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## **AFRICAN INDIGENOUS LAND RIGHTS IN A PRIVATE OWNERSHIP PARADIGM**

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### *Abstract*

It is often believed that indigenous law confers no property in land. Okoth-Ogenda reconceptualised indigenous land rights by debunking the myth that indigenous land rights systems are necessarily “communal” in nature, that “ownership” is collective and that the community as an entity makes collective decisions about the access and use of land.<sup>2</sup> He offers a different understanding of indigenous land right systems by looking at the social order of communities that creates “reciprocal rights and obligations that this binds together, and vests power in the community members over land”. To determine who will be granted access to, or exercise control over, land and the resources, one needs to look at these rights and obligations and the performances that arise from them. This will leave only two distinct questions: who may have access to the land (and what type of access)<sup>3</sup> and who may control and manage the land resources, on behalf of those who have access to it?<sup>4</sup>

There is a link with this reconceptualisation and the discourse of the commons. Ostrom's classification goods leads to a definition of the commons (or common pool resources), as “a class of resources for which exclusion is difficult and joint use involves

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<sup>2</sup> Okoth-Ogendo “The nature of land rights” in A Claassens & B Cousins (eds) *Land, Power & Custom* 100.

<sup>3</sup> See Cousin's comments and examples in Cousins “Characterising ‘communal’ tenure: nested systems and flexible boundaries” in Cousins & Claasens (eds) *Land, Power & Custom* (2008) 122.

<sup>4</sup> Okoth-Ogendo “The nature of land rights” in A Claassens & B Cousins (eds) *Land, Power & Custom* 100.

subtractability”.<sup>5</sup> The question this paper wish to answer is: would it be 1) possible to classify the indigenous land rights system as a commons and 2) would it provide a useful analytical framework in which to solve the problem of securing land tenure in South Africa?

### *Keywords*

African indigenous law; land; common law ownership paradigm; titling

## *1 INTRODUCTION*

Section 25(6) of the South African Constitution entitles persons or communities “whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices” to tenure which is legally secure. Section 25(9) commands parliament to enact legislation to provide for such tenure security. The subsequent White Paper on Land<sup>6</sup> highlighted some principles with regard to security tenure, and made specific reference to tenure security in the former homelands,<sup>7</sup> where African indigenous land

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<sup>5</sup> D Feeny et al “The tragedy of the Commons: twenty-two years later” 1990 *Human Ecology* 1 4.

<sup>6</sup> Department of Land Affairs, Government of the Republic of South Africa *South African Land Policy White Paper* (1997).

<sup>7</sup> The apartheid government issued various laws in the hope to segregate the different groups in South Africa. The first of the so-called “land acts” was the Black Land Act 27 of 1913 which provided for the areas where occupation was restricted to black persons only. In the urban areas, segregation was effect by the Natives (Urban Areas) Act 21 of 1923; the Blacks (Urban Areas) Consolidation Act 25 of 1945; the Black Communities Development Act 4 of 1984. The Black Land Act was succeeded by the South African Development Trust and Land Act 18 of 1936 which provided for “released areas”, also restricted to black people. On the other end, the Group Areas Act 41 of 1950 regulated the acquisition, alienation and occupational rights to land and provided for four independent nation states, so-called homelands (Transkei, Bophuthatswana, Ciskei and Venda), and six self-governing territories (KwaNdebele, QwaQwa, Gazankulu, Lebowa, KwaZulu-Natal and KaNgwane). The segregation of people and the division of land was made possible by legislation authorising the (forced) removal and the eviction of the people from their land. Every area had its own specific regulations and town planning rules. At the advent of the new South Africa, about 17 000 statutory measures was issued to segregate and control land division, with 14 different land control systems in South Africa. Before the change an estimated 3,5 million people were displaced by apartheid land law, and 80% of people in South Africa lived on 18% of the land. For a more in-depth discussion see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* 6<sup>th</sup> ed (2006) 256 and A Claassens “Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation” (1993) 9 *SAJHR* 422 425. <http://www.sahistory.org.za/pages/places/villages/homelands/homelands.htm>

tenure<sup>8</sup> was held in trust by the government that issued permits to black people in these homelands.<sup>9</sup> The idea is that tenure reform must move towards rights and away from the permits that was in place during apartheid. The aim is also to unify the system of land rights and to rid of the second class system for black people that were developed during apartheid. There was also a call in the White Paper that people should be allowed to choose the tenure system which is appropriate to their circumstances (that would include group and individual rights, or a combination), provided that the system adhere to the Constitution's commitment to basic human rights and equality. For this a rights based approach was proposed, that also recognise the *de facto* rights in law.<sup>10</sup>

The problem, however, is *how* to do recognise and secure tenure rights. Should tenure be secured in the private ownership paradigm, or should indigenous forms of land tenure be fully recognised and thus protected.<sup>11</sup> Due to the domination of private property in the officially recognised laws of South Africa before the advent of constitutional democracy, the inclination is towards protection in the private ownership paradigm. The success of such an approach is questionable, and in the recent case of *Tongoane v National Minister for Agriculture and Land Affairs*<sup>12</sup> the Constitutional Court declared the Communal Land Rights Act<sup>13</sup> that was meant to be the legislation securing indigenous land rights, unconstitutional.<sup>14</sup> The problem therefore remains: how do we secure indigenous land rights?

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<sup>8</sup> The term "African indigenous land tenure" is preferred to "traditional" or "customary" land rights in this paper, since the author is of the view that "traditional" and "customary" may be too restrictive.

<sup>9</sup> The system was more complex than what can be elaborated on in this paper. The 1913 Land Act is usually regarded as the first of the spatial segregation acts, and only permitted Africans to live in certain areas (7% of the land). The 1936 Land and Trust Act added another 6% to the land that Africans could occupy. This land was held in trust, and Africans could hire, purchase or occupy this land. Legislation was passed (Native Administration Act of 1927; Bantu Authorities Act of 1951 and Regulation 188 of 1969, to name a few) that drastically reduced a landholder's ability to alienate, transfer or bequeath land.

Allocation of land was dependant on White officials who followed strict regulations that did not accommodate African indigenous land tenure systems. See B Cousins "The politics of communal tenure reform: A South African case study" in W Anseeuw & C Alden eds *The struggle over land in Africa* (2010).

<sup>10</sup> For the principles see paragraph 4.18 of the White Paper.

<sup>11</sup> A Claassens and B Cousins poses this question in A Claassens & B Cousins (ed) *Land, Power & Custom* (2008) 9.

<sup>12</sup> 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC).

<sup>13</sup> 11 of 2004.

<sup>14</sup> The Constitutional Court only focused on the procedural aspects of the adoption of the Act, and not the substantive issues raised.

This paper does not purport to provide an answer to this complex question. Rather, this paper investigates whether the African indigenous land tenure system can be analysed within the framework of the commons. It aims to investigate whether the framework of the commons can provide different insights, or perhaps a different vocabulary, whereby indigenous land tenure can be secured in the current ownership paradigm<sup>15</sup> without African indigenous land tenure losing their unique character.

The paper will do this by first looking at pre-colonial land tenure to investigate the root of contemporary indigenous land holdings and the characteristics of such tenure.

Thereafter it will look at the development of indigenous land tenure and the colonial and private property right influences on tenure, and the linguistic problems that developed in describing African indigenous land tenure. A brief overview of the commons will follow, after which the applicability and the usefulness of the discourse of the commons for African indigenous land tenure will be assessed. The conclusion will discuss the possible usefulness of the framework of the commons for securing land rights.

## *2 THE HISTORY OF AFRICAN LAND TENURE*

### *2 1 Pre-colonial African indigenous land tenure*

In precolonial times the indigenous peoples of South Africa had land abundant, with farming and herding being the pre-dominant economic activities.<sup>16</sup> Environmental factors such as rainfall, topography, soil and availability of water influenced the economy of the indigenous peoples. In KwaZulu-Natal, this meant that the patterns of

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<sup>15</sup> Whether it *should* be protected in an ownership paradigm is a separate debate all together, one which is beyond the scope of this paper. For purposes of this paper it will therefore be assumed that protection in an ownership paradigm is most viable route at the moment. At a recent colloquium on "Development, Pluralism and Access to Resources" held at the University of Cape Town, A Pope raised the question whether indigenous law land rights *are* in fact insecure, see A Pope "Indigenous law land rights: constitutional imperatives and proprietary paradoxes" (on file at author). Likewise the scope of this paper will not look into that debate, and will assume that in the ownership paradigm, indigenous law land rights *are* insecure.

<sup>16</sup> TW Bennett *Customary law in South Africa* (2004) 371.

residence and political authority were largely limited to independent homesteads.<sup>17</sup> These independent homesteads resulted in a more decentralized structure of political authority, with every unit having access to abundant resources allowing for a self-sufficient existence.<sup>18</sup> On the Highveld the situation was different. The sparse water and harsh climate meant that homesteads were concentrated around whatever water was available, and also meant that the political authority was centralised and concentrated in villages with comprised of up to a thousand inhabitants. Due to the climate, agriculture was difficult and risky, and therefore not intended to create wealth. The focus was on livestock, that was less risky and labour intensive.<sup>19</sup>

Cattle were most valued and often used in ceremonies and celebrations to establish or re-confirm social relations.<sup>20</sup> Despite exchange of cattle and other products, there were not regular traders and marketplaces. Material possessions had more social and ritual importance than economic value.<sup>21</sup>

Cousins elaborates on the communal land rights system, emphasising the political and social embeddedness of land rights.<sup>22</sup> He sketches a picture of pre-colonial land tenure, when “[I]and tenure was both ‘communal’<sup>23</sup> and ‘individual’, and can be seen as ‘a system of complementary interests held simultaneously’”,<sup>24</sup> and proceeds in sketching how the colonial rule changed it.<sup>25</sup> This often entailed the colonial state trying to retain a form of ‘communal’ land tenure that might suit their interests.<sup>26</sup>

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<sup>17</sup> TW Bennett *Customary law in South Africa* (2004) 371.

<sup>18</sup> TW Bennett *Customary law in South Africa* (2004) 371.

<sup>19</sup> TW Bennett *Customary law in South Africa* (2004) 372.

<sup>20</sup> TW Bennett *Customary law in South Africa* (2004) 372.

<sup>21</sup> TW Bennett *Customary law in South Africa* (2004) 373.

<sup>22</sup> B Cousins “Characterising ‘communal’ tenure” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 110.

<sup>23</sup> Earlier in the chapter he notes that ‘communal’ and ‘customary’ are not synonyms. Communal land rights systems also exist that does not derive from customary law, nor is dependent on a traditional authority for the management of the tenure. HWO Okoth-Ogendo “The nature of land rights” in A Claassens & B Cousins (eds) *Land, Power & Custom* 110.

<sup>24</sup> B Cousins “Characterising ‘communal’ tenure” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 111.

<sup>25</sup> B Cousins “Characterising ‘communal’ tenure” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 111.

<sup>26</sup> B Cousins “Characterising ‘communal’ tenure” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 111. Interestingly, in the Cape Colony, the Glen Grey Act 25 of 1894 (C) attempted to

The concept of “ownership” was therefore limited in pre-colonial South Africa and more often embedded in status relationships. Put differently, African indigenous law in property was more concerned with people’s obligations towards each other in respect of property, than with the rights of people in property. The relationships between people were more important than individual’s ability to assert his or her interest in property against the world. Entitlements to property are more in the form of obligations resulting from family relationships than a means to exclude people from the use of certain property.<sup>27</sup> Property can thus be said to be ‘embedded’ in social relationships rather than an individual’s exclusive claim over private property.<sup>28</sup>

In 1989 Okoth-Ogendo remarked that studies on African indigenous land tenure are mostly descriptive, without much regards to the theories that underline such systems.<sup>29</sup> This influenced the discussion on land reform in that the descriptive analysis was always done within the theoretical framework of Roman law, with the predominance of the doctrine of ownership rather than the property itself became the focal point.<sup>30</sup> It can therefore be useful to investigate African indigenous land rights in the theoretical framework of the commons.

## *2 2 African indigenous land tenure today*

### *2 2 1 Introduction: the language barrier of the common law*

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individualise customary tenure, by only allowing one arable plot per married man, and only the titleholders were allowed to graze their cattle on the commonage. This system, however, reverted back to ‘communal’ tenure. B Cousins “Characterising ‘communal’ tenure” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 111.

<sup>27</sup> TW Bennett *Customary law in South Africa* (2004) 373.

<sup>28</sup> B Cousins “The politics of communal tenure reform: A South African case study” in W Anseeuw & C Alden eds *The struggle over land in Africa* (2010) 60.

<sup>29</sup> HWO Okoth-Ogendo “Some issues of theory in the study of tenure relations in African agriculture” (1989) *Africa: Journal of the International African Institute* 6.

<sup>30</sup> HWO Okoth-Ogendo “Some issues of theory in the study of tenure relations in African agriculture” (1989) *Africa: Journal of the International African Institute* 6 7.

African indigenous law had limited scope to develop at its own pace and based on its own principles, as the colonial conquest introduced a market economy and African indigenous law, was at least officially and as far as property was concerned, replaced by common law.<sup>31</sup> Common law brought with it a new vocabulary that made it difficult, if not impossible, to interpret African indigenous law land tenure.<sup>32</sup> The concept of “ownership” is particularly problematic, as is the idea that *before* “ownership” all things were held in common with everybody having equal rights to the same thing,<sup>33</sup> or belonged to nobody. Bennett asserts that “[i]t is more likely that, before the concept of individual ownership emerged, only rights of use were protected”.<sup>34</sup> This implies that for short periods of time, while a resource is used, other people could be excluded, and protection was only needed for short-terms. The need for longer term protection only came with the move from nomadic lifestyle to a more settled lifestyle.<sup>35</sup> With the settlement of people on land, and the cultivation of such land and the herding of cattle, the more scarce resources became. With the increased scarcity of resources, the need for regulation of access and the protection of rights became.<sup>36</sup> The control of land therefore became a monetary advantage, and competition to control it grew.<sup>37</sup>

With the introduction of commerce, an exchange value had to be attached to a commodity, and in this context ownership provided the answer in securing the property.<sup>38</sup> With ownership came the idea of “absoluteness” that implied that one person

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<sup>31</sup> TW Bennett *Customary law in South Africa* (2004) 373. The “common law” terminology can be confusing. Roman-Dutch law is based on Roman law that implies that the history of South African law has a Roman law foundation, something South Africa shares with Western Europe. “Common law” as a term refers mostly to Roman-Dutch law as it was adapted and developed in South African case law and custom. “Common law” is usually distinguished from other sources of law such as legislation and customary law. Law, as developed in case law in England, is also referred to as “Common Law”. This “Common Law” forms the basis of law in Anglo-American law and was hardly influenced by Roman law. The law of equity, however, plays a significant role in the English “Common Law”. To make things somewhat more confusing, the South African common law was influenced by the English Common Law. See LM du Plessis *Introduction to Law* 3<sup>rd</sup> ed (1999) 19 – 20. To simplify things, when reference is made to the Roman-Dutch common law it will be written in the lower case, while if reference is made to the English Common Law, the letters will be capitalised.

<sup>32</sup> TW Bennett *Customary law in South Africa* (2004) 374.

<sup>33</sup> TW Bennett *Customary law in South Africa* (2004) 374.

<sup>34</sup> TW Bennett *Customary law in South Africa* (2004) 374.

<sup>35</sup> TW Bennett *Customary law in South Africa* (2004) 375.

<sup>36</sup> TW Bennett *Customary law in South Africa* (2004) 375.

<sup>37</sup> M Chanock *Land, custom and social order* (1985) 231.

<sup>38</sup> TW Bennett *Customary law in South Africa* (2004) 375.

could hold all the entitlement in a certain property, and dispose of it at free will.<sup>39</sup> This differs remarkably from the pre-colonial era where different interests in the same property could vest in different holders,<sup>40</sup> and where these interests are furthermore flexible and ever changing.<sup>41</sup>

Colonialists assumed that such a language of ownership was universally applicable, and furthermore assumed that the concept of “ownership” was only applicable to “civilized” societies. The colonizers also “assumed that land must have an owner, even where rights had never been defined”.<sup>42</sup> The fact that “ownership” was a strange concept to indigenous groups meant that the government could appropriate this “unowned” land.<sup>43</sup> If a dispute arose between Africans about land, common law was used to fill the gaps instead of the courts developing African indigenous law to fill such gaps.<sup>44</sup> Some people attempted to overcome the problem of indigenous land tenure and the incompatibility with “ownership” by stating that land was “common to all people”,<sup>45</sup> “communal”,<sup>46</sup> or that communities as “corporate entities” make the decisions regarding access and use of land.<sup>47</sup>

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<sup>39</sup> For a discussion of the concept “absolute ownership” in the African customary land tenure context, see AN Allot “Towards a definition of ‘absolute ownership’” (1961) *Journal of African Law* 99; SR Simpson “Towards a definition of ‘absolute ownership’:II” (1961) *Journal of African Law* 145. Allot discuss the problem in countries based on the English law that requires registration of title to land and the limited choice of title that can exist in respect of land. In the absence of an adequate vocabulary to describe and therefore register certain interests under customary law, the risk remains that such interests and the land in which such interests are held would be unowned.

<sup>40</sup> TW Bennett *Customary law in South Africa* (2004) 375. See also AN Allot “Towards a definition of ‘absolute ownership’” (1961) *Journal of African Law* 99 100 where Allot discusses the practical implications of this with registration. He asks how the official that need to register title in a piece of land will handle the problem of the chiefs that claim paramount control over the lands, families claiming to be owners of lands and the re-parcelled sections of land being handed to individuals: who must he register? For criticism see SR Simpson “Towards a definition of ‘absolute ownership’:II” (1961) *Journal of African Law* 145.

<sup>41</sup> AN Allot “Towards a definition of ‘absolute ownership’” (1961) *Journal of African Law* 99 100.

<sup>42</sup> M Chanock *Land, custom and social order* (1985) 232.

<sup>43</sup> TW Bennett *Customary law in South Africa* (2004) 375.

<sup>44</sup> TW Bennett *Customary law in South Africa* (2004) 377. See M Chanock *Land, custom and social order* (1985) 232 for a discussion of how this worked in practice.

<sup>45</sup> TW Bennett *Customary law in South Africa* (2004) 377.

<sup>46</sup> TW Bennett *Customary law in South Africa* (2004) 377.

<sup>47</sup> HWO Okoth-Ogendo “The nature of land rights under indigenous law in Africa” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 99.

However, the use of the term “communal” is problematic.<sup>48</sup> Bennett<sup>49</sup> sums it up by stating that the popular use of the word “suggest that groups of people, who are closely bound together by common interests and values, share land for purposes of subsistence” rather than the more unobjectionable idea that all members of the community having equal claims to land, that “membership of a political community is the basis of an individual’s entitlement to land” or that an individual is not free to dispose land at will.<sup>50</sup> The idea that land is farmed collectively and that the produce is then shared is erroneous.<sup>51</sup> The legal concept “communal” is also confusing. On the one hand it can mean that a right is held by a group jointly (one property, inseparable title), while on the other hand it can mean that it is held by a group in common (one property, separate but same title in land). The latter term is only useful insofar as right to pasture and natural resources is concerned, but not as far as African indigenous tenure is concerned.<sup>52</sup>

Likewise the term “trust” was also used as an attempt to describe African indigenous tenure. This means that the bare title vests in the indigenous group, with the chief as the trustee, and “usufructuary” rights being granted to the individuals that enjoy beneficial occupation. The use of the word “trust” is also problematic, since the “usufructuary” rights granted to the individual does not amply describe the interest in African indigenous law, nor does these people have a remedy against the traditional leader as trustee, as they would have under trust law.<sup>53</sup>

Okoth-Ogendo regards the insistence to use common law concepts to explain and define African indigenous land tenure as “more than just an intellectual error” and part of the bigger design of the colonial authorities to justify expropriation of land, as land in this

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<sup>48</sup> HWO Okoth-Ogendo “The nature of land rights under indigenous law in Africa” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 99.

<sup>49</sup> TW Bennett *Customary law in South Africa* (2004) 377 – 378.

<sup>50</sup> TW Bennett *Customary law in South Africa* (2004) 378.

<sup>51</sup> TW Bennett *Customary law in South Africa* (2004) 378.

<sup>52</sup> TW Bennett *Customary law in South Africa* (2004) 378.

<sup>53</sup> TW Bennett *Customary law in South Africa* (2004) 379.

framework is regarded as “dead capital”.<sup>54</sup> One of the consequences of this is that tenure insecurity is the reality in most areas of land held under African indigenous law as is evident in South Africa.<sup>55</sup> This is not because African indigenous law property systems are inherently insecure, but rather due to “the dislocation of these systems from the social and institutional context that defines and sustains them” and the application of the indigenous law in the colonial legal framework.<sup>56</sup> How should African indigenous land tenure be understood then? This question will be answered by first looking at the characteristics of African indigenous law land tenure, before providing alternative vocabulary for understanding African indigenous land tenure.

### *2 2 2 The characteristics of indigenous law land tenure today*

The previous paragraphs argued that common law cannot be described in common law concepts, since the concepts used are culturally specific and foreign to indigenous law.<sup>57</sup> Bennett instead use the words “right” “power” and “interest” to describe African indigenous land tenure.<sup>58</sup> He bases this on Allott’s analytical scheme that first seeks to identify the status of the interest holder,<sup>59</sup> secondly to look at the content of the interest<sup>60</sup> and lastly to look at the uses of particular land in order to determine what rights and powers can be exercised over the land.<sup>61</sup> When one uses this scheme, it is possible for two or more interest holders to simultaneously exercise rights and powers on the same piece of land. “Allott’s scheme”, Bennett states “frees us from the

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<sup>54</sup> HWO Okoth-Ogendo “The nature of land rights under indigenous law in Africa” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 98.

<sup>55</sup> HWO Okoth-Ogendo “The nature of land rights under indigenous law in Africa” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 98.

<sup>56</sup> HWO Okoth-Ogendo “The nature of land rights under indigenous law in Africa” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 98.

<sup>57</sup> TW Bennett *Customary law in South Africa* (2004) 379.

<sup>58</sup> TW Bennett *Customary law in South Africa* (2004) 380.

<sup>59</sup> TW Bennett *Customary law in South Africa* (2004) 380. People acquire interest in land by belonging to a political unit such as a family, ward or nation.

<sup>60</sup> TW Bennett *Customary law in South Africa* (2004) 380. One looks at the interest to determine what a holder may and may not do, and what limitations and affinities are contained in their interests. These interests are divided between “benefit” (the right to use and enjoy land) and “control” (the power to decide who may benefit).

<sup>61</sup> TW Bennett *Customary law in South Africa* (2004) 380. The uses to which land are put determine the rights and power that are attached to it. For example: while dry grassland is set aside for grazing of herd belonging to the members of a community, fertile land is reserved for individual cultivation of land.

ownership paradigm”<sup>62</sup> where tenure seems to be “a system of complementary interests held simultaneously”.<sup>63</sup>

Okoth-Ogenda reconceptualises indigenous land rights systems by debunking the myth that indigenous land rights systems are necessarily “communal” in nature, that “ownership” is collective and that the community as an entity makes collective decisions about access and use of land.<sup>64</sup> He offers a different understanding of indigenous land right systems. For him, the social order (ie how people relate to each other rather than an individual to his property) creates “reciprocal rights and obligations that this binds together, and vests power in the community members over land”.<sup>65</sup> To determine who will be granted access to, or exercise control over, land and the resources, one needs to look at these rights and obligations and the performances that arise from them. This will leave only two distinct questions: who may have access to the land (and what type of

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<sup>62</sup> TW Bennett *Customary law in South Africa* (2004) 381.

<sup>63</sup> TW Bennett *Customary law in South Africa* (2004) 381. HWO Okoth-Ogendo “The nature of land rights under indigenous law in Africa” in A Claassens & T Bennett (eds) *Land, Power & Custom* (2008) 96 – 98 highlights five juridical fallacies that underlies the colonial and post-colonial doubt about the applicability of indigenous law in general. Firstly, early anthropologists did not regard indigenous law as “law” at all. Secondly, it was believed that indigenous law conferred no property in land. Thirdly, the conviction that radical title could only vest in the sovereign. Fourthly, the belief that indigenous communities had no juristic personality and lastly, the assumption that “indigenous and social governance institutions were incapable of, or unsuitable as, agents for the allocation of land and the management and resolution of disputes relating to land”. One of the main consequences of these fallacies are that the nature and content of indigenous land rights are misrepresented and distorted, and the clear distinction in Indigenous law between the individual and collective land rights is continuously denied. This review focuses on the second and last fallacy, and how a better conception of the fallacies might help solve the problem.

<sup>64</sup> HWO Okoth-Ogendo “The nature of land rights” in A Claassens & B Cousins (eds) *Land, Power & Custom* 100. See chapter 5 where Ben B Cousins lists this as one of the problems with CLARA 132.

<sup>65</sup> HWO Okoth-Ogendo “The nature of land rights” in A Claassens & B Cousins (eds) *Land, Power & Custom*. B Cousins “Characterising ‘communal’ tenure” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 129 complements the chapter of HWO Okoth-Ogendo in providing examples that fits Okoth-Ogendo’s conceptual framework. He also analyses the customs of various people in South Africa in order to point out distinctive features of ‘communal’ tenure regimes in South Africa, based on Okoth-Ogendo’s conceptual framework, that highlights the social embeddedness and inclusive nature of African indigenous land rights and the distinction between access to land and control of land. This echoes Singer’s idea that property law reflects and shapes social relations. Property “is an intensely social institution. It implicates social relationships that combine individualism with a large amount of communal responsibility.” J Singer *The edges of the field* (2000) 3.

access)<sup>66</sup> and who may control and manage the land resources, on behalf of those who have access to it?<sup>67</sup>

In African indigenous law land tenure, land structures social relations.<sup>68</sup> Okoth-Ogendo describes it as an “inverted pyramid”, where the tip is the family, the middle the clan lineage and the base the community.<sup>69</sup> It is group standing that provides access to land, and therefore social relations are more important than a relationship with the land itself.<sup>70</sup> It is not only concerned with present day social relations, but also a connection to the past,<sup>71</sup> as it is believed that the ancestors are attached to the land.<sup>72</sup> The fact that those that control the land have a transgenerational obligation to preserve the land also means that the ability to alienate the land to people outside the group is limited.<sup>73</sup>

The control of access to land should be viewed in the context of social relations.<sup>74</sup> Since traditional leaders derive their legitimacy from the founding fathers and therefore seen as a direct channel to communicate with the ancestors, they have certain powers with regard to the land.<sup>75</sup> They have power to allot the land, to regulate the use of common resources and expropriate and confiscate land in certain circumstances.

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<sup>66</sup> See Cousin's comments and examples in B Cousins “Characterising ‘communal’ tenure: nested systems and flexible boundaries” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 122.

<sup>67</sup> HWO Okoth-Ogendo “The nature of land rights” in A Claassens & B Cousins (eds) *Land, Power & Custom* 100.

<sup>68</sup> TW Bennett *Customary law in South Africa* (2004) 381.

<sup>69</sup> HWO Okoth-Ogendo “The tragic African commons: A century of expropriation, suppression and subversion” Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 [available at <http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf>] 2.

<sup>70</sup> M Chanock *Land, custom and social order* (1985) 231.

<sup>71</sup> HWO Okoth-Ogendo “Some issues of theory in the study of tenure relations in African agriculture” (1989) *Africa: Journal of the International African Institute* 6 11.

<sup>72</sup> HWO Okoth-Ogendo “The tragic African commons: A century of expropriation, suppression and subversion” Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 [available at <http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf>]

<sup>73</sup> HWO Okoth-Ogendo “Some issues of theory in the study of tenure relations in African agriculture” (1989) *Africa: Journal of the International African Institute* 6 11.

<sup>74</sup> TW Bennett *Customary law in South Africa* (2004) 382.

<sup>75</sup> TW Bennett *Customary law in South Africa* (2004) 382. Some traditional leaders view themselves as “owners” of the land because of this, and sold the mineral rights or rented the land. This is, according to Bennett, due to a misunderstanding of the principles of traditional leadership that required a traditional leader to always govern for the benefit of the nation.

When the chief allots land, he not only allocates land to families, but also dedicates certain lands for grazing and agricultural use.<sup>76</sup> Such decisions are also not made collectively, but they are made with reference to the common values of each level of the pyramid as discussed above.<sup>77</sup> Even though the scarcity of land means that the chief's role in allocating land is diminishing, he still plays an important role to confirm the transfer of land that takes place in practice. In doing so he has a duty to "act like a father" in making sure that the land is distributed fairly between households.<sup>78</sup> The allocation of land was traditionally gratis, while today it is common to offer some form of payment as a thank-offering.<sup>79</sup>

Traditionally, the power to regulate the resources entails that the chief can decide when and how these resources may be used. When formulating the rules pertaining to access, he must exercise his discretion for the public good.<sup>80</sup> In the 19<sup>th</sup> century, the colonial powers tried to, and in some instances succeeded, in breaking down the chiefly power, replacing it by (white) magistrates. The lack of recognition of African indigenous law in these formal structures helped played a role in undermining the chiefly powers.<sup>81</sup> The apartheid laws and structures broke chiefly power even further, often grouping people together that have no historical ties with the government appointing traditional

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<sup>76</sup> TW Bennett *Customary law in South Africa* (2004) 383. See also Bennett's comments that this is not so prevalent today anymore, due to the scarcity of land and the fact that most people settle on land on a relatively permanent basis.

<sup>77</sup> HWO Okoth-Ogendo "The tragic African commons: A century of expropriation, suppression and subversion" Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 [available at <http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf>] 2.

<sup>78</sup> TW Bennett *Customary law in South Africa* (2004) 384.

<sup>79</sup> TW Bennett *Customary law in South Africa* (2004) 384.

<sup>80</sup> TW Bennett *Customary law in South Africa* (2004) 385. This means that the chief must consider the people's welfare especially in connection with the environment. For instance: the killing of animals may be prohibited if the animal species border on extinction. Likewise, the burning of grass may be prohibited when it is dry. The problem with effective action at environmental protection is that there are no coherent policies due to the decentralised nature of the political setup; human needs are given priority over the environment and due to poverty and overpopulation in the modern state, environmental concerns are sometimes pushed to the back. See TW Bennett *Customary law in South Africa* (2004) 385. See also P Delius "Contested terrain: land rights and chiefly power in historical perspective" in A Claassens & B Cousins (eds) in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 221.

<sup>81</sup> P Delius "Contested terrain: land rights and chiefly power in historical perspective" in A Claassens & B Cousins (eds) in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 221.

leaders that will advance the apartheid government's policies.<sup>82</sup> African indigenous systems of land tenure that was often "managed" by the chiefs were replaced by government regulations that only allowed for quitrent (where annual rent was paid to the state) and permission to occupy granted by the state.<sup>83</sup>

As an individual you also have certain rights and duties with regard to the land. You have a right of avail,<sup>84</sup> that is, to receive land to build houses coupled with access to the commonage;<sup>85</sup> a right to residential sites and arable fields and grazing.<sup>86</sup> The right of avail is restricted in as far as access to land is dependent on an affiliation with the ward where the land is situated.<sup>87</sup> The right to residential sites and arable fields usually implicate that a member of the community will have two plots – one for housing and one for farming. The holder of both these plots will have exclusive rights over the land and is protected from trespass, but are restricted insofar as the uses of the plots are restricted to cultivation of crops for domestic consumption.<sup>88</sup> Members may also graze their stock on the commonage. As far as the commonage is concerned, no individual may claim exclusive use of the land.<sup>89</sup> Again, access to the commonage is based on socially-defined membership that is reinforced and managed within the group based on the reciprocal obligations of the members in the social hierarchy.<sup>90</sup>

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<sup>82</sup> B Cousins "The politics of communal tenure reform: A South African case study" in W Anseeuw & C Alden eds *The struggle over land in Africa* (2010) 62.

<sup>83</sup> B Cousins "The politics of communal tenure reform: A South African case study" in W Anseeuw & C Alden eds *The struggle over land in Africa* (2010) 56; P Delius "Contested terrain: land rights and chiefly power in historical perspective" in A Claassens & B Cousins (eds) in *Land, Power & Custom* (2008) 225. One of the substantive objections to the Communal Land Rights Act 8 of 2004 was that it will re-enforce the apartheid boundaries and the apartheid system of land governance but chiefs that traditionally would not be seen as legitimate by the community.

<sup>84</sup> TW Bennett *Customary law in South Africa* (2004) 388.

<sup>85</sup> TW Bennett *Customary law in South Africa* (2004) 391.

<sup>86</sup> TW Bennett *Customary law in South Africa* (2004) 398.

<sup>87</sup> TW Bennett *Customary law in South Africa* (2004) 391. It is possible to get access to land even if you are not a member of the ward, but there are stricter rules that regulate such access.

<sup>88</sup> TW Bennett *Customary law in South Africa* (2004) 392. Commercial farming is generally not allowed. Residential houses normally includes space for a garden where some crops are planted. See TW Bennett *Customary law in South Africa* (2004) 394.

<sup>89</sup> TW Bennett *Customary law in South Africa* (2004) 398.

<sup>90</sup> HWO Okoth-Ogendo "The tragic African commons: A century of expropriation, suppression and subversion" Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 [available at <http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf>] 3.

The rights in these lands can also be taken away.<sup>91</sup> Since land cannot be inherited rights are also lost at the death of the holder.<sup>92</sup> Traditionally land could not be alienated by sale. Pre-colonial concepts of land were that it is god-given and cannot be appropriated. With colonialism came a real estate market, the common law concept of ownership, property law and contract. Land is also a scarce resource, and individuals are more inclined to assert exclusive rights over the land. The ability to alienate African indigenous land is furthermore restricted by the *Upgrading of Land Tenure Rights Act*.<sup>93</sup> The fact that it could not be alienated by sale and only acquired through membership of a group is an indication that property has more of a social function than a transition of wealth.

## *2.2 Preliminary analysis of African indigenous land tenure*

African indigenous land tenure characteristics are firstly that they are held as a transgenerational asset, secondly that they are managed on different levels of the social organisational structure and lastly that they are used in function-specific ways.<sup>94</sup> Access to and control of land depends on an individual's place in the social order of the community.

It was shown that the traditional African indigenous land tenure's natural development was stunned by the colonial ideological framework of private ownership that was perpetuated in the post-colonial governments. African indigenous land tenure was also interpreted in this framework, where the property systems were not recognised and land held under such systems often declared *res nullius* due to it not being "owned" in the

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<sup>91</sup> TW Bennett *Customary law in South Africa* (2004) 399. Before colonisation abandonment was probably the most common way of losing rights, but due to the scarcity of land and the more settled lifestyle it is debatable whether this still happens often.

<sup>92</sup> TW Bennett *Customary law in South Africa* (2004) 402.

<sup>93</sup> 112 of 1991 ss 2(1), 3(1) and 19(2).

<sup>94</sup> HWO Okoth-Ogendo "The tragic African commons: A century of expropriation, suppression and subversion" Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 [available at <http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf>] 3.

common law sense.<sup>95</sup> These lands were then converted into individualised private property, a system, as indicated above, is strange to African indigenous land tenure,<sup>96</sup> often managed by legislation or interpreted in the common law framework. It is by attempting to formalise rights in the common law framework that African indigenous land tenure is seen as insecure. The question then is: is there an *alternative* framework that can accommodate the unique characteristics of African indigenous land tenure within the common law ownership paradigm that can help secure these rights? This is where the framework of the commons might be helpful.

### 3 DISCOURSE OF THE COMMONS AS AN ANALYTICAL FRAMEWORK FOR AFRICAN INDIGENOUS LAND TENURE?

#### 3.1 A short introduction to the commons

There is a link with this reconceptualisation and the discourse of the commons.<sup>97</sup> The term “commons” is often equated with “public domain” as “a given right, a non-assigned right, an unclaimed right or an unmanaged resource”.<sup>98</sup> One problem with defining the commons is that it does not neatly fit somewhere in the conventional private/public dichotomy. It is often referred to as the private property of a group, although this might not always be accurate because in many instances, commons regimes also recognise the rights of transient resource users (such as grazing or foraging) on an equal

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<sup>95</sup> HWO Okoth-Ogendo “The tragic African commons: A century of expropriation, suppression and subversion” Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 [available at <http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf>] 5; 8.

<sup>96</sup> HWO Okoth-Ogendo “The tragic African commons: A century of expropriation, suppression and subversion” Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 [available at <http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf>] 9.

<sup>97</sup> In Hardin “The tragedy of the commons” 1968 *Science* 162: 3859 1243 1244 the social and economic consequences when individuals are allowed free and unlimited access to a form of commons are explained. The tragedy is that individuals will rationally seek to maximize their gains and exploit the commons, because they can benefit directly while costs are distributed among all the other users of the commons. Hardin concludes that “[r]uin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.” Hardin 1968 *Science* 1243 1244. For Hardin, the solution to this problem includes privatization and regulation.

<sup>98</sup> C Hess & E Ostrom “Ideas, artifacts, and facilities: information as a common-pool resource” *Law and Contemporary Problems* (2003) 111 114.

footing.<sup>99</sup> This problem of classification is solved somewhat by Ostrom, on whose classification this review article relies. She identifies four broad classes of goods, as illustrated in the table below.

		SUBTRACTABILITY	
		<i>Low</i>	<i>High</i>
EXCLUSION	<i>Difficult</i>	Public goods (e.g. Sunset / common knowledge)	Common-Pool Resources (e.g. Irrigation systems, libraries)
	<i>Easy</i>	Club goods (e.g. Day-car centres/ country clubs)	Private goods (e.g. Doughnuts / personal computers)

This classification leads to a definition of the commons (or common pool resources), as “a class of resources for which exclusion is difficult and joint use involves subtractability”.<sup>100</sup>

Excludability is about control of access, while subtractability implies that the exploitation of the resource by one user, affects the ability of the other users to exploit the resource.<sup>101</sup> The difficulty of exclusion implies that means should be devised to prevent the free-rider problem, that is, to keep unauthorised users from benefiting from the resource.<sup>102</sup> National, regional or local governments, communal groups, private individuals or corporations can all be owners of a common-pool resource.<sup>103</sup>

<sup>99</sup> R Meinzen-Dick et al “Securing the Commons” *CGiAR Systemwide Program on Collective Action and Property rights* available at [www.capri.cgiar.org](http://www.capri.cgiar.org) [ 04-12-2009].

<sup>100</sup> D Feeny et al “The tragedy of the Commons: twenty-two years later” 1990 *Human Ecology* 1 4.

<sup>101</sup> D Feeny et al “The tragedy of the Commons: twenty-two years later” 1990 *Human Ecology* 1 3.

<sup>102</sup> C Hess & E Ostrom “Ideas, artifacts, and facilities: information as a common-pool resource” *Law and Contemporary Problems* (2003) 111 120.

<sup>103</sup> C Hess & E Ostrom “Ideas, artifacts, and facilities: information as a common-pool resource” *Law and Contemporary Problems* (2003) 111 120.

### 3 2 African indigenous land tenure as a commons?

Would it be possible to classify the indigenous land rights system as a commons?

Okoth-Ogendo has touched on this issue in a previous paper<sup>104</sup> where he defined that commons as “ontological organised land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities”. This can relate back to the two questions that Okoth-Ogendo asks,<sup>105</sup> namely: who may have access (excludability) and who may control and manage the land resources (subtractability).

Does the classification of Hess and Ostrom<sup>106</sup> help in this regard? Excludability, according to Hess and Ostrom,<sup>107</sup> is difficult when it is impossible (or really hard) to develop physical or institutional means to exclude beneficiaries.<sup>108</sup> This creates a risk of exploitation if means are not devised to prevent unauthorised users from benefiting, leading to the free rider problem.<sup>109</sup> In the traditional African indigenous land law there was systems in place to prevent the free-rider problem. This means that excludability from land was managed within groups. Excludability became difficult once resources became scarce, but pre-colonial African land tenure provided mechanisms within the political and social structures of communities to prevent the free-rider problem. An ownership paradigm, however, emphasises the rights of owners in relation to land, based on the information in the Deed’s registry. When the Deed’s registry is silent on who the owner is, or if the owner is the state as is the case in big areas in the former homelands, the rights of the non-owners that might occupy the land under a different

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<sup>104</sup> HWO Okoth-Ogendo “The tragic African commons: A century of expropriation, suppression and subversion” Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 [available at <http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf>].

<sup>105</sup> HWO Okoth-Ogendo “The nature of land rights” in A Claassens & B Cousins (eds) *Land, Power & Custom* 100.

<sup>106</sup> C Hess & E Ostrom “Ideas, artifacts, and facilities: information as a common-pool resource” *Law and Contemporary Problems* (2003) 111 111.

<sup>107</sup> C Hess & E Ostrom “Ideas, artifacts, and facilities: information as a common-pool resource” *Law and Contemporary Problems* (2003) 111 111.

<sup>108</sup> See Cousin’s comments on the problem with common pool resources in the rural areas in chapter 5 B Cousins “Characterising ‘communal’ tenure” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 122.

<sup>109</sup> Ie when people benefit alone from using the resource, but share the burden.

system is threatened. Such non-owners will have difficulty in an ownership paradigm to exclude others from the land.

When subtractability is high, it means that the use of one person subtracts from the quantity available to others. If subtractability is not limited or managed properly, then this will create problems of overuse.<sup>110</sup> Again, when land was abundant in pre-colonial times, subtractability was not such a big problem. However, with 80% of the population living on 17% of the land at the end of apartheid, land became a scarce resource, and the use of land by one person subtracted from land available to others.

From this categorisation it can therefore be argued that African indigenous land is a type of common-pool resource (or commons), in that 1) it is difficult to devise rules to exclude, especially when you operate in an “ownership paradigm”<sup>111</sup> and 2) that the use of the land by one person does subtract from the land.

#### *4 THE USEFULNESS OF THE COMMONS DISCOURSE IN SECURING AFRICAN COMMUNAL LAND TENURE*

Do we sit with an unsolvable problem as far as communal land is concerned? Asked differently, is the commons necessarily tragic? Common-pool resources (as Hess and Ostrom refer to them), should not be confused with open access regimes, “where no one has the legal right to exclude anyone from using a resource”.<sup>112</sup> In fact, many common-property regimes do sometimes control access to resources, even if it is not

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<sup>110</sup> C Hess & E Ostrom “Ideas, artifacts, and facilities: information as a common-pool resource” *Law and Contemporary Problems* (2003) 111 123.

<sup>111</sup> Singer refers to it as the “ownership model”. He criticises this approach by saying “[i]f property means ownership, and if ownership means power without obligation, then we have created a framework for thinking about property that privileges a certain form of life – the life of the owner”. He further criticises property on the basis that property rights are not bundled together and owned by one person (as is the case in indigenous land right systems in Africa), and that property rights does not only describe the relationship between a person and a thing, but also relationships between people (that is also relevant for the indigenous land right system in Africa). See J Singer *Entitlement* (2000) 3, 5.

<sup>112</sup> C Hess & E Ostrom “Ideas, artifacts, and facilities: information as a common-pool resource” *Law and Contemporary Problems* (2003) 111 121.

formally recognised.<sup>113</sup> African indigenous land tenure would be such an instance. Rose<sup>114</sup> confirms this by adding that it might be due to the kind of group – groups of which the members know one another well and interact well, can establish effective property regimes. These groups are likely to be tied together by family, geography and so forth.<sup>115</sup>

Okoth-Ogendo confirms Hess and Ostrom’s statement that access to the resources is often regulated. Okoth-Ogendo proclaims that the African (land) commons are managed by an inverted social hierarchy pyramid – with the top presenting the family, the middle the clan and lineage, and the base the community. However, decisions on each level are not made collectively, but rather individually with the common values and principles taken into account on each level. On community level decision-making entails the protection of the territory on behalf of the whole group, which means that radical title belongs to the members of the group across generations.<sup>116</sup> Access to resources of the commons, on the other hand, is only open to individuals and groups that qualify on the basis of their membership to a specific group (this correlates with what Rose said). This is based on the reciprocal obligations within the group. The quantum and quality of this right of access will depend on the “membership category”.<sup>117</sup>

Access to land in African indigenous land right systems are controlled through membership (in family, lineage or community), and an individual can acquire this access

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<sup>113</sup> C Hess & E Ostrom “Ideas, artifacts, and facilities: information as a common-pool resource” *Law and Contemporary Problems* (2003) 111 123.

<sup>114</sup> C Rose “Liberty, property, environmentalism” 2010 *Arizona Legal Studies Discussion Paper No 10 -19* 5.

<sup>115</sup> C Rose “Liberty, property, environmentalism” 2010 *Arizona Legal Studies Discussion Paper No 10 -19* 5.

<sup>116</sup> HWO Okoth-Ogendo “The tragic African commons: A century of expropriation, suppression and subversion” Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 [available at <http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf>].

<sup>117</sup> HWO Okoth-Ogendo “The tragic African commons: A century of expropriation, suppression and subversion” Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 [available at <http://www.plaas.org.za/pubs/op/occasional-paper-series/OP%2024.pdf>].

on account of their membership.<sup>118</sup> This access is specific to the kind of resource it aims at managing, and access is maintained on the basis of production,<sup>119</sup> and therefore has clearly defined internal rules. The nature and content of such an access right is therefore multiple, making it impossible for various people to hold a right in or right of access to the same particular piece of land.<sup>120</sup>

Management of the resource, on the other hand, is an incident of the community's sovereign power,<sup>121</sup> and is exercised by the political authority in a society. This sovereignty is based on an "inverted hierarchy", where, as was pointed out above, the tip of the pyramid is the authority of the family unit (usually cultivation and residence), the next layer the clan or lineage (usually over grazing, hunting or intergenerational distribution of resources), and the base the authority of the community (usually defence, dispute settlement and transport facility maintenance). It is therefore clear that control and management of land resources are not the responsibility of one authority (the state) alone. This structure facilitates the individual's right of access to the land by virtue of membership of the community.<sup>122</sup> This right to access and power to manage the resources do not fit in neatly with the ownership paradigm in which they are often forced to operate, as no one person or group has exclusive control over the access to land, or the management of the resources. Social organisation plays a key role in granting access to a resource, as well as measurements to secure tenure. As Okoth-Ogendo states: "rights of access under these systems are indeed 'secure' as long as they are being asserted; individuals have real rights under those systems; and indigenous social structures are able to manage land resources sustainably".<sup>123</sup> Law and social

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<sup>118</sup> HWO Okoth-Ogendo "The nature of land rights" in A Claassens & B Cousins (eds) *Land, Power & Custom* 100.

<sup>119</sup> HWO Okoth-Ogendo "The nature of land rights" in A Claassens & B Cousins (eds) *Land, Power & Custom* 100.

<sup>120</sup> See B Cousins "Characterising 'communal' tenure" in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 112 – 113.

<sup>121</sup> HWO Okoth-Ogendo "The nature of land rights" in A Claassens & B Cousins (eds) *Land, Power & Custom* 101.

<sup>122</sup> HWO Okoth-Ogendo "The nature of land rights" in A Claassens & B Cousins (eds) *Land, Power & Custom* 101.

<sup>123</sup> HWO Okoth-Ogendo "The nature of land rights" in A Claassens & B Cousins (eds) *Land, Power & Custom* 101.

organisation is therefore equally important in secure indigenous land rights.<sup>124</sup> Further investigation might also show that some African indigenous communities comply with Ostrom's eight design principles<sup>125</sup> by long-enduring common property resource institutions.

## 5 CONCLUSION

This paper showed the pre-colonial and present day African indigenous land tenure is unique and struggles to fit in the common law notion of "property" and "ownership". It has also been argued that the commons (or common property resources, as Ostrom termed it) might be a more comfortable fit for the African indigenous land tenure system. The commons is a framework that at least needs to be considered more closely when analysing African indigenous land tenure. It offers an explanation of how it is possible

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<sup>124</sup> See also chapter 5 where B Cousins states that "[p]eople often view land rights as underpinning the continuity of social units as well as securing access to the basic conditions of human existence. Tenure security derives in large part from locally legitimate landholding rather than the law." B Cousins "Characterising 'communal' tenure" in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 113.

<sup>125</sup> See E Ostrom *Governing the commons* (1990) 90. They are, in short:

1. "Clearly defined boundaries  
Individuals or households who have rights to withdraw resource units from the CPR must be clearly defined, as must the boundaries of the CPR itself.
2. Congruence between appropriation and provision rules and local conditions  
Appropriation rules restricting time, place, technology, and/or quantity of resource units are related to local conditions and to provision rules requiring labor, material, and/or money.
3. Collective-choice arrangements  
Most individuals affected by the operational rules can participate in modifying operational rules.
4. Monitoring  
Monitors, who actively audit CPR conditions and appropriate behavior, are accountable to the appropriators or are the appropriators.
5. Graduated sanctions  
Appropriators who violate operational rules are likely to be assessed graduated sanctions (depending on the seriousness and context of the offense) by other appropriators, by officials accountable to these appropriators, or by both.
6. Conflict-resolution mechanisms  
Appropriators and their officials have rapid access to low-cost local arenas to resolve conflicts among appropriators or between appropriators and officials.
7. Minimal recognition of rights to organize  
The rights of appropriators to devise their own institutions are not challenged by external government authorities.
8. (Larger systems) Nested enterprises  
Appropriation, provision, monitoring, enforcement, conflict resolution, and governance activities are organized in multiple layers or nested enterprises."

that various people can have a claim or similar claims to the same property. At the very least it offers an alternative vocabulary to describe African indigenous land tenure.

It has been argued that the language of ownership creates particular problems in circumscribing African indigenous land tenure. The problem is solved to an extent by rather asking “who owns what interest in land” instead of who owns the land.<sup>126</sup> Since this is still based on the notion of ownership, it is probably better to ask, in “commons” language, “in whom, for what purposes and for how long should an allocation of power in respect of particular aspects of land be made?”<sup>127</sup>

What is clear is that access to land and control over the land are more complex than in common law, where an owner is regarded as having both powers. In African indigenous land tenure, a number of persons can each hold a power or a combination of powers in the same piece of land. The level of control will differ in each case, depending on the socio-political organization of the group.<sup>128</sup> The discourse of the commons, although not fully elaborated on here, provides for such possibilities.

The problem is still: how do we formalise African indigenous land tenure in the registration system. The problem is that the South African registration system does not allow for the registration of African indigenous land rights, but rather classifies rights in terms of the common law notion of “ownership”. Moreover, a study by Kingwill studied the effect of titling on tenure security in two communities in the Eastern Cape in South Africa and found that in black freehold areas “property relationships between various associated members of families or lineages are more relevant in defining ownership than the currency of title deeds”.<sup>129</sup> Therefore even in the cases where rights or tenure

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<sup>126</sup> HWO Okoth-Ogendo “Some issues of theory in the study of tenure relations in African agriculture” (1989) *Africa: Journal of the International African Institute* 6 9.

<sup>127</sup> HWO Okoth-Ogendo “Some issues of theory in the study of tenure relations in African agriculture” (1989) *Africa: Journal of the International African Institute* 6 9.

<sup>128</sup> HWO Okoth-Ogendo “Some issues of theory in the study of tenure relations in African agriculture” (1989) *Africa: Journal of the International African Institute* 6 11.

<sup>129</sup> R Kingwill “Custom-building freehold title: the impact of family values on historical ownership in the Eastern Cape” in A Claassens & B Cousins (eds) *Land, Power & Custom* (2008) 185.

are titled, people still evaluate their rights and security in tenure in the social context rather than on relying on who the title deed says is owner. Pienaar proposes a land information system that works parallel with the deeds registry system, recording the various interests in land.<sup>130</sup> This seems like a viable option, and in this context the framework of the commons might help in providing a vocabulary or mechanism through which to do it.

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<sup>130</sup> G Pienaar "Land information as a tool for effective land administration and development" (2010) paper delivered at the Colloquium on Development, Pluralism and Access to Resources, 26 – 27 November 2010 held at the University of Cape Town.

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