provisions that provide women with the same rights as men, but if history is anything to go by, the patriarchal traditions are bound to hinder the enjoyment of these rights at the ground level.

#### 6.3.4.2 Inheritance

The Kenyan National Land Policy explicitly cites the need to protect women's right to inherit land. This principle was carried through in the *Constitution* of Kenya through section 68 (c) which provides that the dependents of deceased persons holding interests in any land including

---

42 3 of 2012.

43 S 4.3.3 chapter 4.



the interests of spouses in actual occupation of land must be protected. Over and above this purported protection, the *Constitution* has mandated that legislation to that effect be adopted timely.

#### 6.3.4.3 Female representation in decision-making bodies

The *Community Land Act* (hereinafter the *CLA*) is not very overt and inclusive of women's access to land in Kenya. It instead leaves all the decisions regarding the community land to the usually "patriarchal institutions". There is no mention of the composition of the land administration bodies throughout the act. This not only leaves women vulnerable, but also renders all the pro-women legislation of Kenya ineffective.<sup>44</sup> The *Constitution* of Kenya, on the other hand, recognises and protects the equal rights of women and men. It is imperious on the achievement of full empowerment of women since the rights range from the equality on ownership of property clause, inheritance rights as well as guaranteeing women a place in leadership and governance positions.

#### 6.3.5 Final analysis on women's access to communal land

A *prima facie* observation of the CLTB, *VLA* and the *CLA* shows that gender equality is provided for in the constitutions of all three jurisdictions. Whether or not this gender equality is observed is a different story that requires one to personally witness over time. In terms of the constitutions, women must be treated with respect and on an equal footing with their male counterparts in all matters, more so in land matters. It is interesting to note that inheritance issues are mostly left to customary practices of each community, which is a negation in terms since it was illustrated that customary practices in these communities do not observe gender equality and this qualifies as discrimination based on sex. What is worse is that even the lawmakers themselves are conscious

---

44 S 4.3.3.1 chapter 4.

of these discriminatory practices. In Tanzania, this is contrary to the standards set in section 20(2) of the *VLA*, which provides that cognizance must be taken of rules of customary law when decisions are taken in respect of land held customarily, provided they do not go against women's or children's rights, in which case, that rule or decision will be rendered void.<sup>45</sup>

Likewise, section 3 (f) of the South African CLTB provides that the principle of equality must be applied in the regulation and administration of communal land. In addition, section 14 of the Kenyan *CLA* urges all the registered communities to consider the principle of equality of all persons as well as equal treatment of applications (for land) for women and men. Equal treatment is all encompassing and includes the right to access, to participate and make decisions among many other freedoms. On a larger spectrum of protection is the humanity perspective. Thus, the traditional exclusion of women from property and land ownership on gender grounds is the most damaging global human rights violation. In this regard, many organizations and states alike advocate for the reverence of women's human rights to own property including land.<sup>46</sup>

To conform to the standards set by the international and regional instruments, the South African *Constitution* has also embodied those equality principles. The CLTB has remedied the contentious non-equality clauses under *CLARA* by giving half of the leadership positions in communal land administration to women. Nonetheless, the patriarchal communities continue to inhibit women's autonomy to deal with land in ways they deem fit because they are seen as "minors" despite being the tillers of the land. Thus, if women's communal land rights and interests continue to be ignored as they are, perhaps there is no point in pretending

---

45 S 4.3.3.2 chapter 4.

46 S 4.3.3.2 chapter 4.

that land rights are actually “communal” when over half the communities faces marginalisation and their rights are treated as secondary. Alternatively, the CLTB’s placement of an equal number of women and men in leadership positions could prove futile if communities opt for the institution of traditional leadership to administer its land; women are likely to be side-lined since the institution is in itself patriarchal. In this light, it is up to the Director General and the Department as a whole to oversee that the provisions of the law are carried out to the letter.

The Kenyan National Land Policy, the Tanzanian National Land Policy and the South African Land Policy alike, have repeatedly emphasized that women’s tenure in land is insecure, while also noting that there was conflict between constitutional and international provisions on gender equality as against customary practices. These practices marginalise women in relation to land access and inheritance. The problem of women’s land insecurity is not one to be solved by institutional reform, but by repealing and replacing discriminatory laws. Hence, the respective governments admonished the law makers to repeal all discriminatory laws and replace them with those that acknowledge women as capable heirs to their husbands’/fathers’ property. This implies that it should not matter whether a woman is married, has been married or never married if she is eligible for inheritance of land/property. Despite the recommendations of these policies, the *CLA*, *VLA* and CLTB have not incorporated the provisions that repeal customary practices of inheritance as invalid.

The Kenyan *CLA* makes provision for a widow to remain on her and her husband’s property after his death, but only for as long as she stays unmarried. This implies that when she re-marries she loses the right of

occupation. This is a beneficial provision but it is still insufficient because it makes no mention of divorced and single women.<sup>47</sup>

Finally, it is vital to have equal representation of men and women on the decision-making structures because this empowers women. Their access to land and property is central to their economic empowerment (land is essential for food production and income generation). Evidence has shown that agricultural production and food security increase when women are allowed to make meaningful decisions. Nonetheless, placing them on these structures would not make sense if they were not familiarised and trained on their rights and interests in land. It is one thing to be able to make decisions, but to effectively “represent” one must be fully aware of what they are representing. It would seem that Tanzania and South Africa allow female representation on their village institutions. Despite Kenya having the latest legislation, it does not make provision for female representation on their land administration bodies. Specifically, section 15(1) of the *CLA* makes provision that a registered community must have a community assembly that composes of adult members without recourse to the gender of those members.<sup>48</sup>

## **6.4 *Dispute resolution***

### **6.4.1 *Overview***

Disputes occur, develop and get resolved as a part of social evolution. The unsatisfactory settlement of disputes is likely to hinder social development and is a potential source of social instability. Broadly and simply speaking, dispute resolution methods can be classified into traditional and modernist approaches.<sup>49</sup> The traditional methods of dispute resolution systems are those that prescribe an outcome based on conjoint problem-sharing

---

47 S 4.3.3.1 chapter 4.

48 S 4.5.2.3 chapter 4.

49 S 4.4.3 chapter 4.

wherein the disputants liaise to redefine their squabble, while also preserving their relationship.

Alternatively, the modernist view is that land titling and registration are institutional means of land administration and land conflict management. The ancestral roots of this thinking can be traced to the laissez-faire economic thoughts of Adam Smith and John Locke. Regarding land conflict management, modernists have sustained that, since land transactions are documented in land registers to which references can be made, land disputes and litigation costs are reduced.<sup>50</sup> In this regard, registration of land serves to circumvent disputes, identify individual and collective owners who could be the rightful people to consult in land transfers. Over and above this, the land register outlines the boundaries of land and creates and protects the interests of indigenous peoples.

Broadly and generally speaking, land-related conflicts are a result of tenure insecurity. When the scope and breadth are overly limited, duration is too short and rights are inadequate and unenforceable and conflict usually follows. Thus, secure tenure in land wards off conflict since when community members have an agreement upon a location and extent of land, they have assurance in the title they hold, that for an ascertained period of time interpersonal and intercommunity conflicts are curbed.

#### *6.4.2 South Africa*

##### (a) The traditional dispute resolution method

The traditional leadership institution is widely acknowledged in rural South Africa. The government of South Africa has solidified this position through the *Traditional Leadership Framework and Governance Act* (hereinafter the *TLFGA*) and the Traditional Courts Bill (hereinafter the TCB). The TCB was meant to affirm and recognise the traditional justice system as part of

---

<sup>50</sup> See s 5.2.3.2.3 chapter 5.

the South African legal system in line with the constitutional imperatives and values. Similarly, the TCB reinforced the principle of restorative justice and reconciliation. However, it has been argued that the abovementioned objectives are just decoys while their real objective is to rework customary law by centralising power in the hands of senior traditional leaders hence adding more powers that they did not originally hold under custom.<sup>51</sup> These concerns have escalated further under the Traditional and Khoi-San Leadership Bill. This Bill seeks to replace the *TLFGA*, which connects communal land with traditional courts by superimposing apartheid tribal identities on those living in former homeland areas. Although rejected by both the Parliament and the Constitutional Court, this Bill seeks to legalise a version of unilateral chiefly authority<sup>52</sup>

Over and above the dispute resolution functions normally performed by the traditional leaders, the CLTB places an even bigger role on them in a sense of regulation, management and administration of communal land in South Africa. Nonetheless, for a traditional leadership institution to perform these functions, it must be duly constituted in terms of the *TLFGA*.<sup>53</sup> This clearly impedes on the separation of powers principle since it will be both a governing body as well as a judicial one.

(b) Alternative Dispute Resolution (hereinafter ADR) methods

(i) Mediation

The CLTB will acknowledge mediation as an alternative dispute settlement method. In terms of its section 45(2), when the disputants cannot overlook and accept the conclusions they arrive at in a negotiation, the dispute should be directed to the traditional council, the CPA or the Household Forum for mediation. If the matter that is forwarded for

---

51 The TCB was rejected by the South African Parliament in 2014.

52 S 2.4.3.2 chapter 2.

53 S 3.1 chapter 3.

mediation is not finalised within three months from its institution, there is procedure outside of mediation that will be followed.<sup>54</sup> The general feeling around the mediation process is that it has lost its effectiveness in South Africa over the years. This can be attributed to the following factors:

- (i) In most of the leading land legislation in South Africa, the mediation procedure can only be instigated by the public officials.
- (ii) In a majority of the South African legislation that allude to the mediation process, remuneration of the mediators is not provided for.
- (iii) There is generally a lack of training for mediators in South Africa.

For these reasons, the courts have resorted to punitive measures in instances where legal practitioners fail to mediate their cases where it is necessary to do so.<sup>55</sup>

## (ii) Arbitration

Arbitration in South Africa is governed by the *Arbitration Act* which outlines rules and guidelines for the successful application and enforcement of arbitration laws. Its object is to provide for the settlement of disputes and the enforcement of awards by arbitral tribunals. Nonetheless, for it to apply, the parties thereto must have agreed beforehand that they will follow such action if and when a dispute arose between them. The CLTB is silent on the arbitration technique. To circumvent the costly formal court proceedings, the arbitration technique would be a more viable option for communal land resolution of disputes in South Africa. This is because arbitral awards are binding in nature yet more effective than mediation.

---

54 S 4.4.3.2.2 chapter 4.

55 S 4.4.3 chapter 3. *Brownlee v Brownlee* [25 August 2009 (Unreported) South Gauteng High Court].

### 6.4.3 Tanzania

#### (a) Traditional dispute resolution method

The *VLA* promises an established, independent, expeditious and a just system of dispute resolution in land issues. In the same light, directly related to land disputes, is the *Courts (Land Disputes Settlement) Act* (hereinafter the *Courts Act*), which espouses the customary and traditional principles. The *Courts Act* provides that in the exercise of its customary law jurisdiction, a Ward Tribunal must apply the customary law that is practiced in that area. This is a very wise decision on the part of the lawmakers since customary rules differ from community to community. Thus, when a dispute arises between community members, they already know the rules that apply to their dispute beforehand.

The main issue with the Tanzanian legal system is that it has not adopted any legislation that entrenches the traditional method of dispute resolution into the system; it is only mentioned in various legislations.

#### (b) ADR methods

##### (i) Mediation

In terms of the *VLA*, any matter concerning village land has to be mediated upon by a duly appointed village council in order to assist the disputants to arrive at a mutually acceptable solution. Mediation is ordinarily a voluntary process, except where the law explicitly dictates it. The parties agree to the process and they control the dispute resolution process. In so far as the procedure for the mediation processes is concerned, section 8 of the *Courts Act* points in the direction of section 61 of the *VLA*; the latter is silent in this regard. Section 61(2) provides for what the convenor has to do once they are made aware of the eminent mediation process (appointment of mediators and convening a meeting); it does not show the actual technique that should be followed in the



mediation process. Mediation under the *VLA* is thus flawed in that it resembles formal court processes where one is not at liberty to choose who to preside over their dispute.

In the same manner, a mediator who is a member of the village land council may only be excused of his role, if any of the disputants is a family member or has any interest in the dispute before him. Thus, a disputant's only ground for the application of a potential mediator's recusal would be to prove that the latter has a "direct interest" in the matter to be mediated upon. This goes against the very core principles of mediation. The basic understanding in mediation is that the disputants are allowed to choose their own mediator who will at all times appear to be neutral.<sup>56</sup>

#### (ii) Arbitration

As detailed and bulky as the *VLA* and the *Courts Act* are, there is no mention of arbitration as a means of dispute resolution technique in Tanzania. This is very restrictive and narrow minded since the Tanzanian dispute resolution system does not appreciate the diversity of the ADR techniques.

#### 6.4.4 Kenya

##### (a) Traditional dispute resolution method

Traditional dispute resolution methods are still widely acknowledged in the Kenyan rural communities and derive their validity from the customs and traditions which are the primary pillar of any the justice system that acknowledges them. In particular, land matters are the sole jurisdiction of the traditional authorities. These mechanisms are well entrenched in Article 159 of the *Constitution* of Kenya.<sup>57</sup> The *Judicature Act*, likewise,

---

<sup>56</sup> S 4.4.3.2.2 chapter 4.

<sup>57</sup> This section recognises the use of traditional dispute resolution mechanisms as well as alternative dispute resolution systems.

recognises customary law as a source of law in the Kenyan legal system. This legislation was one of the first in Kenya, cementing customary law in the Kenyan legal system. It caveats that customary law is only applicable insofar as it is not repugnant to justice and morality.

(b) ADR methods

(i) Mediation

The Kenyan *Civil Procedure Act*<sup>58</sup> defines mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties. There is a court-mandated mediation in Kenya, as in South Africa, but over and above this, Kenya also has a court annexed mediation wherein parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment. The main object of mediation is to reorient the parties towards each other. This is not done by imposing rules on them, instead they are assisted to achieve a new and shared perception of their relationship. Mediation is forward-looking, thus its goal is for all parties to work out a solution they can live with and trust. It focuses on solving problems, not uncovering the truth or imposing legal rules. In terms of section 40(1) of the *CLA*, parties to a dispute may agree amongst themselves that they will use mediation to resolve their dispute. This mediation may either apply in an informal or formal setting where the disputants will participate and also design the format of the settlement agreement. Additionally, the mediation procedure under the Mediation Rules is more effective in Kenya than Tanzania and South Africa in that its decisions are final and cannot be appealed.

---

58 Caps 21, Laws of Kenya.

(ii) Arbitration

The *Arbitration Act* defines arbitration to mean any arbitration whether or not administered by a permanent arbitral institution. Arbitration has been defined as a process subject to statutory controls, whereby formal disputes are determined by a private tribunal of the parties' choice. Similarly, sections 39 through 42 of the *CLA* make provision for dispute resolution mechanism in respect of community land, particularly arbitration. In terms of section 40(1) of the *CLA*, the parties to a dispute may choose to invoke arbitration measures to resolve their dispute, in which case they will have to appoint an arbitrator of their choice. If they cannot agree on an arbitrator, the appointment thereof will be governed by the *Arbitration Act*.<sup>59</sup>

*6.4.5 Final analysis on dispute resolution*

A feature common to South Africa, Tanzania and Kenya is that they remain true to the traditional dispute resolution method especially when it concerns communal land disputes. Nonetheless, the Tanzanian and Kenyan legal systems have not formally adopted any legislation to entrench the traditional leadership as a formal institution in their legal systems and, in turn, the traditional dispute resolution technique. Inasmuch as it is established that the CLTB, *VLA* and the *CLA* observe alternative dispute resolution methods, different techniques are adopted by same. For example, the Tanzania's most preferred method of dispute resolution is mediation, while in Kenya arbitration takes precedence. In South Africa, it is not as clear as the CLTB touches briefly on all techniques. The *TLFGA*, too, sheds no light in this regard. Conciliation, on the other hand, seems not to be popular in all three countries. This could be attributed to the historical confusion between conciliation and

---

59 S 4.4.3.2.3 chapter 4.

arbitration since at some point in time these concepts were used synonymously.

In the same light, it is important to point out that the lines between the techniques are very blurred due to the lawmaker's oversight. After all, they are not all lawyers. Moreover, it is very easy to confuse concepts when dealing with traditional dispute resolution techniques, since infused with it is various other ADR mechanisms, this could prove beneficial or disastrous because of the collective benefits that come carrying the collective shortcomings of the techniques employed. As mentioned before, an effective dispute resolution system implies more secure tenure in that the resolution thereof gives the successful disputant some sort of assurance that their rights and interests are recognised by the community and the authorities. Therefore, seeing that community land forms a majority part of land in Kenya and Tanzania, save for South Africa, there is a need to strengthen and improve dispute resolutions systems.

With less than 20 per cent of communal land in South Africa being occupied by about a third of the overall population, this implies that the tenure uncertainty of the rural communities requires protection as a matter of urgency. In relation to objective (c) and (d)<sup>60</sup>, the object of every dispute resolution mechanism is to mend the social relationships that are likely to go sour when people live together. The mechanisms employed therein should work in a way that allows the disputants to still live together amicably after such conflict has been resolved. It has been shown that the institution of traditional leadership has re-emerged in South Africa, whether from its oppressive roots of apartheid or as a new creature is dubious. The primary role of traditional leaders has and will

---

60 To analyse the communal land tenure policies, legislation and case law in relation to land tenure security, women's access to communal land and resolution of disputes and to compare the communal land tenure systems in South Africa, Tanzania and Kenya relating to communal land tenure security, women's access to land as well as dispute resolution.

always be maintenance of peace and order in the communities, but, this role is often tainted by petty government politics.

The promulgation of the TCB and the *TLFGA* was seen as a preservation of custom by many with a few exceptions who see it as a redundant institution in a democratic and constitutional state. If there is to be any future for these institutions, the principle of separation of powers must be observed. In attempting to solve land disputes, various techniques are used and they are often employed as a means of restoring peace between disputants. These techniques have regressed from a winner-loser mentality in that both parties to the dispute must both be satisfied by the outcome arrived at.

#### *6.4.6 Future research*

This study does not in any way claim to have thoroughly proved or disproved the enquiries that inspired it. Nonetheless, it can contribute to the resolution of the issues addressed. Thus, these discussions are open for further debate. The recommendations and findings presented hereunder, are neither a solution, nor are they the only complete answer, but they can provide some guidance with the challenges posed by the gap in knowledge.

The following long- to medium-term future research agenda is proposed:

- Future research could test the findings of this study with practical case studies, especially on the ill-treatment of women's landholding in South Africa, Tanzania and Kenya. There is a need to investigate the existing gaps in the legislation and what actually happens in practice.
- Land tenure security is not a concept that can easily be measured or ascertained, therefore, this can be tested on different levels in future.

- Although the traditional dispute resolution system is still widely acknowledged in South Africa, Tanzania and Kenya, the CLTB, *VLA* and *CLA* show that there is a place for ADR mechanisms. Nonetheless, there is a great need to broaden and acknowledge the various techniques of the ADR in the communal land tenure legislation.

## **6.5 Recommendations**

### *6.5.1 Tenure security*

This study has established that land tenure security is a complex subject all round, even worse is the attempt to secure communal land rights. To this end, it was argued that after the enactment of the CLTB, the coinciding registration of individual and community land needs to be reviewed. With the majority of the South African population residing in the rural communities, to assume that all the communities titles as well as the family titles will all be issued in unison, is preposterous. Thus, it is recommended that a pilot project of community land registration be carried out in the first phase and only when it is done, the second phase of individual land registration be carried out. Also, South Africa should adopt legislation that provides for registration of communal land in which the recording of land rights will encapsulate the exact use rights and interests as they exist on the ground. Over and above this, in this era, where everything is so technologically advanced, there is a strong need for an electronic registration of these communal land rights.

All issues considered, in Kenya there are five formal land titling systems which have been vaguely harmonised by the *Land Registration Act*. Nonetheless, it has been contended by different commentators that these efforts have failed to offer a secure and efficient land title registration regime in Kenya. Thus, it is recommended that the Kenyan community

land legislation be amended to avoid confusion within the communities. The titling systems are reportedly difficult for the urban communities as it is, what more of the rural communities? Similarly, Kenya allows individual land use on community land, but prohibits registration of individual title.

#### *6.5.2 Women's access to communal land*

In some communities women have rights and access to land, however, the major impediment faced by most is their ignorance of these rights. Thus, the South African *Government* must ensure that the provisions of the laws are actually being followed to the letter in the communities. This can be done by disseminating educational brochures containing information on the rights and interests of all members of the community. Alternatively, the DRDLR can conduct workshops educating community members on their entitlements in land. A lesson that can be learnt from Kenya is the inclusion of the inheritance provisions in the *CLA*. Although some communal land administration procedures revert back to the customary practices, section 68 of the *CLA* is worthy of note. Furthermore, there is a need to raise awareness on customary land laws and how they impact on women's rights. An abandonment of these practices that encourage or promote gender discrimination should be the first step. Of these three jurisdictions, South Africa seems to be ahead on the representation of women on decision-making bodies; this is evidenced by the provisions of the CLTB. Over and above this, the DRDLR should make it a criminal offence if the CLTB is not followed in the manner prescribed.

Nonetheless, there is still a huge gap in the gender parity in South Africa, Tanzania and Kenya. In this light, an amalgamation of the feminist movement and the human rights based approach can cover a broader base since their principles on women empowerment are analogous. Finally, in terms of the inheritance aspect, there are no two ways about it: the only way to do away with this discrimination is to do away with

customary practices that side-line women's communal landholding. This is clearly not something that can happen in a whim, but over a period of time. Women are an integral part of many South African communities and must not be treated as outsiders in their own villages.

### *6.5.3 Dispute resolution*

The traditional dispute resolution methods are part and parcel of the South African legal system. However, its patriarchal practices and discrimination of women remain notorious. Furthermore, its ineffectiveness is largely because of its unbinding outcomes. The enforcement of outcomes of the dispute resolution mechanisms, whether traditional or ADR's, is very vital for the dispute resolution system of any country, otherwise it would not make sense to spend money unnecessarily for processes that are of no force and effect. An amendment of the traditional leadership legislation to make the decisions authoritative and binding is necessary. Also, it is suggested that this can be curbed by computerising court documents and keeping records of the decisions as court precedents.

What is worse, if chosen as the land administration authorities, the institution of traditional leadership will be performing dual functions, namely the dispute resolution function as well as the administrative function. This duality threatens the tenure security of the community members since they are not assured in their landholding because the authorities are impartial. In the same vein, the South African legal system should encourage the use of ADR mechanisms by making it compulsory in specific disputes and in selected jurisdictions. In this way, the expensive litigation route will be eluded.

To conclude, it is assumed and trusted that this study has made a significant contribution from a communal land tenure security perspective



to the growing body of academic literature on land reform, gender equality discrimination as well as resolution of disputes. It is hoped that, by implementing the abovementioned recommendations secure tenure can be attained, women's land rights will be respected and the resolution of disputes will become fairer and facilitate the realization of communal land tenure security.

## **BIBLIOGRAPHY**

### **Literature**

#### **A**

Adams and Knight "Land Policy Developments and Setbacks" in Chigara B (ed) *Southern African Development Community land issues*

Adams M and Knight R "Land Policy Developments and Setbacks in Southern Africa in Chigara B (ed) *Southern African Development Community land issues: towards a new sustainable land relations policy* (Routledge New York 2012) 27-56

Adhiambo *Indigenous Conflict Resolution Mechanisms*

Adhiambo AJ *Indigenous Conflict Resolution Mechanisms among Pastoralist Communities in the Karamoja Cluster- A case study of the Turkana* (MA- Dissertation University of Nairobi 2012)

Ajayi and Buhari 2014 *ARR*

Ajayi AT and Buhari LO "Methods of Conflict Resolution in African Traditional Society" 2014 *African Research Review* Vol.8 No.2 138-157

Ajiima *Making Kenya a Hub for Arbitration*

Ajima DO *Making Kenya a Hub for Arbitration of International Financial Services Disputes* (LLM-Dissertation University of Nairobi 2014)

Aliber and Cousins 2013 *JAC*

Aliber M and Cousins B "Livelihoods after Land Reform in South Africa" 2013 *Journal of Agrarian Change* Vol.13 No.1 104-165

Amman and Duraiappah 2004 *EDE*

Amman H and Duraiappah K "Land Tenure and Conflict Resolution: a game theoretic approach in the Narok district in Kenya" 2004 *Environment and Development Economics* vol.9 No3 383-407

Archambault and Zoomers (eds) *Global Trends in Land Tenure Reform*

Archubault C and Zoomers A *Global Trends in Land Tenure Reform: Gender Impacts* (Routledge London and New York 2015)

## **B**

Badenhorst, Pienaar and Mostert *The Law of Property*

Badenhorst PJ, Pienaar JM and Mostert H *Silberberg and Schoeman's The Law of Property* 5<sup>th</sup> ed (Lexis Nexis Cape Town 2006)

Barry "Dysfunctional CPA's"

Barry M "Dysfunctional Communal Property Associations in South Africa: The Elandskloof Case" *FIG Working Week Surveyors Key Role in Accelerated Development* (3-8 May 2009 Eilat, Israel)

Banda "Romancing Customary Tenure" in Fenrich *et al. The Future of African Customary Law*

Banda LJ "Romancing Customary Tenure" in Fenrich J, Galizzi P and Higgins TE (eds) *The Future of African Customary Law* (Cambridge University Press New York 2011) 312-335

Banda 2006 *JAL*

Banda F "Blazing a Trail: The African Protocol on Women's Rights Comes into Force" 2006 *Journal of African Law* Vol.50 No.1 72-84

Basu 2016 *JID*

Basu S "Community, Conflict and Land: Exploring the Strategic Partnership Model of South African Land Restitution" 2016 *Journal of International Development* Vol. 28 733-748

Baldwin 2014 *CP*

Baldwin K "When Politicians Cede Control of Resources: Land, Chiefs, and Coalition-Building in Africa" 2014 *Comparative Politics* Vol.46 No.3 253-271

Beall, Gelb and Hassim 2005 *JSAS*

Beall J, Gelb S and Hassim S "Fragile Stability: State and Society in Democratic South Africa" 2005 *Journal of Southern African Studies* Vol.31 No.4 681-700

Bennett *A Sourcebook of African Customary Law*

Bennett TW *A Sourcebook of African Customary Law for Southern Africa* (Juta Cape Town 1991)

Bennett, Ainslie and Davis 2013 *LUP*

Bennett J, Ainslie A and Davis J "Contested Institutions? Traditional Leaders and Land Access and Control in Communal Areas of Eastern Cape Province, South Africa" 2013 *Land Use Policy* Vol.32 27-38

Bennett *Customary Law in South Africa*

Bennett TW *Customary Law in South Africa* (Juta Cape Town 2004)

Bennett "'Official' vs 'living' Customary law" in *Land Power and Custom*

Bennett T "Official vs Living Customary Law: Dilemmas of description and recognition" in Claasens A and Cousins B (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (UCT Press Cape Town 2008)

Bentley 2005 *HRR*

Bentley KA "Are the Powers of Traditional Leaders in South Africa Compatible with Women's Equal Rights?: Three Conceptual Arguments" *Human Rights Review* Vol.6 No.4 48–68

Beyers and Fay 2015 *AA*

Beyers C and Fay D "After Restitution: Community, Litigation and Governance in South African Land Reform" 2015 *African Affairs* Vol.114 No.456 432- 454

Biyela and Reddy "Rural Local Government and Development" in Ray and Reddy (eds) *Grassroots Governance*

Biyela BB and Reddy PS "Rural Local Government and Development: A Case Study of Kwazulu-Natal: Quo Vadis?" in Ray DI and Reddy PS *Grassroots Governance: Chiefs in Africa and the Afro-Caribbean* (University of Calgary Press Canada 2003)

Blattman, Hartman and Blair 2014 *APSR*

Blattman C, Hartman A and Blair R "How to Promote Order and Property Rights under Weak Rule of Law? An Experiment in

Changing Dispute Resolution Behavior Through Community Education" 2014 *American Political Science Review* Vol.108 No.1 100-120

Blom *Land Reform and Gender Equality*

Blom L *Land Reform and Gender Equality in South Africa* (Master's Dissertation Lund University 2006)

Boone 2007 *AA*

Boone C "Property and Constitutional Order: Land Tenure Reform and the Future of the African State" 2007 *African Affairs* Vol.106 No.425 557–586

Bosch and Hirschfield *Legal Analysis*

Bosch D and Hirschfield E *Legal Analysis of Communal Property Institutions in Land Reform* (Unpublished report CISR Pretoria 2004)

Bottazzi, Goguen and Rist 2016 *JPS*

Bottazzi P, Goguen A and Rist S "Conflicts of customary land tenure in rural Africa: is large-scale land acquisition a driver of 'institutional innovation'?" 2016 *The Journal of Peasant Studies* Vol.43 No.5 971–988

Brasselle, Gaspart and Platteau 2002 *JDE*

Brasselle AS, Gaspart F & Platteau, JP 2002 "Land Tenure Security and Investment Incentives: Puzzling Evidence from Burkina Faso" *Journal of Development Economics* Vol.67 No.2 373-418

Bromley 2008 *LUP*

Bromley BW "Formalising property relations in the developing world: The wrong prescription for the wrong malady" 2008 *Land Use Policy* Vol.26 20-27

Bruce A *Review of Tenure Terminology*

Bruce JW *A review of the Tenure Terminology* (Land Tenure Center University of Wisconsin- Madison 1993)

Bruce and Knox 2009 *WD*

Bruce JW and Knox A Structures and Stratagems: Making Decentralisation of Authority Over Land in Africa Cost-effective" 2009 *World Development* Vol.37 No.8 1360-1369

Bunch "Introduction" in Meillon and Bunch (eds) *Holding on to the Promise*

Bunch C "Introduction: Imagine a World" in Meillon C and Bunch C (eds) *Holding on to the Promise: Women's Human Rights and the Beijing +5 Review* (Rutgers University of New Jersey New York 2001)

Bryceson "Reflections" in Stahl (ed) *Looking Back, Looking Ahead*

Bryceson DF "Reflections on the unravelling of the Tanzanian peasantry, 1975–2015" in Stahl M (ed) *Looking back, Looking ahead- Land, Agriculture and Society in East Africa* (Lightning Source UK Ltd. Date Unknown) 9-36

Budlender *et al.* "Women, Land and Customary Law"

Budlender D, Mgweba S, Motsepe K and Williams L *Women, Land and Customary Law* (Community Agency for Social Enquiry Johannesburg 2011)

Byamugisha *Securing Securing Africa's Land*

Byamugisha FFK *Securing Africa's Land for Shared Prosperity: A Program to Scale up Reforms and Investments* (The World Bank Washington Washington 2013)

## C

Carey-Miller and Pope *Land Title*

Carey-Miller DL and Pope A *Land Title in South Africa* (Juta Law Publishing Cape Town 2000)

Chauveau and Colin "Changes in Land Transfer Mechanisms" in *Changes in customary land tenure systems in Africa*

Chauveau JP and Collin JP "Changes in Land Transfer Mechanisms: Evidence from West Africa" in Cotula (ed) *Changes in customary land tenure systems in Africa* (Londres IIED 2007)

Chavangi *et al.* "Complications in land allocations"

Chavangi T, Swazuri M, Nyamasege G and Dokhe E "Complications in land allocations: appraisal of the Community Land Act 2016 Kenya" in Annual World Bank Conference on Land and Poverty Responsible Land Governance: Towards an Evidence Based Approach (20-24 March 2017 Washington DC) 1-18

Cheboror *An investigation into the extent of application of ADR mechanisms*

Cheboror MK *An investigation into the Extent of Application of Alternative Disputes Resolution Mechanisms in Settling Land Disputes in Kenya: A Case Study of Banta Settlement Scheme Nakuru County* (Bachelor of Real Estate University of Nairobi 2009)



Choundree 1999 *AJCR*

Choundree RBG "Traditions of Conflict Resolution in South Africa"  
1999 *African Journal on Conflict Resolution* 9-27

Claasens 2005 *AJ*

Claasens A "Women. Customary Law and Discrimination: The impact of the Communal Land Rights Act" 2005 *Acta Juridica* No.1 42-81

Claasens and Mnisi-Weeks 2009 *SAJHR*

Claasens A and Mnisi-Weeks S "Rural Women Re-defining Land Rights in the Context of Living Customary Law" 2009 *South African Journal on Human Rights* Vol.25 491-516

Claasens and Cousins "Communal Land Rights" in *Securing Land and Resource Rights*

Claasens A and Cousins B "Communal Land Rights, Democracy and Traditional Leaders in Post-apartheid South Africa" in Saruchera M (ed) *Securing Land and Resource Rights in Africa: Pan-African Perspectives* (Programme for Land and Agrarian Studies (PLAAS) Western Cape 2004)139-158

Claasens 2009 *Agenda*

Claasens A "Who Told Them We Want this Bill? The Traditional Courts Bill and Rural Women" 2009 *Agenda* Vol.23 No.82 9-22

Claasens 2013 *JAC*

Claasens "Recent Changes in Women's Land Rights and Contested Customary Law in South Africa" 2013 *Journal of Agrarian Change* Vol.13 No.1 71-92

Claasens 2014 *JSAS*

Claasens A "Denying Ownership and Equal Citizenship: Continuities in the State's Use of Law and 'Custom', 1913–2013" 2014 *Journal of Southern African Studies* Vol.40 No.4 761-779

Claasens and Smythe "What's Law Got to do With It" in Claasens and Smythe (eds) *Marriage, Land and Custom*

Claasens A and Smythe D "What's Law Got to do With It" in Claasens A, Smythe D (eds) *Marriage, Land and Custom* (Juta Cape Town 2013)1-27

Claasens and Ngubane "Women, Land and Power" in *Putting Feminism on the Agenda*

Claasens A and Ngubane S "Women, Land & Power: The Impact of the Communal Land Rights Act" in Claasens A & Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press Cape Town 2008) 154-183

Collins and Mitchell 2017 *JAC*

Collins A and Mitchell MI "Revisiting the World Bank's Land Law Reform Agenda in Africa: The promise and Perils of Customary Practices" 2017 *Journal of Agrarian Change* 1-20

Cotula (ed) *Changes in Customary Systems in Africa*

Cotula L *Changes in Customary Systems in Africa* (Russell Press Herfordshire 2007)

Cotula *Gender and Law: Women's Rights in Agriculture*

Cotula L *Gender and Law: Women's Rights in Agriculture* (Food and agriculture Organisation of the United Nations Rome 2006)

Cousins 2001 *LRD*

Cousins T 2001 "Communal Property Associations: Who is on the Jury and What are they Judging?" 2001 (September/October) *Land & Rural Digest* 24

Cousins 2002 *ESRR*

Cousins B "Reforming Communal Land Tenure in South Africa: Why the draft Communal Land Rights Bill is not the answer: legislation and policy" 2002 *ESR Review* 7-11

Cousins 2005 *SLR*

Cousins B "Embeddedness v Titling: African Land Tenure Systems and the Potential Impact on the Communal Land Rights Act 11 of 2004" 2006 *Stellenbosch Law Review* 488-513

Cousins 2007 *JAC*

Cousins B "More Than Socially Embedded: The Distinctive Character of 'Communal Tenure' Regimes in South Africa and its Implications for Land Policy" 2007 *Journal of Agrarian Change* Vol.7 No.3 281–315

Cousins 'Characterising Communal Tenure'

Cousins B 'Characterising Communal Tenure: Nested systems and flexible boundaries". in Claassens A & Cousins B (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press Cape Town 2008) 113-138

Cousins "Potential and Pitfalls of 'Communal' land tenure reform"

Cousins B "Potential and Pitfalls of 'Communal' Land Tenure Reform: Experience in Africa and Implications for South Africa" *World Bank Conference on 'Land Governance in Support of the MDGs: Responding to New Challenges* (9-10 March 2009 Washington DC)

Cousins 2017 *Transformation: Critical Perspectives on Southern Africa*

Cousins B "Land Reform in South Africa is Sinking. Can it be Saved?" 2017 *Transformation: Critical Perspectives on Southern Africa* Vol.93 1-23

Cross and Hornby *Opportunities and Obstacles*

Cross C and Hornby D *Opportunities and Obstacles to Women's Land Access in South Africa* (A Research Report for the Promoting Women's Access to Land Programme 2002)

## **D**

Dahl 1987 *CC*

Dahl TS "Women's Law: Methods, Problems, Values" 1987 *Contemporary Crises* Vol.10 361-371

Dancer 2017 *SLS*

Dancer H "An Equal Right to Inherit? Women's Land Rights, Customary Law and Constitutional Reform in Tanzania" 2017 *Social and Legal Studies* Vol.26 No.3 1-20

Deininger and Binswanger *WBRO*

Deininger K and Binswanger H "The Evolution of the World Bank's Land Policy: Principles, Experience and the Future Challenges" 1999 *The World Bank Research Observer* Vol.14 No.2 247- 276

De Soto *The Mystery of Capital*

De Soto H *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Black Swan Publishers New York 2001)

Delville "Changes in Customary Land Management Institutions" in *Changes in Customary Systems in Africa*

Delville PL "Changes in 'Customary' Land Management Institutions: Evidence for West Africa" in Cotula L *Changes in Customary Systems in Africa* (Russell Press London 2007) 35-49

## **E**

Elfvorsson 2015 *JPR*

Elfvorsson E "Providing Security or Protecting Interests: Government Interventions in Violent Communal Conflicts in Africa" 2015 *Journal of Peace Research* Vol.52 No.6 791-805

Enemark *et al.* "Fit-for-purpose Land Administration"

Enemark S, Bell KC, Lemmen C and McLaren R "Fit-for-purpose land administration" (International Federation of Surveyors (FIG) 2014 Denmark) 1-37

Englert 2003 *AJDS*

Englert B "From a Gender Perspective: Notions of Land Tenure Security in the Uluguru Mountains, Tanzania" 2003 *Austrian Journal of Development Studies* Vol.XIX No.1 75-90

Everingham and Jannecke 2006 *JSAS*

Everingham M and Jannecke C "Land Resituiton and Democratic Citizenship in South Africa" 2006 *Journal of Southern African Studies* Vol.32 No.3 545-562

## **F**

Fairley *Upholding Customary Land Rights*

Fairley EC *Upholding Customary Land Rights Through Formalization: Evidence from Tanzania's Program of Land Reform* (PhD-dissertation University of Minnesota 2013)

Faris *An Analysis of the Theory and Principles of ADR*

Faris JA *An Analysis of the Theory and Principles of Alternative Dispute Resolution* (LL.D Thesis University of South Africa 1995)

Fay 2009 *WD*

Fay DA "Land Tenure, Land Use, and Land Reform at Dwesa–Cwebe, South Africa: Local Transformations and the Limits of the State" 2009 *World Development* Vol.37 No.8 1424-1433

Fenn *Introduction to Civil and Commercial Mediation*

Fenn P *Introduction to Civil and Commercial Mediation* (Chartered Institute of Arbitrators Manual London 2003)

Fife "Richtersveld Restitution Implementation Challenges"

Fife T "Richtersveld Restitution Implementation Challenges" *Land Divided: Land and South African Society in 2013, in Comparative Perspective* (24 -27 March 2013 University of Cape Town)

Foster "Boundary Disputes"

Foster RW "Boundary Disputes- The U.S. Surveyor's Role" *FIG Congress Facing the Challenges -Building the Capacity* (11-16 April 2010 Sydney)

Fred-Mensah 1999 *WD*

Fred-Mensah BK "Capturing Ambiguities: Communal Conflict Management Alternative in Ghana" 1999 *World Development* Vol. 27 No.6 951-965

Frueh *Political Identity and Social Change*

Frueh J *Political Identity and Social Change: The Remaking of the South African Social Order* (State University New York 2003)

## **G**

Galaty 2016 *IJC*

Galaty JG "Reasserting the commons: Pastoral Contestations of Private and State Lands in East Africa" 2016 *International Journal of the Commons* Vol.10 No.2 709-727

Grabe, Dutt and Dworkin 2014 *JCP*

Grabe S Dutt A and Dworkin SL Women's community Mobilization and well-being: Local Resistance to Gendered Social Inequities in Nicaragua and Tanzania 2014 *Journal of Community Psychology* Vol.42 No.4 379–397

Gilbert 2002 *IDPR*

Gilbert A "On the mystery of capital and the myths of Hernando de Soto: What difference does legal title make?" 2002 *International Development Planning Review* Vol.24 No.1 1-19

Goldberg *et al. Dispute Resolution*

Goldberg SB, Sander FEA and Rogers NH *Dispute Resolution: Negotiation, Mediation and other Processes* 4<sup>th</sup> ed. (Aspen Publishers New York 1995)

Goldman, Sander and Rogers 2016 *JPS*

Goldman MJ, Davis A and Little J "Controlling Land They Call Their Own: Access and Women's Empowerment in Northern Tanzania" 2016 *The Journal of Peasant Studies* Vol.43 No.4 777–797

Grande "Delivering Land"

Grande D L "Delivering Land for Tenure Reform: Proposed Practical Guidelines" 2003 Legal Entity Assessment Project (LEAP) South Africa

Gray and Gray *Elements of Land Law*

Gray S and Gray F *Elements of Land Law* 3rd ed. (Butterworths London 2001)



## H

Haramata *Book Review*

Haramata I "Book Review: The Mystery of Capital Bulletin of the Drylands: People, Policies, Programmes" (International Institute for Environment and Development New York 2001)

Harvey 2004 *Socialist Register*

Harvey D "The 'New' Imperialism: Accumulation by Dispossession" 2004 *Social Register* Vol.40 63-87

Henrysson and Joireman 2009 *LSR*

Henrysson B and Joireman F "On the Edge of the Law: Women's Property Rights and Dispute Resolution in Kisii, Kenya" 2009 *Law & Society Review* Vol.43 No.1 39- 60

Himonga and Bosch 2000 *SALJ*

Himonga C and Bosch C "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning? 2000 *South African Law Journal* Vol.117 306-341

Hodgson *Land and water: The Rights Interface*

Hodgson S *Land and water: The Rights Interface* (Food and agriculture Organisation of the United Nations Rome 2006)

Hoffman 2014 *JSAS*

Hoffman MT "Changing Patterns of Rural Land Use and Land Cover in South Africa and their Implications for Land Reform" 2014 *Journal of Southern African Studies* Vol.40 No.4 707-725

Hunt 2004 *DPS*

Hunt D "Unintended Consequences of Land Rights Reform: The Case of the 1998 Uganda Land Act" 2004 *Development Policy Review* Vol.22 No.2 173-191

## **I**

Isinika and Kikwa "Promoting Gender Equality" in Stahl (ed) *Looking Back, Looking Ahead*

Isinika A and Kikwa A "Promoting Gender Equality" in Stahl M (ed) *Looking back, Looking ahead- Land, Agriculture and Society in East Africa* (Lightning Source UK Ltd. Date Unknown) 87-96

Iyi 2016 *JLPUL*

Iyi JM "Fair Hearing without Lawyers? The Traditional Courts Bill and the Reform of Traditional Justice System in South Africa" 2016 *The Journal of Legal Pluralism and Unofficial Law* Vol.48 No.1 127-152

## **J**

Jacobs 2004 *JIWS*

Jacobs S "Livelihoods, Security and Needs: Gender and Land Reform in South Africa" 2004 *Journal of International Women's Studies* Vol.6 No.1 1-19

Jacobs 2009 *GC*

Jacobs S "Gender and Land Reforms: Comparative Perspectives 2009 *Geography Compass* Vol.3 No.5 1675-1687

Jacobs and Kes 2014 *FE*

Jacobs K and Kes A "The Ambiguity of Joint Asset Ownership: Cautionary Tales from Uganda and South Africa" 2014 *Feminist Economics* Vol.21 No3 23-55

Johnson *Communal Land and Tenure Security*

Johnson E *Communal Land Tenure Security Analysis of the South African Communal Land Rights Act 11 of 2004* (LLM-dissertation Stellenbosch University 2009)

## **K**

Kabia 2014 *CILJ*

Kabia FS "Behind the Mirage in the Desert- Customary Land Rights and the Legal Framework of Land Grabs" 2014 *Cornell International Law Journal* Vol.47 709- 734

Kagwanja, Muthee and Kimaru *Ethnicity, Land and Conflict*

Kagwanja P, Muthee D and Kimaru T *Ethnicity, Land and Conflict in East Africa* (Routledge Publishing Tanzania 2011)

Kalabamu 2000 *LUP*

Kalabamu FT "Land Tenure and Management Reforms in East and Southern Africa: The case of Botswana" 2000 *Land Use Policy* Vol. 17 305-319

Kameri-Mbote *et al. Ours by Right*

Kameri-Mbote P, Odote C, Musembi C and Kamande M *Ours by Right: Law, Politics and Realities of Community Property in Kenya* (Strathmore University Press Kenya 2013)

Kameri-Mbote "Gender Issues"

Kameri-Mbote P "Gender Issues in Land Tenure under Customary Law" *Land Rights for African Development: From Knowledge to Action* (31 Oct- 3 November 2005 Nairobi)

Kameri-Mbote and Akech "Ownership and regulation of land right in Kenya"

Kameri-Mbote P and Akech M P "Ownership and Regulation of Land Rights in Kenya: Balancing Entitlements with the Public Trust". *Beyond the National Land Policy* (31 July 2008 Nairobi)

"Property Rights Inheritance and Succession" in Karuru and Kabugij (eds) *Women and Law in East Africa*

Karuru N and Kabugij A "Property Rights Inheritance and Succession" in *Women and Law in East Africa* (Giant Printers Nairobi 1997) 22-47

Karanja 1991 *TWLS*

Karanja PW "Women's Land Ownership Rights in Kenya" *Third World Legal Studies* Vol.10 No.6 109-135

Kepe 2001 *DSA*

Kepe T "Clearing the Ground in the Spatial Development Initiatives (SDIs): Analysing 'process' on South Africa's Wild Coast" 2001 *Development Southern Africa* 18:279-293

Kgosimore 2002 *AC*

Kgosimore DL "Restorative Justice as an Alternative way of Dealing with Crime 2002 *Acta Criminologica* Vol.15 No.2 69-73

Khonou 2009 *PELJ*

Khonou SF "Traditional Leadership and Independent Bantustans of South Africa: Some Milestones of Transformative Constitutionalism Beyond Apartheid" 2009 *Potchefstroom Electronic Law Journal* Vol. 12 No.4 81-122

Kironde "Improving Land Sector Governance in Africa"

Kironde JML "Improving Land Sector Governance in Africa: The Case of Tanzania" at the *World Bank Conference on Land Governance in support of the MDGs: Responding to New Challenges* (9-10 March 2009 Washington DC)

Kibagendi *The Problem of Land Rights Administration*

Kibagendi AM *The Problem of Land Administration in Kenya* (LL.M Thesis University of Nairobi 2004)

Kimani and Maina 2010 *JECDSW*

Kimani EN and Maina LW "Older Women's Rights to Property and Inheritance in Kenya: Culture, Policy, and Disenfranchisement" 2010 *Journal of Ethnic, Cultural Diversity in Social Work* Vol.19 No.4 256-271

Klaus and Mitchell 2015 *JPR*

Klaus K and Mitchell M "Land Grievances and the Mobilization of Electoral Violence- Evidence from Cote d'Ivoire 2015 *Journal of Peace Research* Vol.52 No.5 622-635

Kloppers and Pienaar 2014 *PELJ*

Kloppers HJ and Pienaar GJ "The Historical Context of Land Reform in South Africa and Early Policies" 2014 *Potchefstroom Electronic Law Journal*/Vol.17 No.2 677-707

Knight *Statutory Recognition of Customary Land Rights*

Knight RS *Statutory Recognition of Customary Land Rights in Africa. An Investigation into Best Practices for Law-making and Implementation* (FAO Legislative Studies Rome 2010)

Krantz 2015 *Working Papers in Human Geography*

Krantz L "Securing Customary Land Rights in Sub-Saharan Africa" 2015 *Working Papers in Human Geography* Vol.1 1-19

## **L**

Lahunou *The Role of State Weakness in Customary Conflict Resolution*

Lahunou A "The Role of State Weakness in Customary Conflict Resolution"(Masters Thesis Uppsala University 2016)

Lastarria-Cornhiel 1997 *WD*

Lastarria-Cornhiel S "Impact of privatization on gender and property rights in Africa" 1997 *World Development* Vol.25 No.8 1317-1333

Lengoiboni and Molendijk "Land administration and tenure registration"

Lengoiboni M and Molendijk M 2015 *International Conference on Geospatial Technologies for Sustainable Urban and Rural Development* (18-20 November 2015 Kigali Rwanda)

Lindén *From Constitutional Law to Reality*

Linden G *From Constitutional Law to Reality: A Field Study on the new Kenyan Constitution's Effects on Land Conflicts* (Master's Thesis Lund University 2013)

LiPuma and Koelble 2009 *JCAS*

LiPuma E and Koelble T "Deliberative Democracy and the Politics of Traditional Leadership in South Africa: A case of despotic domination or democratic deliberation?" 2009 *Journal of Contemporary African Studies* Vol.27 No.2 201-223

Lund and Boone 2013 *Africa*

Lund C and Boone C "Introduction: Land Politics in Africa: Constituting Authority, over Territory, Property and Persons" 2013 *Africa* Vol.83 No.1 1-13

Lugoe "Government Regulated Land"

Lugoe, FN "A century of Government Regulated Land Access in Tanzania" An unpublished discussion on *Land Administration in Africa* (28 May 2008 Dar Es Salaam)

Lotz *et al.* (eds) *Commercial Law*

Lotz DJ Boraine A Delport PA and Prozesky-Kuschke B in Nagel CJ (ed) *Commercial Law* (Butterworths Law United Kingdom 2011)

## **M**

Mac Ginty 2008 *CC*

Mac Ginty R "Indigenous Peace-making versus the Liberal Peace" 2008 *Cooperation Conflict* Vol.43 139-163

Machethe "Agriculture and poverty in South Africa"

Machethe CL "Agriculture and Poverty in South Africa: Can Agriculture Reduce Poverty?" Unpublished contribution presented at the *Overcoming Underdevelopment Conference* (28-29 October 2004 Pretoria)

Maganga *et al.* 2016 *AJAS*

Maganga F, Askew K, Odgaard R and Stein H "Dispossession through Formalization: Tanzania and the G8 Land Agenda in Africa" 2016 *Asian Journal of African Studies* Vol.40 3-49

Mailula 2011 *CCR*

Mailula D "Customary (Communal) Land Tenure in South Africa Did Tongoane Overlook or avoid the Core Issue" 2011 *Constitutional Court Review* Vol.4 73-112

Mamdani *Citizen and Subject*

Mamdani M *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Blackwell Publishing Ltd New Jersey 1998)

Maina *Registration of Title to Land*

Maina SC *Registration of Title to Land: A Critique of the Land Registration Act No.3 of 2012* (LL.M Dissertation University of Nairobi 2012)

Mamdani *Citizen and Subject*

Mamdani M *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Fountain Publishers Kampala 1996)



Mandela *A Long Walk to Freedom*

Mandela RN *A Long Walk to Freedom* (Little Brown and Co New York 1994)

Manirakiza *The Role of Land Records*

Manirakiza JG *The Role of Land Records in Support of Post-Conflict Land Administration: A Case Study of Rwanda in Gasabo District* (LLM-thesis University of Twente The Netherlands 2014)

Manji 2001 *TWQ*

Manji A "Land Reform in the Shadow of the State: The Implementation of New Land Laws in Sub-Saharan Africa" 2001 *Third World Quarterly* Vol.22 No.3 327-342

Manona "Informal' Land Rights Under Siege"

Manona S "Informal Land Rights under Siege 18 Years into Democracy" Unpublished contribution delivered at the Lunchtime Seminar Series of *Law Race and Gender –Rural Women Action* (30 March 2012 University of Cape Town)

Manona *et al.* "Proposed Land Tenure and Land Administration Interventions"

Manona S, Denison J. Averbeké WV and Masiya T "Proposed Land Tenure and Land Administration Interventions to Increase Productivity on Smallholder Irrigation Schemes in South Africa" in PLAAS, SPII and Isandla Institute *Overcoming inequality and structural poverty in South Africa: towards inclusive growth and development* (12-14 September 2010 Johannesburg)

Mario *Zimbabwe, Land and the Dictator*

Mario P *Zimbabwe, Land and the Dictator* 6<sup>th</sup> ed. (Godfrey Publishers Zimbabwe 2009)

Mashamba *ADR in Tanzania*

Mashamba CJ *Alternative Dispute Resolution in Tanzania* (Mkuki na Nyota Publishers: Dar Es Salaam 2014)

Mayson, Barry and Cronwright "Elandskloof Land Restitution"

Mayson D, Barry M and Cronwright R "Elandskloof Land Restitution: Establishing Membership of a Communal Property Association" in International Conference on *Land Tenure in the Developing World with a Focus on Southern Africa* (27–29 January 1998 University of Cape Town)

Mbebe and Van der Merwe *Informal Justice*

Mbebe M and Van der Merwe *Informal Justice: The Alexandra Justice Centre and the Future of Interpersonal Dispute Resolution* (Johannesburg Centre of Applied Legal Studies 1994)

Mbhele *The South African Law of Contract*

Mbhele TV *The South African Law of Contract as Influenced by the National Credit Act 34 of 2005: An Evaluation* (LLM-dissertation University of Pretoria 2015)

McAuslan *A GlassHouse Book*

McAuslan P *A GlassHouse Book, Land Law Reform in Eastern Africa Traditional or Transfromative* (Routledge Oxfordshire 2013)

Mutangadura "Women and Land Tenure Rights in Southern Africa"

Mutangadura G "Women and Land Tenure Rights in Southern Africa: A human rights-based approach" in Church House *Gender, Land Rights and Inheritance* (8-9 November 2004 London)

Meinzen-Dick and Mwangi 2007 *LUP*

Meinzen-Dick R and Mwangi E "Cutting the web of interests: Pitfalls of formalizing property rights" 2007 *Land Use Policy* Vol.51 No.1 36-43

Mnisi-Weeks 2011 *SACQ*

Mnisi-Weeks SM "The Traditional Courts Bill: Controversy Around Process, Substance and Implications" 2011 *South African Crime Quarterly* No. 35 3-10

Moagi 2008 *INGOJ*

Moagi LA "A Gendered perspective on issues and challenges surrounding land tenure Security in South Africa: An Analysis of Critical Security Studies 2008 *International NGO Journal* Vol.3 No.12 213-223

Moeng *Land Reform Policies*

Moeng JK *Land Reform Policies to Promote Women's Sustainable Development in South Africa* (Philosophiae Thesis University of Pretoria 2011)

Mohamed *Access to Land Justice*

Mohamed FH *Access to Land Justice in Eastern Africa: A Case Study of Communal Land Rights in Naivasha, Kenya* (LLM-thesis University of Nairobi 2014)

Mokgope 2000 *PLAAS*

Mokgope K "Programme for Land and Agrarian Studies Annual Report" (University of Western Cape Western Cape 2000) 1-19

Mostert 2011 *PELJ*

Mostert H "Tenure Security Reform and Electronic Registration: Exploring Insights from English Law" 2011 *Potchefstroom Electronic Law Journal*/Vol. 14 No.3 85-118

Mostert and Pienaar "Formalisation" in *Modern Studies*

Pienaar JM & Mostert H "Formalisation of South African Communal Land Title and its Impact on Development" in Cooke (ed) in *Modern Studies in Property Law* (Hart Publishing Oregon 2005) 317-340

Moyo *et al.* 2013 *G&B*

Moyo CS, Francis J and Ndlovu P "Grassroots Communities' Perceptions Relating to Extent of Control as a Pillar of Women Empowerment in Makhado Municipality of South Africa" 2013 *Gender and Behaviour* Vol.11 No.2 4864-4882

Moyo & Chambati Land and Agrarian Reform in Zimbabwe

Moyo S & Chambati W (eds) "Land and Agrarian Reform in Zimbabwe: Beyond White Settler Capitalism (CODESRIA National Working Group Dakar 2013)

Msomi and Matthews 2015 *JDS*

Msomi NZ and Matthews S "Protecting Indigenous Knowledge using Intellectual Property Rights Law: The Masakhane Pelargonium Case" 2015 *Journal of Development Studies* Vol. 45 No.1 62-77

Muigua *Resolving Conflicts through Mediation in Kenya*

Muigua DK *Resolving Conflicts through Mediation in Kenya*  
(Glenwood Publishers Nairobi 2012)

Muigua *Settling disputes through arbitration in Kenya*

Muigua DK *Settling Disputes through Arbitration in Kenya*  
(Glenwood Publishers Nairobi 2012)

Mutopo 2011 *JPS*

Mutopo P "Women's Struggles to Access and Control Land and Livelihoods after Fast Track Land Reform in Mwenezi District, Zimbabwe" 2011 *Journal of Peasant Studies* Vol. 38 No.5 1021-1046

## **N**

Ng'ong'ola "Constitutional Protection of Property" in Saruchechea (ed)  
*Securing Land and Resource Rights in Africa*

Ng'ong'ola C "Constitutional Protection of Property and Contemporary Land Problems in Southern Africa in Saruchera M (ed) *Securing Land and Resource Rights in Africa: Pan-African Perspectives* (Programme for Land and Agrarian Studies (PLAAS) Western Cape 2004)

Njoh *et al.* 2016 *JAAS*

Njoh AJ, Ananga EO and Anchang JY "Africa's Triple Heritage, Land Commodification and Women's Access to Land: Lessons from Cameroon, Kenya and Sierra Leone" 2017 *Journal of Asian African Studies* Vol. 52 No.6 760-779

Ntsebeza "Land Tenure Reform"

Ntsebeza L "Land tenure reform in South Africa: An example from the Eastern Cape Province" in *Land Rights and Sustainable Development in sub-Saharan Africa* (16-19 February 1999 Berkshire)

Ntsebeza 2003 *Development Update*

Ntsebeza L Democracy in South Africa's Countryside: Is there a Role for Traditional Authorities? 2003 *Development Update* 55-84

Ntsebeza "Rural Governance in Post-1994 South Africa

Ntsebeza L "Rural Governance in Post-1994 South Africa: Has the Question of Citizenship of Rural Inhabitants Been Settled 10 years in South Africa's Democracy?" Paper presented at The Commons in an Age of Global Transition, the Tenth Conference of the International Association for the Study of Common Property (IASCP) (9-13 August 1994 Oaxaca Mexico)

## O

Ochieng *Opportunities and Challenges*

Ochieng R *Opportunities and Challenges for Kenya Women in the New Land Laws* (Lambert Academic Publishing Kenya 2015)

Odote *Legal and Policy Framework*

Odote C *The Legal and Policy Framework Regulating Community Land in Kenya An Appraisal* (Friedrich Ebert Stiftung Kenya 2013)

Odukwe 2016 *IJSSHR*

Odukwe E "Land Disputes and Communal Socio-economic Developments" 2016 *International Journal of Social Sciences and Humanities Reviews* Vol. 6 No.4 166-174

Okharedia "The Emergence of ADR in South Africa"

Okharedia AA "The Emergence of Alternative Dispute Resolution in South Africa: A Lesson for other African Countries" in *African Regional Congress of Industrial Relations* (24-28 January 2011 Lagos)

Okoth-Ogendo 1989 *AJIAI*

Okoth-Ogendo HWO "Some issues of theory in the study of tenure relations in African agriculture" 1989 *Africa: Journal of the International African Institute* 6-17

Okoth-Ogendo, "The Nature of Land Rights under Indigenous Law in Africa" in *Land, Power and Custom*

Okoth-Ogendo HWO "The Nature of Land Rights under Indigenous Law in Africa in Claasens and Cousins (eds) *Land Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press Cape Town 2008) 95-109

Okoth-Ogendo 2003 *UNLJ*

Okoth-Ogendo HWO "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" 2003 *University of Nairobi Law Journal* Vol.1 107-117

O'Laughlin *et al.* 2013 *JAC*

O’Laughlin B, Bernstein H, Cousins B and Peters PE “Introduction: Agrarian Change, Rural Poverty and Land Reform in South Africa since 1994” 2014 *Journal of Agrarian Change* Vol. 13 No.1 1-15

Omale 2006 *AJCS*

Omale DJ “Justice in History: an Examination of African Restorative Traditions and the Emerging Restorative Justice Paradigm” 2006 *African Journal of Criminology and Criminal Justice* Vol. 2 No.2 30-60

Onyango 2014 *Sociology and Anthropology*

Onyango PO “Balancing of rights in land law: a key challenge in Kenya” *Sociology and Anthropology* Vol. 2 No.7 301-308

Oomen *Chiefs in South Africa*

Oomen B *Chiefs in South Africa: Law, Power and Culture in the Post-apartheid Era* (University of KwaZulu Natal Press Durban 2005)

Osei-Hwedie and Rankopo “Indigenous Conflict Resolution” in *Indigenous Methods of Peacebuilding*

Osei-Hwedie K and Rankopo MJ “Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana” in Osei-Hwedie BZ, Galvin T and Shinoda H (eds) *Indigenous Methods of Peacebuilding* (IPSHU Hiroshima 2012) 33-51

Ossome 2014 *FE*

Ossome L “Can the Law Secure Women's Rights to Land in Africa? Revisiting Tensions between Culture and Land Commercialization” 2014 *Feminist Economics* Vol. 20 No.1 155-177



Ossome *States of Violence*

Ossome MR *States of Violence: Structural Dynamics of Gendered, Ethnicized and Sexualized Violence in Kenya's Democratic Transitions* (PhD-dissertation University of the Witwatersrand 2015)

Otieno "Land Use Planning"

Otieno KC "Land Use Planning and Communal Land Tenure Reforms in Pastoral Areas: The Experience of Kenya" in *World Bank Conference on Land and Poverty Responsible Land Governance: Towards an Evidence Based Approach* (20-24 March 2017 Washington DC) 1-13

Ovens 2003 *AC*

Ovens M "A Criminological Approach to Crime in South Africa" 2003 *Acta Criminologica* Vol. 16 No.3 67-80

Owoo and Boake-Yiadom 2015 *JID*

Owoo NS and Boakye-Yiadom L " The Gender Dimension of the Effects of Land Tenure Security on Agricultural Productivity: Some Evidence from two Districts in Kenya 2015 *Journal of International Development* Vol. 27 917-928

Owasanoye "Dispute Resolution Mechanisms"

Owasanoye B "Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa" in UNITAR *Arbitration and Dispute Resolution* (11-15 September 2000 Harare)

## **P**

Pallotti 2008 *RAPE*

Pallotti A Tanzania: Decentralising Power or Spreading Poverty"  
2008 *Review of African Political Economy* Vol.35 No.116 221-235

Peters 2009 *JSAS*

Peters PE "Bewitching Land: the Role of Land disputes in  
Converting Kin to Strangers and in Class Formation in Malawi"2009  
*Journal of Southern African Studies* Vol. 28 No.1 155-178

Peters 2004 *JAC*

Peters PE "Inequality and Social Conflict Over Land in Africa" 2004  
*Journal of Agrarian Change* Vol. 4 No.3 269-314

Pienaar 2009 *PELJ*

Pienaar GJ "Aspects of Land Administration in the Context of Good  
Governance" 2009 *Potchefstroom Electronic Law Journal* Vol. 12  
No.2 15-55

Pienaar 2011 "Land Information" in *Acta Juridica*

Pienaar GJ "Land Information as a Tool for Effective Land  
Administration and Development" in *Acta Juridica* (Juta Clairemont  
2011) 238-271

Pienaar 2015 *Scriptura*

Pienaar JM "Land Reform Embedded in the Constitution: Legal  
Contextualisation" 2015 *Scriptura* Vol. 114 1-20

Pienaar 2013 *JHSF*

Pienaar GJ "Land Tenure Security: the Need for Reliable Land  
Information" 2013 *The Journal of Helen Suzman Foundation* No.70  
20-27

Pienaar and Klopers 2014 *PELJ*

Pienaar GJ and Klopers H "The Historical Context of Land Reform in South Africa and Early Policies" 2014 *Potchefstroom Electronic Law Journal*/Vol. 17 No.2 677-707

Pienaar *Land Reform*

Pienaar JM *Land Reform* (Juta South African Property Law Cape Town 2014)

Pope 2010 *LDD*

Pope A "Get Rights Right in the Interests of Security of Tenure" 2010 *Law, Democracy and Development* Vol. 14 1-23

Pope "Indigenous-law Land Rights" in Mostert and Bennett (eds) *Pluralism and Development*

Pope A "Indigenous-law Land Rights: Constitutional Imperatives and Proprietary Paradoxes" in Mostert H and Bennett C *Pluralism and Development* (University of Cape Town Cape Town 2010)

Pretorius *Dispute Resolution*

Pretorius P *Dispute Resolution* (Juta Cape Town 1993)

## Q

Quan "Changes in Intra-Family Land Relations" in *Changes in Customary Systems in Africa*

Quan J "Changes in Intra-Family Land Relations" in Cotula L (ed) *Changes in Customary Systems in Africa* (Russell Press 2007 Hertfordshire) 51-61

## R

Ramutsindela and Mogashoa 2013 *SD*

Ramutsindela M and Mogashoa M "The People's Choice: Options for Land Ownership in South Africa's Land Reform" 2013 *Social Dynamics* Vol. 39 No.2 308-316

Ravnborg *et al.* 2016 *JID*

Ravnborg HM, Spichiger R, Broegaard RB and Pedersen RH "Land Governance, Gender Equality and Development: Past Achievements and Remaining Challenges" 2016 *Journal of International Development* Vol. 28 No.3 412-427

Robinson "Women 2000" in Meillon and Bunch (eds) *Holding on to the Promise*

Robinson M "Women 2000: The Future of Human Rights" in Meillon C and Bunch C (eds) *Holding on to the Promise: Women's Human Rights and the Beijing +5 Review* (Rutgers University of New Jersey 2001) 13-22

Rock *et al.* *Systematic Land Registration*

Rock F, Sisoulath V, Metzger C, Chanhthaneun S, Phayalath X and Derbidge J *Systematic Land Registration in Rural Areas of Lao PDR: Concept Document for Countrywide Application* (Deutsche Gesellschaft für Internationale Zusammenarbeit Germany 2015)

Roth and Haase 1998 *BASIS*

Roth M and Haase D "Land Tenure Security and Agricultural Performance in Southern Africa" 1998 *Broadening Access and Strengthening Input Market Systems* 1-20

Rudman "Genderised Land Reform" in Chigara (ed) *Reconceiving Property Rights*

Rudman A "Genderised Land Reform and Social Justice - A Gender Perspective on the Formalization of Communal Land Tenure" in Chigara B (ed) *Reconceiving Property Rights in the New Millennium: Towards a New Sustainable Land Relations Policy* (Routledge Oxon 2012)

Rugege 2003 *LDD*

Rugege S "Traditional leadership and its future role in local governance" 2003 *Law Democracy and Development* Vol.2 171-200

## **S**

Schneider 2007 *AS*

Schneider L "High on Modernity? Explaining the Failing of Tanzanian Villagization". *African Studies* Vol. 66 9–38

Schoeman *ADR Methods as a Tool*

Schoeman PJA *Alternative Dispute Resolution as a Toll for the Resolution of Inter-Governmental Environmental Disputes* (LLM-Dissertation University of Potchefstroom 2004)

Shivji *Not Yet Democracy*

Shivji IG *Not Yet Democracy: Reforming Land Tenure in Tanzania* (Faculty of Law University of Dar es Salaam Tanzania 1998)

Shivji "The Land Acts 1999"

Shivji IG "The Land Acts 1999: A cause for celebration or a celebration of a cause?" Keynote Address to the *Workshop on Land*

held at Morogoro (University of Dar es Salaam 19-20 February 1999) 1-9

Shivji "Village Governance"

Shivji I "Village Governance and Common Pool Resources in Tanzania" Paper prepared for *Mpwapwa Workshop* (March 2002) 1-87

Shivji *Accumulation in an African Periphery*

Shivji IG *Accumulation in an African Periphery* (Mkuki Na Nyota Publishers Tanzania 2009)

Sibanda "Overview of *CLARA*"

Sibanda S "Overview of CLARA Regulatory Framework and Implications in Konrad-Adenauer Stiftung *Land Reform in South Africa: Constructive Aims and Positive Outcomes- Reflecting on the way to 2014* (26-27 August 2008 Pretoria) 125-130

Siegel 2015 *SAJHR*

Siegel N "Thinking the Boundaries of Customary Law in South Africa" 2015 *South African Journal on Human Rights* Vol. 31 No.2 357-378

Simpson *Land Law and Registration*

Simpson SR *Land Law and Registration* (Cambridge University Press New York 1976)

Skelton 2007 *AJ*

Skelton A "Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and Denunciation of Crime in South Africa 2007 *Acta Juridica* Vol.28 No.2 228-246

Smith and Wicomb 2011 *AHRLJ*

Smith H and Wicomb W "Customary Communities as 'Peoples' and their Customary Tenure as 'Culture': What we can do with the Endorois Decision" 2011 *African Human Rights Law Journal* Vol. 11 No.2 422-446

Spiegel 2015 *SNR*

Spiegel S "Shifting Formalization Policies and Re-Centralizing Power: The Case of Zimbabwe's Artisanal Gold Mining Sector" *Society & Natural Resources* Vol. 28 No.5 543-558

## **T**

Tapscott 2012 *FJHS*

Tapscott R "The Role of Crowdsourcing for Better Governance in International Development" 2012 *Fletcher Journal of Human Security* No.VII 26-46

Taylor 2004 *Habitat International*

Taylor WE "Property Rights and Responsibilities: The Case of Kenya 2004 *Habitat International* Vol. 28 No.2 275-287

Tenga and Mramba *Theoretical Foundations*

Tenga WR and Mramba SJ *Theoretical Foundations of Land Law in Tanzania* (Law Africa Tanzania 2014)

Tlale *Property Regulation in South Africa*

Tlale MT *Property Regulation in South Africa: Paving a way for Regulation in Lesotho* (LLM-dissertation North West University: Potchefstroom 2014)

Torhonen 2004 *CEUS*

Torhonen M "Sustainable Land Tenure and Land Registration in Developing Countries, including a Historical Comparison with an Industrialised Country" 2004 *Computers, Environment and Urban Systems* Vol. 28 545-586

Toulmin and Quan "Formalizing and securing land rights in Africa"

Toulmin C and Quan J "Formalising and Securing Land Rights in Africa: Overview" in Land in Africa Conference (8-9 November 2004 London)

Toulmin and Quan *Evolving Land Rights*

Toulmin C and Quan J (eds) *Evolving Land Rights, Policy and tenure in Africa* (International Institute for Environment and Development London 2000)

Tshehla 2004 *SAJCJ*

Tshehla B "The Restorative Justice Bug Bites the South African Criminal Justice System" 2004 *South African Journal of Criminal Justice* Vol.17 No.1 1-16

Tsikata 2003 *JAC*



Tsikata D "Securing Women's Interests within Land Tenure Reforms: Recent Debates in Tanzania". *Journal of Agrarian Change* Vol. 3 No.1-2 149–183

Tsikata 2009 *FA*

Tsikata D "Gender, Land and Labour Relations and Livelihoods in Sub-Saharan Africa in the era of Economic Liberalisation: Towards a Research Agenda" 2009 *Feminist Africa* No 12 11-30

## **U**

Ubink 2007 *JAL*

Ubink J "Customary Land Management in Peri-Urban Ghana" 2007 *Journal of African Law* Vol 51 No.2 215-248

Urmilla *et al.* 2010 *AJCR*

Urmilla B, Bronkhorst S, Ahmed F, Okech RN, Omolo NA, Moodley V, Gahima A, Munien S, Perry EC, Potgieter C, Jaggernath J "Land-related Conflicts in Sub-Saharan Africa" 2010 *African Journal of Conflict Resolution* Vol. 10 No.2 53-62

## **V**

Van der Waal 2004 *ASA*

Van der Waal CS "Formal and informal dispute resolution in the Limpopo Province, South Africa" 2004 *Anthropology Southern Africa* Vol. 27 111–121

Van der Walt and Pienaar *Introduction to the Law of Property*

Van der Walt AJ and Pienaar GJ *Introduction to the Law of Property*  
6<sup>th</sup> ed (Juta Cape Town 2009)

Van der Walt *Constitutional Property Law*

Van der Walt AJ *Constitutional Property Law* (Juta Cape Town  
2011)

Van Wyk *Restorative Justice in South Africa*

Van Wyk L *Restorative Justice in South Africa: An Attitude Survey  
among Legal Professional* (Master's Degree 2015 University of Free  
State)

Verma 2014 *FE*

Verma R "Land Grabs, Power, and Gender in East and Southern  
Africa: So, What's New?" 2014 *Feminist Economics* Vol.20 No.1 52-  
75

Ventura & Mohamed 1998 *The Land*

Ventura S and Mohamed MA "Use of Information Technologies to  
Model Indigenous Tenure Concepts" 1998 *The Land* Vol.2 No.3 81-  
100

Visser "Trends in South African Historiography and the Present State of  
Historical Research"

Visser W "Trends in South African Historiography and the Present  
State of Historical Research" in a Paper presented at the Nordic  
Africa Institute (23 September 2004 Sweden)

## W

Walker "Agrarian change, gender and land reform"

Walker C "Agrarian change, gender and land reform: A South African case study" (Social Policy and Development Programme Paper Number 10 April 2002) 1-71

Walker 2003 *JAC*

Walker C "Piety in the Sky? Gender Policy and Land Reform in South Africa" 2003 *Journal of Agrarian Change* Vol 3 No.12 113-148

Walker "Women's Land Rights in Verschuur (ed) *Du grain a moudre*

Walker C "Women's Land Rights, Agrarian Change and Gender Transformation in Post-apartheid South Africa" in *Du grain moudre* Verschuur C *Du grain moudre* (Graduate Institute Publications Geneva 2011) 247-267

Walker 2013 *TE*

Walker C "Uneasy Relations: Women Gender Equality and Tradition" 2013 *Thesis Eleven* Vol.115 No.1 77-94

Walsh 2012 *JEAS*

Walsh M "The not-so-great Ruaha and hidden histories of an environmental panic in Tanzania" 2012 *Journal of Eastern African Studies* 303-305

Wanjiru *ADR for Land Management*

Wanjuri KC *Alternative Dispute Resolution for Land Dispute Management in Kenya: Most Applicable modes of ADR under the New Land Laws* (Bachelor of Laws University of Nairobi Kenya 2014)

Wayumba *Impacts of Different Land Registration Systems*

Wayumba R *Impacts of Different Land Registration Systems on Communal Tenure in Kenya* (Doctor of Philosophy Thesis University of Otago: Denedin 2014)

Weeks 2011 *SACQ*

Weeks SM "The Traditional Courts Bill: Controversy around process, substance and implications" 2011 *South African Crime Quarterly* 3-10

Weideman *Women, Patriarchy and Land Reform*

Weideman M *Women, Patriarchy and Land Reform in South Africa* (Publisher unknown 2006)

Westaway *et al.* 2010 *JCAS*

Westaway A, Boswell R, Rostron B, Jagarnath V, Schafer R, Whisson MG, McMillan LK, and Saliu HA "Book Reviews" 2010 *Journal of Contemporary Studies* Vol.28 No.1 103-117

Whitehead and Tsikata 2003 *JAC*

Whitehead A and Tsikata D "Policy discourses on women's land rights in Sub-Saharan Africa: The implications of the re-turn to the customary" 2003 *Journal of Agrarian Change* 67-112

Wicomb and Smith 2011 *AHRLJ*

Wicomb W and Smith H "Customary Communities as 'Peoples' and their Customary Tenure as 'Culture': What we can do with the Endorois Decision" 2011 *African Human Rights Law Journal* 422-446

Williams *A Piece of Land*

Williams A *A Piece of Land: Black Women and Land in South Africa and the United States of America* (Honors Research Macalester College Minnesota 2007)

Wily "Community-based Land Tenure Management"

Wily LA "Community-based land tenure management: Questions and answers about Tanzania's new Village Land Act, 1999" (Issue Paper 120 International Institute for Environment and Development 2003) 1-59

Wily "Customary Tenure" in Graziadei and Smith (eds) *Comparative Property Law*

Wily LA "Customary Tenure: Remaking Property for the 21<sup>st</sup> Century" in Graziadei M and Smith L (eds) *Comparative Property Law: Global Perspectives* (Edward Elgar Cheltenham 2016)

Wisborg 2002 *CIEDS*

Wisborg P "Is land a human rights issue? Approaching land reform in South Africa" Noragric Working Paper No 24 (Centre for International Environment and Development Studies February 2002) 1-28 also available at <https://www.nlh.no/noragic>

Wisborg 2013 *FE*

Wisborg P "Transnational Land Deals and Gender Equality: Utilitarian and Human Rights Approaches" 2013 *Feminist Economics* Vol.20 No.1 1-30

Wu 2008 Melbourne University Law Review (*MULR*)

Wu TH "Beyond the Torrens mirror: A Framework of the Personam Exception to Indefeasibility" 2008 *Melbourne Law Review* Vol.32 No.3 672-697

## **Y**

Yngstrom 2002 *ODS*

Yngstrom I "Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate Over Land Policy and Changing Tenure Systems" 2002 *Oxford Development Studies* Vol. 30 No.1 21-40

## **Z**

Zetterlund *Gender and Land Grabbing*

Zetterland Y *Gender and Land Grabbing: A Post-Colonial Feminist Discussion about the Consequences of Land Grabbing in Rift Valley Kenya* (Masters Thesis Malmö University: Sweden 2013)

Zevenbergen *Land Registration Systems*

Zevenbergen J *Systems of Land Registration: Aspects and Effects* (Netherlands Geodetic Commission Netherlands 2002)

Zevenbergen "Overselling the Mirror and Curtain Principles"

Zevenbergen JA "Overselling the Mirror and Curtain Principles of Land Titling" in World Bank Conference on Land and Poverty *Responsible Land Governance: Towards an Evidence Based Approach* (20-24 March 2017 Washington) 1-7

## **Case Law**

### **South Africa**

*Alexkor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC)

*Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25

*Bakgatla-ba-Kgafela Tribal Authority and Others v Bakgatla-ba-Kgafela CPA* [939/2013]

*Doctors for Life International v Speaker of the National Assembly and Others* 2006 6 (CC) 416

*Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC)

*Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill.* 2000 (1) SA 732 (CC)

*Knysna Hotel CC v Coetzee NO* 1998 2 SA 743 (SCA)

*Re: Southern Rhodesia* (1919) AC 221

*Richtersveld Community v Alexkor Ltd* 2001 3 SA 1293 (LCC)

*Richtersveld Community v Alexkor Ltd* 2003 6 SA 104 (SCA)

*Shilubana and Others v N Wamitwa* 2008 9 BCLR 1914 (CC)

*Tongoane and Others v Minister for Agriculture and Land Affairs and Others* 2010 6 SA 214 (CC)

*Tsewu v Register of Deeds* 1905 TS 130

## **Tanzania**

*Epharahirim v. Holaria Pastory* . Unreported Primary Court (Civil Appeal) 70 of 1989

*Esiroyo v Esiroyo and Another* 1973 EA 388

*Obiero v Opiyo & others* 1972 EA 227

## **Kenya**

*Best v Chief Lands Registrar* 2014 EWHC 1370

*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya African Court on Human and Peoples Rights* 276/2003

## **Legislation**

### **South Africa**

*Abolition of Racially Based Land Measures Act* 108 of 1991

*Black Authorities Act* 68 of 1951

*Commission for Gender Equality Act* 39 of 1996

*Communal Land Rights Act* 11 of 2004

*Communal Property Associations Act* 28 of 1996

Constitution of the Republic of South Africa 200, of 1993

Constitution of the Republic of South Africa 108, of 1996

*Deeds Registration Act* 37 of 1947

*Development Trust and Land Act* 18 of 1936

*Group Areas Act* 36 of 1966

*Interim Protection of Informal Land Rights Act*

*National Water Act* 36 of 1998



*Native Trust and Land Act* 18 of 1936

*Natives Land Act* 27 of 1913

*Pretoria Convention* of 1881

Traditional Courts Bill (B1-2012 Formerly the Traditional Courts Bill B15-2008)

*Traditional Leadership and Governance Framework Act* 41 of 2003

*Volksraad Resolution* of 1884 (14 August 1884)

## **Tanzania**

Tanzanian National Land Policy 1997

*Village Land Act* 4 of 1999

*Land Act* 5 of 1999

*Land Use Planning Act* 10 of 2007

*Land Adjudication Act* Cap 284 (Revised 2016)

## **Kenya**

*Community Land Act* 27 of 2016

The Constitution of Kenya 27 August 2010

*Land Act* 6 of 2012

*Land Registration Act* 3 of 2012

*National Land Commission Act* 2012

*The Land Registration Act* 3 of 2012

*The Marriage Act* 4 of 2014

The *National Land Commission Act* 2012 (revised version 2014, chapter 5D)

### **International and regional instruments**

African Charter on Human and Peoples' Rights (1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58

African Union's Declaration on Land Issues and Challenges in Africa (2009) Assembly/AU/Decl.1(XIII) Rev.1

Beijing Platform for Action (1995)

Convention on the Elimination of All Forms of Discrimination against Women (1979) 34/180

Framework and Guidelines on Land Policy in Africa (2006)

Istanbul Declaration on Human Settlements (2001)

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (2003)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

Rome Declaration on World Food Security (1996)

Solemn Declaration on Gender Equality in Africa (2004)

Universal Declaration of Human Rights of (1948) General Assembly resolution 217 A

## **Government publications**

GN 1423 in GG 23740 of 18 August 2002 (Communal Land Rights Bill 2002)

GN 2103 in GG 23984 of 29 October 2002 (White Paper on South African Land Policy 1997)

GN 2103 in GG 23984 of 29 October 2002 (White Paper on Traditional Leadership and Governance)

Communal Land Tenure Policy Framework September 2014 Land Reform Policy Workshop Protea Hotel Stellenbosch (TechnoPark) (23-24 August 2013)

GN 183 in GG 37448 of 18 March 2014 (*Rules Board for Courts of Law Act*, 1985 (Act No.107 of 1985))

GN B67A in GG 23740 of 18 August 2002 (Communal Land Rights Bill)

GN 2437 in GG 40965 of 7 July 2017 (Communal Land Tenure Bill 2017)

GN 639 in GG 34656 of 16 September 2011 (Green Paper on Land Reform)

GN 216 in GG 40686 of 15 March 2017 (Electronic Deeds Registration Systems Bill)

## **Internet Sources**

### **A**

Adams *et al.* 1999 <https://www.odi.org>

Adams M, Sibanda S and Turner S 1999 "Land Tenure Reform and Rural Livelihoods in Southern Africa"

<https://www.odi.org/resources/docs/2760.pdf> [Accessed 25<sup>th</sup> October 2016]

Anseeuw *et al.* 2012 <https://www.landcoalition.org>

Anseeuw W, Wily A, Cotula L and Taylor M 2012 "Land Rights and the Rush for Land: Findings on the Global Commercial Pressures on Land Research Project"  
[https://www.landcoalition.org/sites/default/files/.../ILC%20GSR%20report\\_ENG.pdf](https://www.landcoalition.org/sites/default/files/.../ILC%20GSR%20report_ENG.pdf) [accessed 12<sup>th</sup> February 2016]

## **B**

Baker [Date unknown] <https://www.conecta-realty.co.za>

Baker WS [Date unknown] "Key Issues in the System of Land Registration and the Comparatively Reliable and Secure System of Land Registration in South Africa"  
<http://www.connectarealty.co.za/images/downloads/Land%20Registration%20System%20In%20South%20Africa.pdf> [12<sup>th</sup> September 2017]

Bienart 2017 <https://www.gga.org>

Beinart W 2017 "Comments on the Communal Land Tenure Bill 2017" <https://www.gga.org/communal-land-tenure-bill-2017> [Accessed 12<sup>th</sup> September 2017]

Boone 2017 <https://www.wider.uni.edu>

Boone C 2017 "Legal empowerment of the poor through property rights reform Tensions and trade-offs of land registration and titling in sub-Saharan Africa"

[https://www.wider.unu.edu/sites/default/files/wp2017-37\\_0.pdf](https://www.wider.unu.edu/sites/default/files/wp2017-37_0.pdf)  
[Accessed 23<sup>rd</sup> July 2017]

## C

Claasens 2005 <https://www.plaas.org.za>

Claasens A 2005 "Land reform and agrarian change in Southern Africa" <http://www.plaas.org.za/sites/default/files/publications-pdf/OP%2028.pdf> [Accessed 28<sup>th</sup> March 2016]

Claasens 2013 <https://www.customcontested.co.za>

Claasens 2013 "Communal Land Tenure Policy" <https://www.customcontested.co.za/.../06-AUG-2013-Communal-Land-Tenure-Policy-v2.pdf> [Accessed 12<sup>th</sup> February 2016]

Centre on Housing Rights and Evictions (COHRE) 2006 <https://www.gewamed.net/cohre>

Centre on Housing Rights and Evictions (COHRE) 2004 "Bringing Equality Home: Promoting and Protecting Inheritance Rights of Women, A Survey of Law and Practice in Sub-Saharan Africa (Geneva: COHRE)" <https://www.gewamed.net/cohre> [Accessed 28<sup>th</sup> March 2016]

Centre for Law and Society 2013 [https:// www.lrg.uct.ac.za](https://www.lrg.uct.ac.za)

Centre for Law and Society 2013 "The Communal Land Tenure Policy and IPILRA" [http://www.cls.uct.ac.za/usr/lrg/downloads/Factsheet\\_CommunalTenure\\_IPILRA\\_Final\\_Feb2015.pdf](http://www.cls.uct.ac.za/usr/lrg/downloads/Factsheet_CommunalTenure_IPILRA_Final_Feb2015.pdf) [Accessed 19<sup>th</sup> March 2016]

Cross and Hornby 2002 <https://www.gov.za>

Cross C and Hornby D 2002 "Opportunities and Obstacles to Women's Land Access in South Africa"  
[https://www.gov.za/sites/www.gov.za/files/landgender\\_0.pdf](https://www.gov.za/sites/www.gov.za/files/landgender_0.pdf)  
[Accessed 20<sup>th</sup> November 2015]

Crowley 1999 <https://www.portalces.org>

Crowley E 1999 "Women's Right to Land and Natural Resources: Some Implications for a Human Rights-based Approach"  
<https://www.portalces.org/sites/default/files/migrated/docs/489.pdf>  
[Accessed 28<sup>th</sup> January 2016]

## **D**

Doss *et al.* 2014 <https://www.ssrn.com/abstract=2373241>

Doss C, Kovarik C, Peterman A, Quisumbing AR and Van den Bold M 2013 "Gender Inequalities in Ownership and Control of Land in Africa- Myths versus Reality"  
<https://www.ssrn.com/abstract=2373241> [Accessed 15<sup>th</sup> September 2016]

Daley 2011 <https://www.landcoalition.org>

Daley E 2011 "Gendered Impacts of Commercial Pressures on Land"  
[http://www.landcoalition.org/sites/default/files/documents/resources/MOKORO\\_Gender\\_web\\_11.03.11.pdf](http://www.landcoalition.org/sites/default/files/documents/resources/MOKORO_Gender_web_11.03.11.pdf) [Accessed 20<sup>th</sup> October 2016]

Du Plessis and Frantz 2013 <http://ssrn.com/abstract=2381922>

Du Plessis EWJ and Frantz G 2013 "African customary land rights in a private ownership paradigm"  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2381922](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2381922)  
[Accessed 20<sup>th</sup> October 2016]

## **E**

Enemark, McLaren and Lemmen 2015 <https://www.fig.net>

Enemark S, McLaren R and Lemmen C 2015 Fit-for-purpose land administration <https://www.fig.net/pub/figpub/pub60/figpub60.htm> [Accessed 18<sup>th</sup> September 2017]

## **G**

Gafaar 2014 <https://www.landesa.org>

Gafaar R "Women's Land Rights and Property Rights in Kenya" 2014 <https://www.landesa.org/wp-content/uploads/LandWise-Guide-Womens-land-and-property-rights-in-Kenya.pdf> [Accessed 15<sup>th</sup> September 2016]

Gender Equality Commission 2008/09 <https://www.cge.org.za>

Gender Equality Commission 2008/09 "Commission on Gender Equality Presentation to Portfolio Committee" <https://www.cge.pmg-assets.s3-website-eu-west-1.amazonaws.com/.../100512cge> [Accessed 12<sup>th</sup> June 2015]

## **H**

Hall 2003 <https://www.plaas.org.za>

Hall R 2003 "Land rights and agrarian reform; land deals in Africa" <https://www.plaas.org.za> [Accessed 19<sup>th</sup> September 2016]

Heathcote 2017 <https://www.pccmalta2017.com>

Heathcote N "Creating Trust in a Land Administration System" 2017  
<https://www.pccmalta2017.com/wp-content/uploads/2017/04/Nicky-Heathcote.pdf> [Accessed 18<sup>th</sup> March 2017]

Heck 2009 <https://www.hj2009per1tanzania.weebly.com>

Heck B 2009 "Tanzania: Colonization"  
<http://hj2009per1tanzania.weebly.com/colonization.html> [Accessed 25<sup>th</sup> April 2015]

## K

Kameri-Mbote 2013 <https://www.za.boell.org>

Kameri-Mbote P 2013 "I Want it and I Want it Now" in *Perspectives Africa: Women and Land Rights - Questions of Access, Ownership and Control* <https://www.boell.de/en/2013/10/14/perspectives-africa-women-landrights> [Accessed 20<sup>th</sup> September 2016]

Kariuki and Karuiki 2015 <https://www.strathmore.edu>

Karuiki M and Karuiki F 2015 "Alternative Dispute Resolution, Access to Justice and Development in Kenya"  
<http://www.press.strathmore.edu/uploads/journals/strathmore-law-journal/SLJ1/1-SLJ-1-KMuigua-FKariuki-Alternative-Dispute-Resolution.pdf> [Accessed 20<sup>th</sup> September 2017]

Kotze 2009 <https://www.ubs.ac.za>

Kotze H 2009 "Rule 37 and Mediation"  
[https://www.usb.ac.za/disputesettlement/Documents/pdfs/October\\_Newsletter\\_2009.pd](https://www.usb.ac.za/disputesettlement/Documents/pdfs/October_Newsletter_2009.pd) [Accessed 20<sup>th</sup> September 2107]



## **L**

Lange 2008 <https://www.cmi.no>

Lange S "Land Tenure and Mining in Tanzania"  
<https://www.cmi.no/publications/file/3008-land-tenure-and-mining-in-tanzania.pdf> [Accessed 20<sup>th</sup> March 2016]

Larson and Springer 2016 [https://www.iucn.org>tenure\\_rights\\_final](https://www.iucn.org>tenure_rights_final)

Larson AM and Springer J 2016 "Recognition and Respect for Tenure Rights" [https://www.iucn.org.tenure\\_rights\\_final](https://www.iucn.org.tenure_rights_final) [Accessed 12<sup>th</sup> March 2016]

Lengoiboni and Molendijk 2015 <https://www.itc.nl>

Lengoiboni M and Molendijk M 2015 "Land Administration, Innovative Tools for Land Administration"  
<https://www.itc.nl/resumes/lengoibonimn> [Accessed 20<sup>th</sup> September 2017]

Lund, Odgaard and Sjaastad [Date unknown] <https://www.pure.diis.dk>

Lund C, Odgaard R and Sjaastad E "Land Rights and Land Conflicts in Africa: A Review of Issues and Experiences"  
[https://www.pure.diis.dk/ws/files/68278/Land\\_rights\\_and\\_land\\_conflicts\\_in\\_Africa\\_a\\_review\\_of\\_issues\\_and\\_experiences.pdf](https://www.pure.diis.dk/ws/files/68278/Land_rights_and_land_conflicts_in_Africa_a_review_of_issues_and_experiences.pdf) [Accessed 6<sup>th</sup> July 2017]

## **M**

Meer and Campbell 2007 <https://www.lrs.org.za>

Meer T and Campbell C "Traditional Leadership in Democratic South Africa" <https://www.ddp.org.za/information-material/articles> [Accessed 21<sup>st</sup> November 2016]

Meer 2013 <https://www.za.boell.org>

Meer S 2013 "Land Reform and Women's:and Rights in South Africa" in *Perspectives Africa: Women and Land Rights - Questions of Access, Ownership and Control* <https://www.boell.de/en/2013/10/14/perspectives-africa-women-landrights> [Accessed 20<sup>th</sup> September 2016]

Mokgope 2000 <https://www.plaas.org.za/publication-categories>

Mokgope K 2000 *Land reform, sustainable rural livelihoods and gender relations* <https://www.plaas.org.za/publication-categories> [Accessed 12<sup>th</sup> April 2016]

Monene 2010 <https://ke.boell.org>

Monene J 2010 "Towards the Realisation of Women's Land rights in Kenya" [https://www.ke.boell.org/sites/default/files/uploads/2014/02/toward\\_the\\_realisation\\_of\\_land\\_rights\\_for\\_women\\_in\\_kenya.pdf](https://www.ke.boell.org/sites/default/files/uploads/2014/02/toward_the_realisation_of_land_rights_for_women_in_kenya.pdf) [Accessed 12<sup>th</sup> March 2017]

Moyo [Date unknown] [www.zero.org](http://www.zero.org)

Moyo S [Date unknown] *Linking Land and Food Security in Africa: a focus on Southern Africa* [www.zero.org](http://www.zero.org) [Date of use 25<sup>th</sup> April 2015]

Muigua [Date unknown] <https://www.kmco.co.ke>

Muigua K 2012 "Alternative Dispute Resolution and Article 159 of the Constitution"

<http://www.kmco.co.ke/attachments/article/107/A%20PAPER%20ON%20ADR%20AND%20ARTICLE%20159%20OF%20CONSTITUTION.pdf> [Accessed 19<sup>th</sup> April 2017]

## **O**

O'Neill and Piron 2003 <https://www.odi.org>

O'Neill L and Piron LH 2003 "Rights-based Approaches to Tackling Discrimination and Horizontal Inequality"  
<https://www.odi.org/publications/3473-inequality-middle-income-countries> [Accessed 19<sup>th</sup> April 2017]

## **P**

Palmer 1999 [www.mokoro.co.uk](http://www.mokoro.co.uk)

Palmer R "*The Tanzanian Land Acts 1999: An Analysis of the Analyses*" [www.mokoro.co.uk](http://www.mokoro.co.uk) [Date of use 19<sup>th</sup> April 2015]

## **R**

Rycroft 2009 <https://www.usb.ac.za>

Roycroft A 2009 "Why is Mediation not taking Root in South Africa"  
[https://www.usb.ac.za/disputesettlement/Documents/pdfs/October\\_Newsletter\\_2009.pdf](https://www.usb.ac.za/disputesettlement/Documents/pdfs/October_Newsletter_2009.pdf) [Accessed 20<sup>th</sup> September 2017]

## **S**

Sithole and Mbele 2008 <https://www.hsrc.ac.za/research-data/ktree-doc>

Sithole P and Mbele T 2008 "Fifteen Year Review on Traditional Leadership: A research paper" <https://www.hsrc.ac.za/research-data/ktree-doc> [Accessed 8<sup>th</sup> April 2016]

SALRC 1997 <https://www.salrc.justice.gov>

The South African Law Reform Commission 1997 "25 Years of Law Reform: Improving the Quality of Life and Status of Women" [http://www.justice.gov.za/salrc/anr/1997\\_ar.pdf](http://www.justice.gov.za/salrc/anr/1997_ar.pdf) [Accessed 19<sup>th</sup> October 2015]

Sundet 2006 <https://www.landportal.info>

Sundet G "The Formalisation Process in Tanzania" 2006 <https://landportal.info/sites/default/files/theformalisationprocessintanzania.pdf> [Accessed 13<sup>th</sup> March 2017]

Springer 2016 <http://www.usaidlandtenure.net>

Springer J "Land and Resource Tenure and Social Impacts" 2016 <https://www.usaidlandtenure.net/issue-brief/land-and-resource-tenure-and-social-impacts/> [Accessed 13<sup>th</sup> March 2017]

## **T**

Twomey 2014 <https://www.rsc.ox.ac.uk>

Twomey H 2014 "Displacement and Dispossession through Land grabbing in Mozambique" <https://www.rsc.ox.ac.uk/files/files-1/wp101-displacement-dispossession-land-grabbing-mozambique-2014.pdf> [Accessed 20<sup>th</sup> August 2017]

## **U**

Ujamaa Community Resource Team 2014 <https://www.ujamaa-crt.org>.

Ujamaa Community Resource Team 2014 "Securing Communal Land Tenure in Northern Tanzania Using Certificates of Customary Right of Occupancy" <http://www.ujamaa->

crt.org/uploads/1/2/5/7/12575135/ucrt\_ccro\_brief\_2014.pdf  
[Accessed 8<sup>th</sup> September 2017]

## **V**

Verma 2007 <https://www.landcoalition.org>

Verma, R 2007 "Without Land you are Nobody: Critical Dimensions of Women's Access to Land and Relations in Tenure in East Africa" [https://www.researchgate.net/publication/235900078\\_publicationCoverPdf](https://www.researchgate.net/publication/235900078_publicationCoverPdf) [Accessed 1<sup>st</sup> November 2017]

## **W**

Wily 2000 [http:// www.odi.org>resources>doc](http://www.odi.org/resources/doc)

Wily LA 2000 "Land Tenure Reform and the Balance of Power in Eastern and Southern Africa" [http:// www.odi.org> resources>doc](http://www.odi.org/resources/doc)  
[Date of use 30<sup>th</sup> April 2016]

Wily 2003 <https://www.iied.org>

Wily LA "Community-Based Land Tenure Management: Questions and Answers about Tanzania's New Village Land Act, 1999" 2003 [https://www. http://pubs.iied.org/pdfs/9295IIED.pdf](https://www.iied.org/pdfs/9295IIED.pdf) [Accessed 25<sup>th</sup> June 2016]

Wisborg 2002 <https://www.nlh.no/noragic>

Wisborg P 2002 "Is Land a Human Rights Issue? Approaching Land Reform in South Africa" <https://www.nlh.no/noragic> [Accessed 29<sup>th</sup> October 2014]

## Y

Yamano and Deininger 2005 <https://www3.grips.ac.jp>

Yamano T and Deininger K 2005 "Land Conflicts in Kenya: Causes, Impacts and Resolutions"<https://www3.grips.ac.jp/~yamanota/Land%20Conflicts%20in%20Kenya%20%28FASID%20DP%29.pdf> [Accessed 19<sup>th</sup> June 2017]