"Traditional Authorities" and Authority over Land in South Africa

Derick Fay[1]

Abstract

"Authority" is a term that has two primary meanings, one referring to legitimate power or right, the second referring to a social actor who holds such power. In investigating the relationship between authority and property, it is necessary to pay attention to the potential for conflation of or slippage between these two meanings. Those institutions that are labeled as "authorities" in the second sense may not be those that hold authority in the first sense. Conversely, actors who claim authority over a piece of property, may not be aspiring to be authorities: as a result, they may fall outside the vision of states, NGOs, and other actors who seek to recognize local authority, but instead recognize "authorities." These points are illustrated with ethnographic examples from the Eastern Cape of South Africa and a discussion of current South African tenure reform policy.

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[1] dfay@fastmail.fm

Visiting Assistant Professor

Department of Anthropology

Union College (through 6/30/08)

Assistant Professor

Department of Anthropology

University of California, Riverside (from 7/1/08)

This brief paper has two aims: first, to point out some potential ambiguities in the concept of authority as it has been used in recent writing on authority and property, and second, to present a situation in the Eastern Cape of South Africa where landholders claim authority without constituting authorities, and thereby illustrate the analytic and policy significance of the conceptual issues.

The *New Oxford American Dictionary*, 2nd edition provides several definitions of authority;[2] I will refer to the first two of these in this paper as A1, A2. First, authority refers to a property of an actor: "the power or right to give orders, make decisions, and enforce obedience" (A1). Second, authority refers to an actor itself: "a person or organization having power or control in a particular, typically political or administrative, sphere" (A2).[3] Eacg of these meanings of the term are invoked in recent discussions of authority, property and devolution. This not intrinsically a problem, as all three meanings are useful concepts; the multiple meanings become potentially problematic, however, where there is the possibility of slipping from one meaning to another in the midst of analysis.

The authors of the call for papers and concept papers for this panel draw upon different meanings of "authority." Ribot *et al*. 2008 are primarily concerned with A2 -- "authorities" as institutions, typically created and/or recognized by governments and NGOs through processes of devolution: they observe that "states and international institutions are always engaged in recognizing new authorities" (3) and call for attention to the "enfranchising and disenfranchising effects of recognizing different kinds of authorities" (3).

In contrast, Lund (2006) and Sikor and Lund (forthcoming) use authority in the sense of a property of an actor (A1). Lund is concerned with "institutions that effectively exercise public authority of one kind or another" (Lund 2006: 685), drawing on the post-Weberian literature on state formation (cf. Nugent 2004) to examine the constitution of authority inside and outside of the state, and the fluidity and construction of the boundaries of the state itself, as part of "an analytic strategy for the understanding of public authority in contexts where it is not the exclusive realm of government institutions" (Lund 2006: 686).

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[2] Dictionary definitions are from the electronic version of the *New Oxford American Dictionary* built into the Mac OS X operating system.

[3] The *New Oxford American Dictionary* also includes the definition of authority as "the power to influence others, esp. because of...one's recognized knowledge about something" (A3). These are, of course, not the only possible meanings of authority or distinctions between types of authority (consider e.g. the Weberian distinction between "traditional," "rational-legal" and "charismatic" authority -- a set of distinctions that sharpen the possible types of, and bases for, A1 but also incorporate A3).

In Sikor and Lund (forthcoming), there is more slippage between A1 and A2. The paper opens with an anecdote about rural Vietnam in which "both state and village community felt compelled to assert their authority in the uplands" (1, using meaning A1); a few pages later, authority is used in the second sense: "Property claims are enforceable because they are legitimate, in the sense that the state or some other forms of politico-legal authority sanction them." (Sikor and Lund forthcoming: 4). Not long after that, authority is described according to the first definition, as "legitimate power" (7, citing Weber), followed by an account of changing authorities (in the second sense) over forests in Indonesia from Peluso 1992, and the introduction of an additional term, never quite defined, "authority relations" (7, 8).

Given these two different usages of "authority," as legitimate power (A1) and as an institution holding administrative power (A2), in the concept papers, it is not surprising that the call for papers for this panel also slips back and forth between the two meanings, discussing a lack of attention to "the construction...of the enforcing authority" (A2) and switching a few sentences later to "governing actors [who] legitimate their assertion of authority" (A1).

Now, one can ask whether the multiple meanings of "authority" actually pose a problem for anyone? Are the meanings not always clear from context? A passage from Ribot *et al*. suggests what is at stake in this distinction, with a parallel discussion of the ambiguity around "custom." They point to a "blind spot...in development approaches that favor indigeneity" whereby "custom and customary authority are conflated such that customary authorities are favored rather than custom itself" (Ribot *et al*. 2008: 5). There is a similar risk that those identified as authorities (A2) may be equated with those who hold authority (A1). To return to the example from Peluso 1992, the creation by the Dutch and Indonesian administrations of new authorities (A2) to regulate forests did not usurp alternative claims to authority and access by forest-dependent villagers. In this case, the clear institutional divide between the foresters and the villagers eliminates much possibility of semantic confusion. But in cases where both "authorities" (A1) and authority (A2) fall within the domain of the "indigenous" or the "local," I would argue, there is more potential--and more danger--for the two meanings to be conflated. Those institutions that are labeled as "authorities" (A2) -- and in the case of South Africa, designated as such through colonial and apartheid-era legislation -- may not be those that hold authority (A1) over land.

Conversely, and perhaps less obviously, the actors who claim authority (A1) over a piece of property, may not be aspiring to be authorities (A2). As a result, they may fall outside the vision of states, NGOs, and other actors who seek to recognize local authority, but instead recognize "authorities."

In the section that follows, I present a series of situations where people are claiming "authority" (A1) without aiming to constitute authorities (A2). The situation I describe is one that has broad parallels in many areas of sub-Saharan Africa, where a territoriallly-based system of land tenure under chiefs and headmen is gradually being usurped or challenged by claims based on familial control of land.

The setting is southern Hobeni, a community on the southeastern coast of South Africa, in what used to be the Transkei homeland. Hobeni is rather different from some other areas described in the literature on tenure in the Transkei (e.g. Ntsebeza 2005, Turner 1999, Hendricks 1990) in that it was a politically and economically unimportant, culturally conservative area where the South African and homeland administrations did not commit much resources or effort into monitoring or controlling land tenure; they enlisted chiefs and headmen in administration but left much practical scope for local innovation and control over land tenure practices. As in most of the Transkei, people here have been dependent upon migrant labor since the early 20th century, but also rely upon state pensions and other grants along with cultivation (almost exclusively for subsistence) in gardens adjoining their homesteads and more distant fields, and livestock-keeping. Since 2001, land in Hobeni has legally been owned by the Hobeni Communal Property Association, but the members of this organization--elected with a mandate to represent the community in negotiations with the adjoining Cwebe Nature Reserve, not to interfere in local land tenure--have refrained from any attempts to regulate land outside the reserve (in effect refusing to claim an authority to which they might legally be entitled).

Decisions regarding land in Hobeni generally take place within neighborhoods, clusters of 25-50 homesteads with customary ties to a particular subheadman, notwithstanding statements that the headman administers (*ukulawula*) land, and that land is available upon request from the headman.

There are two basic principles that people in the area use to justify access to land. The first is that a residential site with a garden, and a field, should be available to all married men and widows, because these are necessary to secure a livelihood. This gives rise to a discourse with an appearance of egalitarianism, based on an appeal to a common predicament, "*siyahlupeka sonke*–we are all suffering," and a call for equality: "*masilingane*–let us all be equal."

The egalitarianism is limited by what Cross (2001) refers to as "prior and greater need" (2001: 122): it is considered legitimate to refuse access to land to a landless outsider or newcomer, if there is a potential local claimant. In Hobeni, this principle has generally taken precedence over the former, leading to a situation where land is increasingly treated as the property of the kin group referred to in contemporary Xhosa as *ifemili*. This term, obviously derived from the English term "family," refers loosely to all agnatic kin, regardless of gender, and the wives of male agnates.

In practice, there are two patterns of access to land, related to demographic differences between neighborhoods: first, in some neighborhoods, nearly all residents share agnatic ties[4] with one another and the neighborhood subheadman. In such areas, land is

[4] For readers unfamiliar with anthropological jargon, agnates refer to people who are related through a male line of descent (adj. agnatic), cognates to people related through males or females, excluding relatives by marriage (adj. cognatic), and affines to people related through marriage (adj. affinal).

generally only available to those with such agnatic ties, both because of exclusion and because outsiders have been reluctant to seek land in these areas; as one woman from souther Hobeni said in 1998, describing such an area, “a person from [another clan] will not try to live there–he will be like a goat who is among sheep.” Three of the six neighborhoods in southern Hobeni fall into this type, as do perhaps one in four in the region as a whole (see Fay 2005 and 2003 for a discussion of the regional literature review underlying the latter claim). The second pattern of access is found in neighborhoods where the kin composition is more diverse, and has tended to remain so over time. In these areas, people seeking land mobilize ties other than agnatic kinship (e.g. affinal and cognatic kin ties, church membership, employment, patron-client relationships, and healer-initiate/client relationships); outsiders have been more likely to seek land in these areas, and residents have been less likely to close ranks to oppose requests by outsiders. Nevertheless, within these areas, there are pockets of land that are under the control of multi-generational extended families, and which are effectively kept out of the pool of potential sites available to outsiders.

Within the land controlled by such families, subdivision is common. Technically not allowed under the administrative regulations that governed tenure in the Transkei region, subdivision is nevertheless widespread. People who subdivide their land for family members typically say that it is not necessary to consult with the headman or subheadman prior to doing so.

A conversation I had with a retired migrant in a neighborhood inhabited almost entirely by descendants of his great-grandfather illustrates this point succinctly. I asked him about the availability of land, and he explained that his two younger brothers had recently received both residential sites and fields.

When I asked if people could still get new sites in the neighborhood, at first he said it was not possible, that “there are no sites here without people in them.” After a pause, he continued, qualifying his previous statement: “there are sites–it depends on the people of the area. If you go to them and show them a place, they will will say there are no sites available.”

I asked about his brothers. He explained: “there are people who have got sites recently, but they aren’t from outside; they’ve received them from their family’s land.” Such statements and practices situate authority (A1) over familial land in the hands of senior family members.

For the most part, people agree on the legitimacy of long-term familial claims to land, even when such land is not occupied or cultivated. They justify holding land which they are not actively using with reference to the past and the future. When people question

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Lineages refer to corporate groups tracing descent from a common ancestor.

(http://lucy.ukc.ac.uk/TVillage/Pages/glossary.html).

these practices, they speak with a tone of resignation: “there are so many people here who aren’t using their land, but there is nothing we can do–if you ask them to make it available, they will say no, it belonged to someone in my family.”

Senior members of a family often allocate or subdivide sites within their land for family members without the involvement of the subheadman or headman. This practice is exemplified by the case of MaVundle. Her plot had fallen in the heart of the area selected for the settlement of people moved into the area as part of a forced villagization scheme in the early 1980s (“betterment” in South African jargon), under which the land that was formerly her garden was subdivided into eight residential sites. Since removed people began returning to their former sites in the early 1990s, she has been able to reclaim all of this land. As of October 1999, four of the sites established in her garden had been vacated as their owners returned to their former locations. She was reconfiguring her site, expanding her garden to encompass her residential site, and establishing a new residential site for herself adjacent to the expanded garden.

She had also subdivided her land into two other sites for members of her family. Her unmarried daughter was preparing to build her own houses on one of the vacated sites. She also allocated a site within her land to Nothemba, the elder daughter of her deceased husband’s younger brother, who had lived at MaVundle’s homestead (i.e., with his older brother, in his natal homestead) prior to receiving his own site in the 1970s. Nothemba herself was an unmarried woman of 29 years of age with a four year old son. As Nothemba explained it, “before, we were all living together at MaVundle’s site. Now that I needed my own site, I spoke to MaVundle and my father and they gave me this land.”

This case was somewhat controversial at the time because nobody involved consulted with the neighborhood subheadman prior to the subdivision of the site. MaVundle and her neice and daughter claimed the plots which people left behind on the basis of prior ownership and descent, implicitly placing authority over these plots in the control of their family, in opposition to the view that it should be available for the subheadman to reallocate. In effect, they were treating their land as family property, which they could freely allocate among family members without reference to the subheadman.

While the subheadman was concerned about being bypassed, he did not challenge their action. While he might have been able to extract a fine from the parties involved, it appeared unlikely that he could have reversed the decision if he had chosen to try. None of the people involved were outsiders, so there was no basis for them to be rejected as land applicants, and the principles invoked–descent and prior residence–were generally recognized. As of November 2005, MaVundle was living in her own site with her son and a new daughter, secure in her situation.

Another clear example of both long-term claims to disused land and intrafamilial allocation of land can be found in an area referred to as MaTshaweni (“the place of the Tshawes,” a reference to the clan name of the extended family that was claiming the land). This is a much larger area than the site described in the previous case, and involves a larger group of kin; in this case, the “family” involved fits the anthropological

definition of a patrilineage, tracing descent through males to a common remembered ancestor.

Some of the former (and returning) residents of this area were removed under betterment villagization in the 1980s, while others had moved in the 1940s because of frustration over paying fines for cattle trespassing in Cwebe Forest. In 1998-99, the area called MaTshaweni was largely grazing land, filling in with acacia trees. About six hectares, previously cultivated, had been expropriated and converted into a eucalyptus plantation by the Department of Agriculture and Forestry in the early 1980s following the closure of Cwebe Forest to local harvesting.

Despite the passage of more than fifty years since the initial removals, all of the descendants of the lineages that were settled there have claims to the territory; they had begun returning there, reestablishing homesteads and gardens. Three had already returned, while two more planned to return, and their younger sons expected to receive their own residential sites within MaTshaweni. As one woman observed, frustrated with her own chances at getting a better residential site, "the parents there are keeping those plots for their children."

The claim by the Tshawe families to an exclusive right to occupy and allocate land in the area was the source of some frustration for the CPA committee [first mention] in the context of a proposed agricultural project in mid-1999. Members of the CPA committee had been discussing the project with an NGO, the Transkei Land Service Organization (Tralso). This large area of vacant land, adjacent to the Mbanyana River and accessible via a tractor road, appeared to be a suitable site for a small-scale irrigation scheme. The Tshawes, however, insisted that the land was their own, and was not available for public use. I spoke with Mandla, one of the men who had returned to the area. When I asked him about the proposed project, he was explicit about the connection between descent and land ownership. "If Tralso wants a project, I'll give them the land, and they can hire my sons to farm it–if someone else wants a project, they can open their own land and their people can work there–all this land is ours: it's not the land of inkosi, it's not the land of the [CPA] committee." The CPA yielded to his claims, and in 2001 the project was eventually sited in an adjacent neighborhood.

Where is authority (A1) and where are the authorities (A2) in the accounts I have provided? In each of these cases, local actors assert the authority of their family over their land. The authority, in the sense of legitimate power, that they claim is particular and bounded; it refers to the claims of their group of agnatic kin to make decisions regarding the land that they have occupied, over and against the claims of subheadmen, headmen, the CPA committee, etc. But they are not "taking on the mantle of public authority" (Lund 2006: 688), in relation either to the state (ibid.) or other local actors; the authority that they claim is private, or at least strictly limited in its scope to particular pieces of property. It is in this sense that they are aiming to constitute authority (A1) without creating authorities (A2).

Their claims to authority are locally effective without recourse to authorities (A2) because of locally shared authoritative knowledge of histories of occupation, allocation,

cultivation, genealogical ties, etc., and a general agreement about the legitimacy of family control over land. This is not to say that local authorities (particularly subheadmen) are irrelevant to land tenure--they are involved in approving allocation of land to outsiders, adjudicating livestock trespass, and in hearing occasional border disputes[5]--but their role is generally described as one closer to administrative service, recording others' decisions, rather than exerting power.

The difficulty--for external observers, not for Hobeni residents, for whom the situation I describe is clear and generally uncontested--is that the extended families that hold authority over land are not authorities--that is, they are not formal institutions in any sense; they have never had any status in South African land policy, and hold no title or other legal certification of their claims to land. As a result, this makes them vulnerable to policies that would recognize apparent authorities (A2) at the expense of identifying the holders of authority (A1).

The argument I am making here is not entirely novel; it is a variation of a longstanding anthropological critique of a literature on "institutions" that too readily focuses on those institutions that have a formal, recognizable organizational footprint while overlooking the multi-purpose, "embedded," and less legible institutions that may be real holders of power and authority.

It is a point worth raising again, though, in the context of the current struggle over tenure reform legislation in South Africa. In March 2006, four rural South African communities brought a court case challenging the constitutionality of the Communal Land Rights Act (CLRA) of 2004. While previous drafts of the CLR Bill had aimed to institute a "rights enquiry" process, which would grant statutory recognition to existing *de facto* rights and provide for the verification and registration of such rights, the final version of 2004 contained provisions which could put land administration and allocation under "traditional councils"; these are defined in the 2003 Traditional Leadership and Governance Framework Act in terms that could recognize Tribal Authorities which were established under the 1951 Bantu Authorities Act, one of the cornerstones of apartheid (Ntsebeza 2005: 284-288).

By moving away from a rights enquiry process that would focus on existing *de facto* rights, and--at least potentially--identify the sites of authority (A1) over land, to a process that aims to recognize and empower authorities (A2) -- and indeed, to constitute them as authorities in the legal arena, even though their legitimacy and authority over land is contested by many of their would-be subjects, the CLRA risks undermining existing claims to property and creating a legal structure that could be used to remove decision-

[5] With the exception of areas that have been subdivided, borders in Hobeni have been fairly stable; 1962, 1983 and 1996 aerial photos reveal changes in land use from residential sites to cultivation and vice versa, but the borders of plots (outside of the area targeted for settlement under villagization policy) are largely unchanged.

making authority over land away from those who hold such authority at present.

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