

**DEAD OR ALIVE?  
HUMAN RIGHTS AND LAND REFORM IN NAMAQUALAND COMMONS,  
SOUTH AFRICA**

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POUL WISBORG<sup>1</sup>

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<sup>1</sup> PhD Research Fellow, *Centre for International Environment and Development Studies, Noragric*, Agricultural University of Norway and *Programme for Land and Agrarian Studies (PLAAS)*, School of Government, University of Western Cape, Bellville, South Africa

## **Abstract**

### **Dead or alive? Human rights and land reform in Namaqualand commons, South Africa**

Land tenure is emerging as a controversial human rights issue in both local resource conflicts and globalised rhetoric. While access to land is not a human right according to international law, many tenets concerning the right to food and a secure livelihood, to redress for past violations, to rule of law, non-discrimination and democracy apply to land governance.

The relevance of the human rights talk for development is contested. Harri Englund's notion of "*the dead hand of human rights*" refers to the gaps between global and local discourses. Land, particularly the commons, may be a problematic human rights issue because local idioms of ownership are embedded, elusive and flexible, and therefore difficult to codify and protect by national or international regimes. Furthermore, the economic pressures of globalisation may contradict civil-political rights and opportunities, leading Upendra Baxi to discuss whether and how there is a 'future for human rights'.

Based on fieldwork in two communal areas, the paper examines rights perceptions in a process of reforming communal land governance in Namaqualand, South Africa. In Namaqualand, six former "coloured rural reserves" make up more than a quarter of the land and is home and partial resource base to a majority of the rural population. The 'coloured' reserves may have been in the shadow of 'black' homelands in terms of public and political attention, but post-apartheid land reform has played a significant role in expanding the commons. More than 275,000 hectares of private farmland have been bought by government and added as "new commonage", increasing the total communal area by about twenty percent.

Tenure reform through the *Transformation of Certain Rural Areas Act 94 of 1998* (TRANCRAA) is testing the strong land rights manifesto of the South African Constitution (1996): can the 'New South Africa' deliver equitable and secure tenure? TRANCRAA enshrines principles of participation and strengthened local rights, but resource contest, political negotiations and community conflict are delaying and shaping the direction of the implementation. Rights are maintained and changed in specific historically produced constellations of people, power and resources and TRANCRAA is just one of many elements in a process where people's rights to land are under pressure. For people in Namaqualand new rights and practical outcomes depend on interpretations and negotiations that mediate between the global and the local – and thus their ability and power to participate in and affect those processes. TRANCRAA is a silver thread easily broken, between the promises of international and constitutional rights and persistent of poverty.

Human rights and land reform interface in two major ways. First, they stress the fundamental goal of protecting and enhancing livelihoods, both subsistence use and vitally needed new enterprises. Secondly, human rights address the need for trust and legitimacy in the relationship between people and government. Human rights thus make us sensitive to the limited scope of legal reforms that cannot alone address the structural violence of poverty nor ensure non-discriminatory and transparent local governance. In the TRANCRAA process, the '*hand of human rights*' is neither dead nor alive, but

struggling - present in the background, sometimes touching debates and practices, sometimes pushed aside. Legal reform is a bridge between human rights principles and local practice in so far as it resonates with lived realities and perceptions. Within the severe constraints of land shortage and extreme levels of unemployment, secure ownership to common land still appears a necessary, though not sufficient, element in the process of democratisation and rural empowerment. Land rights as human rights become alive and have a legitimate future when they are ingredients in economic development and democratisation.

Poul Wisborg, Visiting Research Fellow Programme for Land and Agrarian Studies, University of Western Cape Pb X17, 7535 Bellville, South Africa Phone: (021) 959 39 61 Fax: (021) 959 37 32 E-mail: Pwisborg@uwc.ac.za/poul@wam.co.za	Noragric, Centre for International Environment and Development Studies P. O. Box 5001, NO-1432 As, NORWAY Phone: +47 64 94 99 50 Fax: +47 64 94 07 60 E-mail: poul.wisborg@ noragric.nlh.no
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## **PREFACE AND ACKNOWLEDGEMENTS**

The Programme for Land and Agrarian Studies (PLAAS), University of Western Cape, South Africa and Noragric of the Agricultural University of Norway work together in a programme on *Human rights, governance and land reform in South Africa*. Linked to this cooperation programme, my PhD project explores rights in the current processes of reforming land tenure in the commons in Namaqualand (Transformation of Certain Rural Areas). . I would like to thank:

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- Francios Jansen who works with me as interpreter and research assistant

I alone remain responsible for the mistakes and inaccuracies of this paper. It remains an exploratory piece that falls far short of the various contributions and knowledge that my colleagues and respondents have shared.

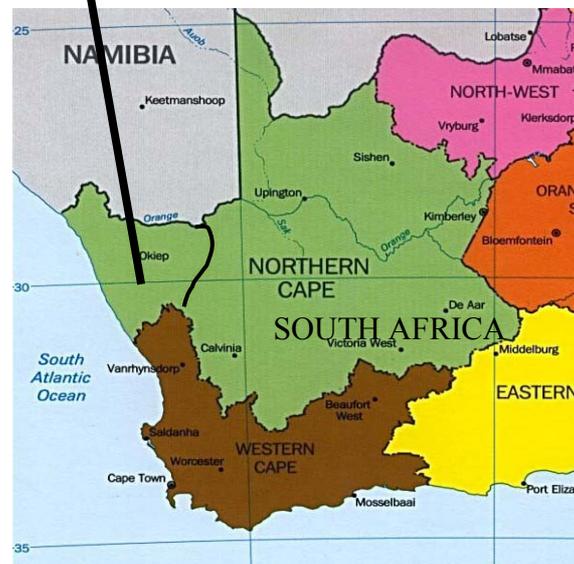
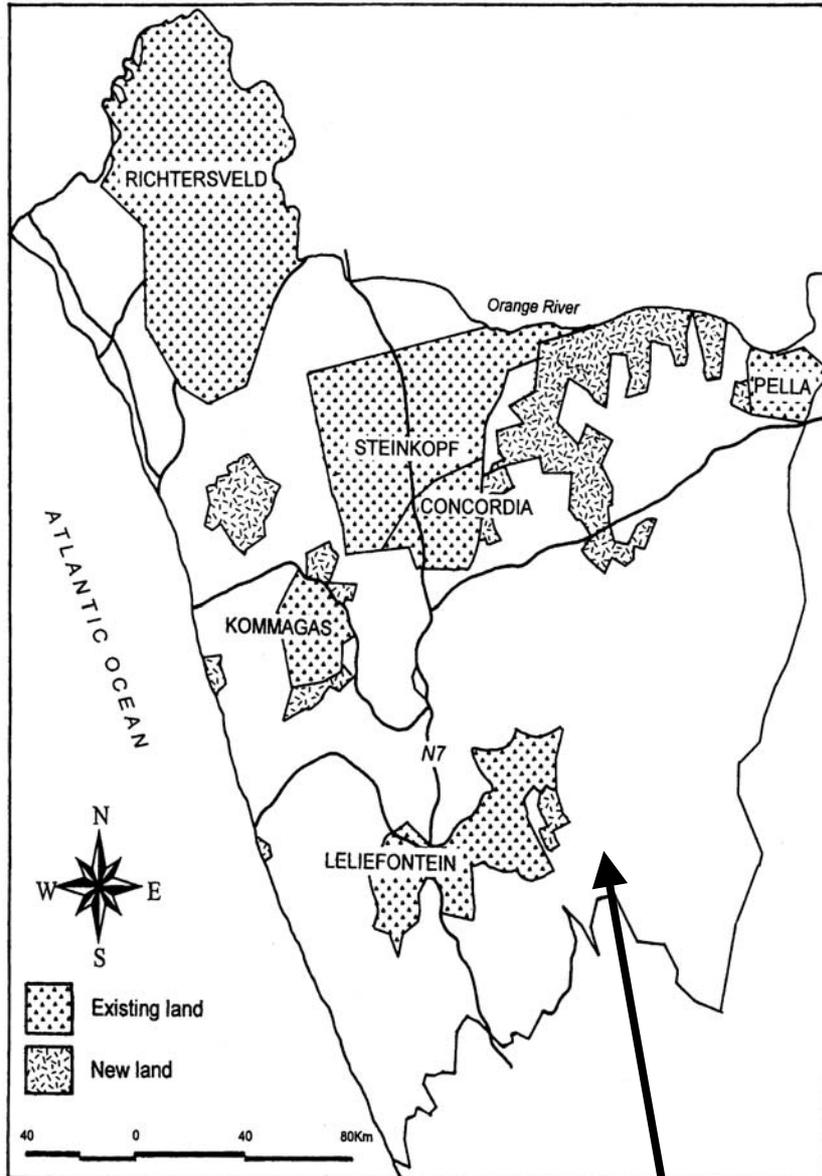
Poul Wisborg,

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**MAP: 'CERTAIN RURAL AREAS', NAMAQUALAND**



## **1. INTRODUCTION**

### ***1.1 Clashes over land – crises of structure***

Land tenure is emerging as a controversial human rights issue in both local resource conflicts and globalised rhetoric. Farm invasions in Southern Africa have given a ‘media-friendly’ face to deep-rooted, structural issues. People confront people: both the rage of the historically dispossessed and the fears of current farm owners appeal to our sympathy and rights sentiments. It has been said that ethics is about recognizing the face of one’s brothers and sisters. Which faces to recognize and identify with in a fight that is not between the good and the bad guys, but between vulnerable individuals with complex histories of suffering or perpetrating rights violations? For some, ‘unlawful’ and violent farm evasions are an image of everything ‘going wrong’, at the levels of the personal, racial, economic and political. Others – including some farmers in Namaqualand – see an approach for emulation: “*If they can do it in Zimbabwe, why cannot we do it here?*” Both sides refer to human rights to justify their views. Human rights protect owners against arbitrary violations, some argue. No, say others, human rights cannot protect those who are enjoying the privileges of more fundamental violations in the past. Thus, clashes over land are ambiguous and disturbing signs of social conflict, contested landscapes and our different positions within them. They speak about the unresolved issue of skewed distribution of land in the settler colonies of southern Africa and other places in a world of appalling inequality. “Human rights and land” is not merely invented by a new turn of the machinery that produces development jargon. It is catchy because it resonates with lives, landscapes and economies of a region. People have died because of ‘land reform’, some have prospered and some are starving because of it. The deep and complex moral, political and practical issues at the ‘human rights – land’ interface are in dire need of concrete, down-to-earth disentangling. Whether politicians, researchers or activists, we may easily bite off more than we can chew (alas!). At the same time, we may also err by developing too narrow visions of a multi-scale and multi-dimensional issue.

### ***1.2 Aim, approach and overview***

The paper presents, in a preliminary form, material from an on-going PhD research project about the interface between human rights and land tenure reform. The research goal is,

*To contribute to the theoretical and empirical understanding of communal land tenure as a human rights issue, by documenting and analysing how people construct ‘rights to land’ in multilevel discourses and ‘struggles over meaning’, and how these struggles over meaning reflect and shape local entitlement processes.*

The study explores how people negotiate and implement the *Transformation of Certain Rural Areas Act 94 of 1998* in two communal reserves (Pella and Komaggas) in Namaqualand, Northern Cape Province. For the communities it appears a rather unique that a government offers to ‘give land back’ and asks people to decide how they want to govern it. For the researcher it is a chance to get close to the aspirations, discussions and conflicts that emerge. While still only scratching the surface, the project will hopefully make some sense of the struggles over the rich meanings and meagre resources in the arid “thirstlands” of Namaqualand.

Part 2 briefly refers to international law and the South African Constitution and two critical perspectives on human rights: Harri Englund suggests that the human rights discourse suppresses alternative and sometimes more effective idioms of human dignity. Upendra Baxi (2001, 2002) is disturbed by the re-interpretation of human rights in favour of dominant actors in the global economy and challenges the view that individual rights are really the measure and means of mainstream development today. Part 3 introduces the Namaqualand area of South Africa. Part 4 outlines the ‘*Transformation of Certain Rural Areas Act*’ as a case of rights-based legal reform. Part 5 examines contested processes and meanings of changing rights and in Pella and Komaggas. Here, a recent experience is land redistribution whereby “people” have got more land, while access and agrarian development are limited by new rules and lack of support. Another context is that the strongly felt historical rights to larger areas have so far been sidelined. Thirdly, boycotting the “Transformation process” illustrate the importance of unique community histories and divisions, but also, perhaps, a broader lack of trust in government and the direction of change. Part 6 reflects on the TRANCRAA as an important piece of rights-based reform in which ‘human rights’ are neither dead nor alive, but struggling. Isolated from a multi-faceted development effort, it may easily miss the human rights aspirations it embodies.

## **2. ‘HUMAN RIGHTS’ AND ‘LAND’ IN AN AGE OF GLOBALISATION**

### ***2.1 International law and the Constitution of South Africa***

‘Land’ has an ambiguous status with respect to human rights. Article 17 of the *Universal Declaration of Human Rights* protects existing individual and collective property<sup>2</sup>. However, the ‘right to own property’ may also be interpreted to challenge the state of affairs when many people have none, or have insecure rights. It obliges governments both to secure access for the landless millions and to protect the rights of owners against arbitrary violations. ‘Property’ was contested at the time of the Cold War and left out of the 1966 Covenants (ESCR/CPR<sup>3</sup>)(Bugge 1998). It is sometimes claimed that the universality criterion rules out ownership to land as a human right. Land, according to that view, is merely a means to achieve other things, and only needed in certain contexts. An alternative view would stress that the land/human rights interface is broad and evolving: international law represents ‘*three generations of human rights*’, from civil, to socio-economic, and environmental/developmental (Hellum and Derman 2000). Its scope includes rights of *allocation, protection, procedure, provision, and development* (Text box 1). Universal principles ban discrimination and unfair inequality and stress a universal right to redress for unfair discrimination. UDHR 1948 (§ 26) held food as a ‘universal’ right and ECSR confirms the rights of everyone to an adequate standard of living (§ 11) and to be free from hunger (§13.1). ECSR places an obligation on states parties to realize these rights by, “...*developing or reforming agrarian systems in such a*

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<sup>2</sup> “Everyone has the right to own property alone as well as in association with others” (§ 17,1); “No one shall be arbitrarily deprived of his property” (§ 17,2).

<sup>3</sup> Selected international law documents listed under Textbox 2, page 4.

way as to achieve the most efficient development and utilization of natural resources” (ECSR, §13.2). Integrating human rights and development is particularly strong in ESCR, CEDAW and the *Declaration on the Right to Development*, (United Nations 1986). Human rights must take national and local situations into account (Cook 1994); in important contexts and for large groups *land is a human right, because landlessness amounts to a violation of people’s welfare rights as per the UDHR and ESCR*. Rights to land also have support in ‘soft law’ (*Agenda 21, Beijing Platform of Action and the ILO Convention on indigenous people’s rights*). By its Constitution, South Africa has further sharpened its duty to provide equitable access to natural resources.

**Text box 1: Why and how land is a human rights issue**

<p><i>Rights of allocation (to 'own land', 'get land')</i></p>	<ul style="list-style-type: none"> <li>• <b>Remedy for acts violating fundamental rights;</b> (UDHR, §8, CPR, §2.3, a); tenure security, redistribution and restitution or comparable redress (CRSA, §25.5, 6, 7)</li> <li>• A 'derivative', context-dependent right following from the rights to life, liberty and security of person" (UDHR, §3) "just and favourable remuneration" for work (UDHR, §23.3), and the right to welfare, food, health etc. (UDHR §25); the "fundamental right of everyone to be free from hunger" (ESCR, §11.2)</li> <li>• Right to conditions which enable citizens to gain access to land on an equitable basis (CRSA, §25.5)</li> </ul>
<p><i>Rights of protection</i></p>	<p><b>Property</b></p> <ul style="list-style-type: none"> <li>• Right to own property individually or in association with others (UDHR, § 17.1)</li> <li>• Existing property patterns protected against arbitrary violation (UDHR, § 17.2; CRSA, §25.3)</li> <li>• Rights to recognition of local property and use rights in so far as consistent with human rights and constitutional principles, with the basis in (UDHR, § 17.2; CRSA, §25.3, CPR, §27)</li> <li>• Equal rights of women (CEDAW, §16.1, h)</li> </ul> <p><b>Against unlawful attacks</b> on family, home, integrity (UDHR § 12; CPR §17)</p> <p><b>Non-discrimination</b></p> <ul style="list-style-type: none"> <li>• Principle of non-discrimination on the basis of race, colour, sex, religion (UDHR, §2; CEDAW, §1)</li> <li>• Principle of non-discrimination of women, including <u>equal treatment in land and agrarian reform</u> as well as in land resettlement schemes (CEDAW, §14.1). Equal rights during marriage and its dissolution (inheritance) (CEDAW, § 16);</li> <li>• Rights to a social order protecting rights and freedoms (UDHR, §28)</li> </ul> <p><b>Movement:</b> Right to freedom of movement and residence (UDHR, §13.1; CEDAW §15.4)</p> <p><b>Freedom of minorities:</b> freedom of ethnic, religious or linguistic groups to practice their own culture (CPR, §27)</p>
<p><i>Rights of procedure</i></p>	<ul style="list-style-type: none"> <li>• Equality before the law and fair trial (UDHR, §7; UDHR, §10; CEDAW §15)</li> <li>• Remedy for acts violating fundamental rights (UDHR, §8, CPR, §2.3, a)</li> <li>• Participation in governance (UDHR §21.1)</li> <li>• The rights to information (UDHR, § 19; CPR § 19)</li> <li>• Recognition of local practice and customary law in so far as consistent with human rights (CPR §27)</li> </ul>
<p><i>Rights of provision</i></p>	<ul style="list-style-type: none"> <li>• Technical and professional education (UDHR, § 26.1); equal rights to vocational training (CEDAW, §10, a)</li> <li>• Equal access to public service (CPR, §25, c; CEDAW, §)</li> <li>• To positive steps to combat real inequality, particular emphasis on women in rural areas (CEDAW, §§3, 5, 14, 14.2). Positive discrimination of women or other groups where they are in a weaker position is permitted (CEDAW, §4.1)</li> </ul>

	Access to agricultural credit and loans, marketing facilities, appropriate technology (CEDAW §14.2), other credit (§13.1)
<i>Rights of development</i>	<p><b>People’s rights:</b> Rights to self-determination, free disposal of natural wealth and resources, and protection against deprivation of the means of subsistence (ESCR and CPR, § 1.2)</p> <p><b>State parties commitment to:</b></p> <ul style="list-style-type: none"> <li>• International assistance and cooperation (ECSR, §2.1, §11)</li> <li>• Agrarian reform for efficient utilization of natural resources (ECSR, §13.2)</li> </ul>

*Universal Declaration of Human Rights, 1948 (UDHR)*

*International Covenant on Economic, Social and Cultural Rights, 1966 (ESCR)*

*International Covenant on Civil and Political Rights, 1966 (CPR)*

*Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW)*

*Constitution of the Republic of South Africa, 1996 (CRSA)*

**Text box 2: Three legs of land reform: §25, the property clause, 5-7**

(5)[Tenure reform] *The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*

(6) [Re-distribution] *A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*

(7)[Restitution] *A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*

*Source: The Constitution of the Republic of South Africa, 1996*

**2.2 Human right and gaps between global and local discourses**

Harri Englund’s has used a metaphor, “*the dead hand of human rights*”, to refer to a gap between global and local discourses; he asks whether the human rights discourse suppresses other views of human dignity and the practices they are imbedded in:

*The ‘human rights talk’ enforces, like a dead hand, a particular understanding of human dignity. It does so by attributing legitimacy to specific moral notions in the public discourse, thereby defining the contours of what is not only acceptable but also conceivable (Englund 2000).*

The ‘rights talk’ changes its functions and relevance during the stages of nation-building and may have had its greatest emancipatory potential during the period of democratic transition(Englund 2000). In the legal reform in Namaqualand commons a new, democratic government is getting down to the business of everyday transformation of land tenure and must build a link between the manifesto rights of the Constitution - their deep sense of protest and triumph - and the changing, contested and diverse local situations and rights-perceptions. Englund finds that our concern with human rights has not inspired sufficient analysis of how ‘rights talk’ limit our understanding of social and political problems. He claims that many NGO staff are more “attuned to donor fashions

than to social situations in rural areas” and find it frustrating when people respond to education on civic rights by complaining about inadequate food and poor roads (Englund 2000). In Englund’s perception, Malawian leaders have “embraced the discourse of rights with such vigour that it is becoming the only language persons in public offices are able to speak”. Englund thinks that we need,

*....not merely to appreciate the situational variation of religious and political beliefs but to indicate forms of social relationships and moral being which may become overshadowed by a single-minded interest in human rights(Englund 2000).*

In Englund’s Malawian case, Catholic leaders are the spoke persons of human rights, for example stressing political mobilisation and the individual’s participation in free elections. Some grass-root reactions within the church and from Pentecostal churches challenge the democratic ideals in practice (by not voting) and in theory (by adhering to alternative experiences of spirituality, personal growth and human dignity). These are valuable as a contribution to a “true pluralism of moral ideas” and because “they contain their own tools for an effective critique of power” (Englund 2000).

Upendra Baxi has elaborated some of Englund’s concerns in a rich and sweeping interpretation of the human rights discourse. He also perceives the *rights talk* ambivalently, as a dominating discourse blinding us to the reality of poverty and suffering and, yet, somehow the only common language enabling us to challenge that reality:

*...a human rights sociolect emerges, in this era of the end of ideology, as the only universal ideology in the making, enabling both the legitimisation of power and the praxis of emancipatory politics. (Baxi 2002) [...] When human rights languages steadily supplant all other ethical languages, when almost each and every 'new' social movement tends to coalesce with the logics and paralogs of human rights, when all resistance to formations of power begins to present itself as morally worthy only when it shapes itself in human rights talk, the politics of human rights brings to us both human hope and hazards. The hope lies in the construction of visions of an 'ethical' state. The hazards lie in the acts of mystification of the modes of production of human misery and suffering. (Baxi 2002).*

Are human rights “dead or alive” in reforming the commons? Land, including the commons, is problematic in a human rights context, because local idioms of ownership are embedded and flexible and therefore difficult to codify and protect by national states or international regimes. Land rights are closely linked to people’s sense of belonging to a place, of group membership and of the dignity of ownership in a multitude of different forms. In a case of legal reform, the hand of human rights may strangle local diversity through dominance, or it may wither by not being able to penetrate at all.

### **2.3 Human right and gaps between discourses and economic realities**

‘Globalisation’ means increased power and speed of century-old local-global interaction. On the one hand, it is about opportunities created by political cross-fertilisation, democratisation and ‘rights-talk’. On the other, it involves the pressures and opportunities created by participating or ‘being participated’ in markets and other trans-national, economic forces. Amartya Sen has suggested that discourse of civil-political

rights and the hard realities of economic deprivation and growth are not contradictory. In stead, the civil rights of the individual are a measure and catalyst of economic development. Sen defends the moral and political priority of development as social change that leads to an expansion of human capabilities and freedoms. His vision builds on economic growth as an instrument, but more importantly on '*democratic and participatory governance as the pre-eminent model of political organisation*' (Sen, 1999: Preface). 'Social justice' and 'development' converge because rights as freedoms are both instrumental and constitutional of development:

*"Freedom is central to the process of development for two distinct reasons.*

*1) The evaluative reason: assessment of progress has to be done primarily in terms of whether the freedoms that people have are enhanced;*

*2) The effectiveness reason: achievement of development is thoroughly dependent on the free agency of people" (Sen 1999).*

Development is a productive dialectics of '*individual freedoms and its social correlates*' (institutions and policy). Democracy depends on the 'participatory capabilities' of individuals and, at the same time, provides the political freedoms and welfare measures necessary to enhance individual rights. Baxi finds the neat match between "development" (socio-economic change) and freedom of the individual implausible as a description of many situations in a world of widespread regression (Baxi 2001). He urges us to look more carefully at what happens as globalisation continues to transform the conditions under which people live and die. Human rights have been valuable in criticising global and national inequality and providing standards for development, but Baxi is far from convinced that political freedoms correct distorted market outcomes. He finds *Development as Freedom* a 'provocative monograph' because it does not problematise who is suffering and who holds the power to reconstruct rights:

*Human rights arise and grow out of the power of social protest and movement dissociated from the matrix of human suffering and the powers of resistance, human rights discourse assumes forms of alienated knowledges leading only to what has been termed poignantly 'democratisation of disempowerment' (Baxi 2001).*

Thus, "human rights and land reform" come alive or die in the misty borderlands of the global and the local, the political and economic. Human rights may be a common language relevant for addressing the social justice issues that land and poverty pose. Amartya Sen has argued that human rights offer a moral foundation for development as well as its most effective tools, individual freedoms and agency protected and nurtured by democratic governance. Still, voices uneasy with the 'human rights talk' suggests that *the human rights discourse is sometimes locally irrelevant and arrogant in terms of its values and message* (Englund) *and that without political protest they may become irrelevant in terms of affecting global economic processes and their local ramifications* (Upendra Baxi).

### **3. THE NAMAQUALAND COMMONS: 'CERTAIN RURAL AREAS'**

Namaqualand is a land of flowers that are beautiful beyond the myth and it is an

administrative district - DC6 - in Northern Cape Province of South Africa (ref. page v). It is arid to semi-arid, predominantly a winter rainfall area with very dry and hot summers and part of the “*Succulent Karoo Biome*”, where succulents dominate the vegetation. Namaqualand borders on the Atlantic to the West, the Orange River border of Namibia to the north, Bende Oranje and Bo-Karoo Districts to the east, and Western Cape to the south. After amalgamation of South African municipalities in 2000, the present-day Namaqualand District includes the municipalities of Hantam and Karoo that were not part of the former administrative and cultural-geographical Namaqualand. This former Namaqualand, today made up of the municipalities: Kamiesberg, Nama-Khoi, Richtersveld and KhaI-Ma, covers an area of about 48,000 km<sup>2</sup> and has a population of about 77,000 (Rohde, Benjaminsen, and Hoffman 2000).

The Namaqualand reserves were created as an outcome of a complex history of colonial dispossession and local self-defence by people of mixed Khoi and San descent assisted by missionaries interested in making them settle as obedient followers. The reserves were based on ‘Tickets of Occupation’ issued in the 19<sup>th</sup> century. The communal lands and settlements were maintained as labour reserves and made part of the legal apparatus of apartheid through the *Coloured Rural Areas Act of 1963*, amended as per *Act 9, 1987*.

**Table 1: Namaqualand Reserves: Some legal milestones**

1820s	Buffelsrivier border of Dutch Cape Colony
1843	‘Ticket of Occupation’, Komaggas
1847	Border of Cape Colony pushed to Orange River, Namaqualand part of the Cape Colony
1854	‘Ticket of Occupation’, Leliefontein
1874	‘Ticket of Occupation’, Steinkopf/Concordia and Pella
1903	Steinkopf rules of self-governance adopted by 186 <i>burgers</i>
1909	Act 29, Mission Stations and Communal Reserves Act. Transfers areas from mission stations to the state. Communities can no longer make own rules
1912	Act 29 of 1909 passed as Proclamation 53; Regulations 1948 and 1959
1964	Act 24; Regulations 1965. Zonation for land use planning. “Economic Units
1979	Act 1; Regulations 1981. Economic units can be leased out or sold
1987	Act 9, Certain Rural Areas Act
1998	Act 94, Transformation of Certain Rural Areas

Source (main): Henk Smith, Legal Resources Centre, Lectures, Concordia and Steinkopf 11. – 12.02.2002

The Act 9 areas are clearly defined legally and geographically. Yet, a powerful group in Komaggas reject that their land was ever an ‘Act 9’ land and some boundaries are contested. The six ‘Act 9 areas’ make up about twenty-seven percent of the land (1.2 million hectares). About 400 private farmers, almost exclusively ‘white’, own about half of Namaqualand. More than four times as many ‘coloured’ households (about 2,000) use the ‘communal’ land (Table 2). Post-apartheid land reform has played a significant role in expanding the commons. More than 275,000 hectares of private farmland have been

bought by government and added as “new commonage” (Surplus People Project 2001) increasing the total communal area by about twenty percent. People in the Act 9 areas hold the use rights to the old and new ‘meent’ (commonage).

**Table 2: Namaqualand: Major pattern of land tenure**

	Area	Percent	Farmers	er	HA/farm
State	383 195	ha 8 %			
Mining	390 000	ha 8 %			
Conservation	230 000	ha 5 %			
Commercial farm	2 500 794	ha 52 %	665		3 761
Communal old	1 042 009	ha 22 %			
Communal new	276 572	ha 6 %			
Sum old and new communal	1 318 581	ha 27 %	2 000		659
Total	4 822 570	ha 100 %	2 665		

*Source: Christo Smith, Department of Agriculture, Springbok, September 2001*

**Table 3: Certain Rural Areas/Act 9 Areas**

	Old Meent (ha) %	New Meent % (ha) distributed	of % increase	Total (ha) %
Leliefontein	192 000 19 %	32 627 13 %	17 %	224 627 18 %
Komaggas	62 600 6 %	27 228 11 %	43 %	89 828 7 %
Concordia	63 383 6 %	40 760 17 %	64 %	104 143 8 %
Steinkopf	329 000 32 %	110 023 45 %	33 %	439 023 34 %
Pella	48 000 5 %	34 912 14 %	73 %	82 912 6 %
Richtersveld	338 000 33 %	0 0 %	0 %	338 000 26 %
	1 032 983 100 %	245 550 100 %	24 %	1 278 533 %

*Source: Christo Smith, Department of Agriculture, Springbok Office*

People in the Namaqualand rural areas express a strong sense of having lost land in history. Much of what belonged to their ancestors were taken by or given to farmers or mining companies, within legal systems that did not recognise their land rights.

**Quote 1: They probably never, let's call it, 'owned' the land...**

*Yes, it is a similar thing to the aboriginal rights land issue. I mean, the company was an outsider, there was these so called coloureds in this area, all along, they probably never, let's call it, 'owned' the land, it was more of aboriginal ownership, so they just moved all over, wherever there was grazing, so that was never an issue. And then probably a hundred or a hundred fifty years ago, whenever the white guys came into this area and said, well we get to here, that's our farm, and bought it and took ownership of it, or got ownership of it, in those days from the state, I would say, whatever years ago. And then it would become a farm with a deed and a paper. And that's where the issue started, the problem of these aboriginal rights, as they presume, and I suppose quite rightly, that the land originally belonged to them, or that it belonged to nobody, because everybody had the right to farm the land.*

*Source: H. J. Bredenkamp, Financial Manager, Okiep Copper Company, 16.11.2001*

Some locals claim that the process of dispossession has continued into the 20<sup>th</sup> century, for example through illegal boundary adjustments and by fencing areas where there were earlier free movement of people and livestock. According to a group of elders in Komaggas, reserve boundaries were encroached upon after the nineteen thirties by white farmers who either moved boundary markers illegally, or got recognition for farms within the reserve area. Dispossession also happened through practical rather than legal changes. In Pella, a white farmer reported that his father had only fenced his 10,000 ha farm around 1960 (interview, Peter van den Heever). Before that, other local farmers would occasionally enter or cross the land, just as the private farmer's stock would at times cross into other areas under private or communal tenure. The Buffelsrivier boundary of the Komaggas reserve runs through the middle of the river, but it was only in the nineteen seventies that a fence was put up to bar people from entering seasonally important grazing areas owned by a white farmer. The prevalent view, however, is that "*Namaqualand rural land claims cannot be addressed through the Land Claims Court process because of the Constitutional 1913 cut-off date agreed to for land restitution matters*" (Department of Land Affairs 2001), see also Text box 2, page 5). Based on legal advice and on resolutions at a meeting of community representatives in August 1994, the major emphasis has therefore been on re-distribution (interview, G. Jordan, Dept. of Land Affairs, March 2002); yet, this is seen as a avenue to redressing past injustice, it is *restitution* with another name (Department of Land Affairs 2001). People also perceive 'tenure reform' as closely associated with redressing past injustice as well as with their recent experiences with changed tenure rules on the 'new farms'. These historical and current experiences point towards the limited scope of tenure reform: it only addresses "certain" lands as defined and limited through history: a detached policy discourse separates historical rights as an issue on its own. Peter Grove, reverend in Komaggas, expresses the significance of historical rights, but also how people strive to give them legal weight. Among some stakeholders in Komaggas, the sense of dispossession combined with a trust in the rights granted by Queen Victoria fuels indignation against the current legal reform for not recognising people's old rights and history rights violations.

**Quote 2: Rights grown out of dispossession – no!**

*So it is the old history of dispossession, in my opinion. But, you see, the interesting thing about this whole process of dispossession is that at some point there was a conflict between the role of Britain as a colonial power and the Afrikaaner establishment and that conflict worked itself out in such a way that people tend to think that the government became their guardian, so that when they want to claim their rights, they link it with the rights their Queen gave them, and not with the traditional and historic rights to the whole region, as people that settled here. And it is very difficult, I think it is almost impossible, you cannot base your rights on what the Queen gave you, the Queen gave you nothing! The Queen colonized! And then from a position of being a master, now claiming that she could demarcate a certain area by a 'ticket of occupation' or some kind of legal tenure, but in people's minds, they say, we received the land in perpetuity from the Queen.....*

*[..].Now, that is very problematic, because the only really legal document that I personally know of is a map that the missionary Heinrich Schmelen had drawn up, defining the area that this community is settling legally. But that particular map excludes two thirds of the land that these people settled originally. So, my argument is that if you are going to claim what the Queen gave you, then you limit yourself to that legal document. If, however, you use a deeper, in my understanding, and broader definition, namely your historic right as a dispossessed people, then of course it is a totally different thing, and then, for instance, the issue of DeBeers claiming diamond rights from whatever legal source becomes a point of contention, and then also the whole way in which these areas have been governed by all sorts of authorities becomes a problematic issue.*

*So, my position is that I believe that the rights of these people reside not in what this current government, the previous apartheid government or the Queen or the colonial government says should be their recognised title, but in the fact that they have resided here historically, let's call it their indigenous rights. But that is at this stage not a very widespread understanding in these areas – people are extremely legal minded here, and I think it is because they have been robbed so often. So they only believe in some kind of law that tells them, this is this and this is that...they don't judge on the basis of justice. [..].People make this whole thing a legal battle, and not a battle of historic rights.*

*Source: Pieter Grove, Reverend United Reformed Church, Komaggas, 22.10.01*

## **4. LEGAL REFORM: TRANSFORMATION OF CERTAIN RURAL AREAS**

### **4.1 New legislation**

In Namaqualand, people are busy implementing legal reforms aimed at strengthening their ownership and management of the six former “coloured rural reserves”. Tenure reform through the *Transformation of Certain Rural Areas Act 94 of 1998* (TRANCRAA) enshrines principles of participation and strengthened rights, yet resource contest, political negotiations and organisational may be just as important when understanding how it works. It is South Africa's only currently implemented legal reform with the major emphasis on communal land tenure, in follow-up of the Constitutional right to secure tenure (§25,8, Text box 2, p. 5). It aims to remove discrimination, protect

residents' formal and informal rights and ensure democratic governance (Text box 3).

### **Text box 3: Transformation of Certain Rural Areas Act 94 of 1998**

**“What does this Act allow us to do:**

- Transfer the Act 9 land from the Minister to the people or representative structures
- Remove many of the old restrictions on the land
- Give the community opportunities to benefit from the exploitation of minerals on their land
- Bring the old Ac 9 areas in line with the rest of South Africa and repeal Act 9 of 1987 after a transition period of 18 months
- Protect the existing rights of residents by ensuring that all formal and informal rights are recognised in the tenure plan for the commonage.”

**“What principles must be adhered to by the land holding entity in dealing with land which is transferred to them through this process?**

If the commonage is not transferred to a private individual(s), the entity holding such land must adhere to the following principles:

- Give all residents (people who ordinarily lived in the Act 9 area at the commencement of the Act or, who are liable for rates and taxes in the area) a fair chance to participate in the decision making process regarding the administration and allocation of the land
- Not discriminate against any resident
- Give residents a fair opportunity to participate in decision making regarding access to land
- Not sell any land without the consent of the majority of residents”

Source: Pamphlet from Department of Land Affairs (undated). Selected parts quoted.

The enthusiasm one may feel for the rhetoric of human rights and the South African Constitution may wane when turning to such a piece of dry legislation – but it commits government in a binding way to make rights become real. Government and the main supporting stakeholders (*Surplus People Project* and *Legal Resources Centre*) place great emphasis on the legality of the reform process as a means to give people clear, enforceable rights. The major stated aim of the Transformation of Certain Rural Areas Act, 1998 is

*“To provide for the transfer of certain land to municipalities and certain other legal entities; the removal of restrictions on the alienation of land; matters with regard to minerals; the repeal of Rural Areas Act, 1987, and related laws; and to provide for matters connected therewith.”*

The Act defines “legal entities” as,

(a) a municipality

(b) a communal property association registered in terms of section 8 of the *Communal Property Associations Act, 1996 (Act No. 28 of 1996)*; or

(c) another body or person approved by the Minister in general or in a particular case

The transfer of land applies to the Act 9 area used in common by the community and held in trust by the State. It is referred to in the Act as ‘the remainder’ to distinguish it from the land situated in the town area, which vests in the municipality. An exception is made for registered or registrable rights of persons in land (primarily residential plots, to which

people are encouraged to register private title deeds). Re-distributed farms are currently owned by the municipalities in which they fall, but are to be managed to the benefit of the community. According to a Notification 12, based on the Municipal Systems Act, 2000, TRANCRAA applies to the redistributed farms bought for the benefit of Act 9 residents.

**Table 4: Categories of land and whether TRANCRAA applies**

<b>Category</b>	<b>Current</b>	<b>Future</b>	<b>TRANCRAA</b>
Township in Act 9 Area (roads, infrastructure, public ground)	Held in trust by the State	Municipal ownership and management	Not applicable
Township in Act 9 area (residential plots)	Held in trust by the State, in the process of transfer to individual owners	Municipal ownership, process of transfer to individual owners to continue	Not applicable
“The remainder” in Act 9 area (“ <i>Old Meent</i> ”)	Held in trust by the State	Municipality, CPA or another body or person approved by the Minister	Applies
Family/private plots in “The remainder” of Act 9 Area ( <i>saailande, bespruuingsgronde</i> etc.)	Held in trust by the State	Municipality, CPA or another body or person approved by the Minister	Applies
Re-distributed farms (“ <i>New Meent</i> ”)	Owned by the relevant municipality	Municipality, CPA or another body or person approved by the Minister	Applies, but limited to farms purchased for the benefit of Act 9 communities
Certain state land outside Act 9 areas	Owned by the State, but provisionally allocated for Act 9 communities	Municipality, CPA or another body or person approved by the Minister	Applies, but limited to farms purchased for the benefit of Act 9 communities

It is the Minister (of Agriculture) who is to take the decision about transfer of land to new entities, but no transfer to a municipality or CPA may take place unless she is satisfied that the relevant legislation or rules,

*(§2) Make suitable provision for a balance of security of tenure rights and protection of rights of use of –*

*(i) the residents mutually*

*(ii) individual members of such a communal property association or other body;*

*(iii) present and future users and occupiers of land,*

*and the public interest of access to land on the remainder and the continued existence or termination of any existing right of a person in such land.*

Paragraph 4 of the Act states principles that a municipality, if it becomes the owner and

manager of the land, must adhere to in respect of people’s rights. That municipality:

- (a) *Must afford residents a fair opportunity to participate in the decision-making processes regarding the administration of the land;*
- (b) *Must not discriminate against any resident; Must give residents reasonable preference in decisions about access to the land;*
- (c) *Must not sell or encumber the land, or any substantial part of it, without the consent of a majority of residents at a public meeting called for that purpose;*
- (d) *Is accountable to the residents;*
- (e) *Must manage and record effectively all financial transactions regarding the land; and*
- (f) *Has fiduciary responsibilities in relation to residents.*

Further important points are that paragraph 5 of the Act removes the legal or other restrictions “*against the title of land situated in a board area*”, related to a) limits on the period for which the land rights was granted; b) restrictions on the right-holder to “*alienate, bequeath, hypothecate or otherwise deal with such land right*”, or c) “*placed any restriction on the transfer of such land right to, or on the possession, use or occupation of such erf or piece of land by any person of a particular population or ethnic group or who is not of a particular population or ethnic group.*”

Finally, paragraph 6 states that, in spite of the transfer of land as per paragraph 3, all mineral rights will continue to vest in the State (and as such be subject to the Minerals Development Bill under preparation). In summary, one may list some arguments regarding the extent to which TRANCRAA is ‘rights-based’ (Table 5) - which is not to assess or make guesses about its genesis or impact.

**Table 5: TRANCRAA strengthens people’s rights: pro et contra**

	<b>Pro</b>	<b>Contra</b>
<b>Goal</b>	Transfer ownership and management right to institutions accountable to local people	Confined to the legally defined area, as such not based on an assessment of broader historical rights
<b>Process</b>	A committee elected by the residents and representing the majority of residents to lead the process	Role and responsibilities of the committee not clearly defined
<b>Rights</b>	Obligation to record and protect formal and informal existing rights of residents Resources for such recording provided	Mineral rights not included
<b>Decision-making</b>	People given opportunity to participate in advisory referendum	Decision-making power about TRANCRAA rests with the Minister
<b>Institutional development</b>	Accountability of municipalities emphasized	No guidelines or resources for (alternative) institutional development
<b>Non-</b>	Non-discrimination stated as	Active measures to curb

<b>discrimination</b>	general principle. Past discrimination on the basis of ethnic group is repealed	discrimination against women not included, nor is help other disadvantaged groups
<b>Livelihoods and agrarian reform</b>	People's implementation focus on development opportunities. Support for land use planning by facilitator and MoA	Not addressed by the Act itself
<b>Residence</b>	Municipal ownership of town area subject to individual registered or registrable rights. Residents given "reasonable preference" to acquire land in "The remainder"	The act does not address security of residence

#### **4.2 Process**

Although the *Transformation of Certain Rural Areas Act 94 of 1998* affects only some tens of thousands out of the millions of South African's who live with uncertain land rights, it is significant as the first attempt of the post-apartheid government to implement land tenure reform for a whole category of communal lands. Still, Government has pursued it in a manner that leaves local stakeholders asking whether it is truly a government-driven process. First, the implementation of the act was delayed pending municipal demarcation and elections late in 2000. While this was understandable, it created a situation that required careful and urgent attention because the act presupposed communal areas that coincided with local government structures (the former *Transitional Local Councils*), while the areas have now been amalgamated into larger municipalities. The *Transformation of Certain Rural Areas Act* stipulates an eighteen-month transition period during which people shall decide on which ownership and management option they prefer. The transition period started in January 2001, and the communities have established committees to study the implications of different options and prepare the referendum at the end of the period. The transition period got off to a rather slow start. With basis in the Act, the government (Department of Land Affairs - DLA) wanted an external organisation to facilitate the transformation process. DLA asked for tenders to be submitted by January 2001. The DLA then spent eight months reviewing the different proposals. Only in late October 2001 was *Surplus People Project* (SPP) informed that they won the tender. SPP had by then already facilitated considerable preparatory work, including the formation of Transformation Committees, producing the first newsletters about the process etc.. During these eight months of valuable time role players felt inhibited by uncertainty. SPP advised the communities to apply for a six-month extension period. It has been approved verbally, but at the time of writing the communities and SPP are still awaiting a written reply. The deadline for submitting the final reports and recommendations to DLA is expected to be January 2003. The community referendums are tentatively scheduled for December 2002. People have established "Transformation Committees" that are preparing and facilitating the process ahead of the community referendums. The committees have set down sub-committees to study what they perceive as the most important issues affected by or affecting the legal reform, namely agriculture, mining, tourism and information. Over the period of my field

work (from September 2001) the process has been speeding up and “intensifying”. More people are becoming aware of the legislation. Groups are starting to “position themselves”.

Informing, discussing with people and facilitating genuine decision-making require a strong presence in communities. Some Transformation Committee members in Pella and the civil society facilitators occasionally let out heartfelt sighs over how demanding the process of implementing TRANCRAA is and how the eighteen or twenty-four month time limit is a deadline hanging over everyone. In spite of this feeling that preparing for TRANCRAA is more demanding than expected, the step in legal reform that is researched has a limited scope. It is about how communities debate and strive to make an informed and democratic decision about how to own and govern their common land. It is not about the building of the institutional capacity to do so; it is not yet about implementing management plans that are only just being drafted; it is not about solving the conflicts that have and will emerge as a consequence of new rights and new enterprises; it is not yet about enforcing and protecting people’s rights through court practice; it is not, in any precise way, about the technical and financial support that people need to ‘get something out of’ strengthened ownership and governance rights; it is not yet about getting vital new businesses going and managing the tensions between entrepreneurs (such as the “emerging farmers”) and the average community member; finally TRANCRAA it is not about getting more land.

## **5. PELLA AND KOMAGGAS**

### ***5.1 At a glance: land and people***

Pella is situated on the Orange River in the north-eastern corner of Namaqualand, and falls within Khai-Ma Municipality with the administrative centre in Pofadder. Both Pella and Komaggas are semi-arid, with Pella lands receiving less and more erratic rains (an average of about 200 mm/year). This means that rain-fed farming is not possible in Pella, while some families own irrigable plots along the Orange River, as does the Roman-Catholic church. The south-western portion of the Pella commons is gently sloping *velt*, with mixed grass-bush cover and scattered trees, interspersed with spectacular rocky outcrops and an elongated red sand dune. The northern and eastern portions are dominated by steep and rocky mountains with scattered grazing areas. Although these are difficult to access, people use them and some reside permanently in the mountains. Komaggas is situated in Nama-Khoi Municipality, some 70 kilometres south west of the municipal and district capital of Springbok. It is located just at the transition between the Kammasberg Mountains (*Bo-velt*) and the flat or undulating *sand-velt* that stretches in a belt along the Atlantic Coast. In good years, rainfall allows cultivation of *saailande* plots, mainly with barley or wheat. People have traditionally moved their livestock between the sand-velt and the mountain grazing areas, and to some extent this is still practised.

Pella and Komaggas Act 9 areas were chosen for fieldwork because limited research had

been done in recent years and because they appeared to make an interesting contrast: Pella is “peaceful” and situated outside the “core” of Namaqualand; Komaggas is a more centrally situated area, and had a known “conflict” related to the TRANCRAA process.

**Table 6: Pella and Komaggas at a glance**

<b>Feature</b>	<b>Pella</b>	<b>Komaggas</b>
People	675 households +/- 6,000 individuals <sup>1</sup>	965 households 4,755 individuals <sup>2</sup>
Settlements	Pella, Annakoppe (14 hh), and other dispersed settlements	Komaggas and Buffelsrivier (+/- 200 hh)
Mission stations	Rheinisch, later London Missionary Society and then Roman Catholic	Rheinisch, later Dutch Reformed Church
Livestock	+/- 12,000 heads of livestock Distributed on approx. 100 hh <sup>3</sup>	4,475 goats. 3,810 sheep. 178 cattle Distributed on 195 households <sup>4</sup>
Act 9 land	48,276 ha	62,600 ha
Re-distributed farms	34,912 ha Dabenoris, Springputs (of Kleinpella), Hoogoor, Varsfontein (of Eyties)	27,228 ha Witbergs Kloof, Graceputs, Kowikam, Plat Vlei, Sannagas
State farms	11,751 ha at Witbank – Houniams and Guadom	
Total land	94,939 ha	89,828 ha
Per hh	154 ha per household	93 ha per household
Per “farmer”	1,041 ha per farmer	461 ha per “farmer”

*1: KhaiMa Municipal manager. 2: Macroplan 2000. 3: Dip figures January 2002, provided by Sanna Cloete. Uncertain whether all households are included. 4: Dip figures 2001, provided by John v. Reenen*

In both areas the majority of people live in a town-like settlement, with amenities such as community meeting hall, police station, shops, clinic, sports stadium. Pella has a beautiful Roman-Catholic church surrounded by date palm orchards, a well-known tourist attraction. Both towns have important links with mining. Many people in Komaggas have worked for the Okiep Copper Company, now in the process of closing down (Quote 3). It once employed 6,000 workers, but expects to lay off the remaining 600 in March 2002 (Bredenkamp, Financial Manager, OCC, interview 16.11.01). DeBeers diamond company in Kleinsee is the major employer for Komaggas people. In Pella, the Swartkoppies salamanite mine was a big employer from 1954 till the mine closed. Currently the mines at Aggeneys and the neighbouring Klein-Pella farms (dates/wine) are significant employers. Unemployment is estimated at 70% in Pella (Mr Rooi, Ward Office, Pella).

**Quote 3: Returning to the land...**

*And now we are sort of closing down, will probably close down in March next year, [...]...we employed up to six or seven thousand at a certain stage, so a good percentage of the people around here had employment, but now we are down to six hundred employees, so a lot of unemployment here, and the more the guys start to look at farming, or just doing something to get an income, and now it is getting more and more of a problem for the land, the guys got a couple of cattle and goats and sheep around.....*

*Source: Interview, H. J. Bredenkamp, Financial Manager, Okiep Copper Company, 16.11.2001*

TRANCRAA reforms the tenure and governance of land with very limited space and production potential. Next to Pella communal land, two farmers own about 10,000 and 8,000 hectares of land. They both find that they can make a living for their small families by keeping in the order of 1,000 sheep (interviews, P. v. d. Heever, Oct. 2001; J Kruger, March 2002). In Pella more than six hundred families have rights to lands that are about ten times the area of what each of these two farmers own and live off. About a hundred families are registered as livestock keepers, but local people themselves say that about a third (200) are involved in farming. Some own a few unregistered goats or sheep, but more commonly a family owns some animals in a herd managed by a close relative. The January 2002 animal count showed that the total livestock number in Pella is at least twice the carrying capacity level recommended by the Dept. of Agriculture (ref. Dialogue 1).

**Dialogue 1: The land is not there....**

<i>Christo:</i>	<i>...here in Pella I am very worried about the condition of the land. And people so often say that additional land shall solve the problem, but I do not think that is realistic, the land is not there.</i>
<i>Poul:</i>	<i>Yes, I suppose that even if the addition of new land has been substantial in Namaqualand, maybe it only just matches population growth in the period since democracy was introduced?</i>
<i>Christo:</i>	<i>Just for argument's sake, I have made an interesting calculation. Let us say ALL the private farms in Namaqualand were bought up and added to the six communal areas. Now if the communal farmers spread their livestock on all these farms, I have calculated that the lands would still be</i>

*overstocked! That shows how enormous the problem is, and how important it is that people start to think about their stocking level.*

*Source: Notes and memory of discussion with Christo Smith, Dept. of Agriculture, Springbok 30.01.2002.*

## **5.2 Re-distribution**

Redistribution of land solved problems for mining companies with land that no longer had mining value and was to some extent environmentally damaged. Re-distribution of *Okiep Copper Company* farms (Quote 4) illustrates some aspects of market-based redistribution: first, the primary importance of the assessment of the value by the seller within his economic environment and the secondary importance of historical or other rights claims of the community; secondly, that the changed political ‘climate’ and court practice reduces, or is perceived to reduce, the value of land next to “communal” areas.

### **Quote 4: Re-distribution is good value**

*We started in March 99, and in the first or second week we offered the Government some land in Komaggas, because we had a lot farms around in this area, because in the old days they just bought up everything which is remotely having a chance of having copper and they bought up the whole area.....[Looking at map]... Komaggas is lying over here, outside the map, so we said that is too far off, we are mining at the moment about here, so we said, the outlying areas are not interesting anymore, it is not worth it, so let's get rid of the land. This one we sold off, this one we sold off and this one we sold off. So we were looking at all these areas we had got left, and asking, are there any possibilities, and if not, let's sell it off, let's get rid of it. Because, it is a couple of thousand hectares still that we got, ten thousand still at the moment, and if the mine closes tomorrow, we cannot put all the land at once on the market, so we started slowly getting rid of the land. [...]*

*The price was slightly below market value, but the problem is, the land was located next to Komaggas communal area and it was always over the years fighting between, yes I would say land rights, cause the area is not fenced, so the guys move over to the next farm, the neighbour's farm, so you would not get a commercial farmer to buy that area, with the risk, it is a political issue, you can't chase the guys off the land, so we were in a way happy to take less for the farm, but at least get our money and get out of it....[.]..... let's say, a white guy in history, he would take it to court, and the court would get settled quickly, put up a fence and that's it, but it is, yeah, a difficult issue these days. So that's why we said, you've got a guy, or someone that has an interest in the farm, so let's....and at the same time it is also some advantage to us that we can say, 'Yes, we have done something for the community'. So it's good value.*

*Source: H. J. Bredenkamp, Financial Manager, Okiep Copper Company, , 16.11.2001*

### **Quote 5: From mining to farming**

*Yes, it did have an impact on people's lives because a whole lot more people bought animals to farm on the farms. And this also increased people's standard of living because the downscaling of work at the mines like Alexkor and so on, caused people to be unemployed. The fact that there was land available resulted in people buying cattle and go and farm. There is still a need for land because more people see it as the only way of survival in the area. Especially for families. Not for young people. Older people see that farming is the only way to make a life now, they are too old to go and seek work on the mines.*

*Source: Alexandra Beukes, Speaker ANC, Pella, 17.10.2001*

The addition of new farms to both Pella and Komaggas are the major and most valuable feature that people associate with land reform. It has to some extent lessened or postponed the hardship associated with down-scaling in the mining sector (Quote 5). People feel that additional land has taken pressure off the old commonage and partly explains the good condition of the *velt* in 2001-2002 (first para of Quote 6). Yet, most observers, both insiders and outsiders, regard the socio-economic benefits of the programmes as seriously constrained by lack of training, inadequate water supply and roads, overstocking, lack of follow-up by the municipal owners and insufficient investment and 'care' by the users (Quote 6).

**Quote 6: ..with the purchase of the farms people got too excited...**

*Question: What have been the main achievements or the main shortcomings of land reform so far?*

*Now you must help. All that I can tell you from the top of my head is that which happened automatically. The pressure is released from Pella Meent, the old Meent of Pella. Basically what happened are the cattle farmers were settled on the six farms. It is a highlight. It is a benefit. The cattle and farmers were transferred to the farms.*

*What was the first question? The shortcomings. It is land. It had been relieved through the securing of the land. We really needed land for grazing. We have never needed land so much for grazing and as a result we bought the farms. What I can maybe add is with the buying of the farm, and Lucas and them can agree or disagree with me. You see what happened, the people were very excited regarding the reclaiming of the land issue. And with the purchase of the farms people got too excited. In their excitement they did not pay attention to the farms' infrastructure. That led to the farms being neglected like now currently the fences are down and the pumps don't work. There is a poor infrastructure and that in the process you can almost say is a low point. I can almost say our people were kind of cheated and because of that we need to look for assistance to repair the infrastructure. Do you understand? You see currently, despite the big shortage that existed, people are still positive. The state promised to help with that. So it is not necessary that we have to go through a dip. The guys used their own initiative. The people are still going forward.*

*Source: meeting with Transformation and Meent Committee members, Pella. 17.10.2001*

A commercial farmer in Pella regarded the re-distributed farms as mismanaged. The new users, in his view, were taking a subsistence-oriented farming practice from the old commonage onto the new farms ("*They are just farming for the own pockets*"). In addition, he mentioned lack of maintenance, which in the case of fences caused problems for neighbours (interview, Peter v. d. Heever, farmer. 21.11.2001). Re-distribution is an important background for TRANCRAA for several reasons. It has given people new experience with working with external stakeholders, such as SPP, Legal Resources Centre, agriculture department and municipalities. Farmers apply for use-rights that are granted to a few, and so the new farms give rise to a new sense of ownership. Furthermore, on the new farms users are exposed to a new regime of procedures and controls such as Ministry of Agriculture stocking levels, although these are loosely

‘enforced’ (Quote 7).

**Quote 7: We as a community had never farmed with this kind of farming methods..**

*My point that I want to make is, we as a community had never farmed with this kind of farming methods. You had a few goats and so you went on. We never really had a farm that we had to manage. We are not contesting the departments rules, it is just that it is a bit hard too understand and to adjust to. In the past it was subsistence farming, and everybody helped. You see our people farmed all their lives. So it is hard for them to understand now that they have the facilities, they have to think commercially. We going through a phase of adjustment. Hopefully it will come right, if of course the department of agriculture agrees to give us more money, and then we can slot in. I am glad we have land today. We have come a long way.*

*Source: TRC committee, Pella*

### **5.3 TRANCRAA in process, TRANCRAA at a stand still**

#### **5.3.1 TRANCRAA process: Pella**

In Pella the TRANCRAA process is going ahead. A *Transformasie komitee* (Transformation committee, TRC) was formed at a community meeting held in October 2000. The committee has 12 members, out of which 5 are women. The Transformation Committee comes in addition to the *Meent komitee* (the Commonage Committee), established to advise and assist the municipality in management of new farms (*nuwe meent*); in the early stage of fieldwork, people outside the committees often reported confusion about what the mandate and differences of the two committees were. The TRC committee holds monthly meetings, with *Surplus People Project* present. It has distributed two newsletters, in August 2001 and February 2002. The TRC has established sub-committees with the task to study and resolve issues related to agriculture, mining, tourism and information, respectively. The TRC, SPP, Agricultural Office and about eighty community members met in February 2002 to discuss and give inputs to a land management plan. They have had a meeting with the agriculture department about developing 99 ha of irrigable land. They are currently not able to use this land within the commons as security for raising loans and it is an important consideration what kind of ownership will be able to assist them in doing so. The process in Pella is regarded as rather smooth, though not as speedy as in some other Act 9 areas (SPP). For example, in Concordia people have completed the work of registering about two hundred family owned *saailande* (dryland farming plots), identified all conflicts related to these plots and solved 11 out of 12 conflicts (Michael Jonas, municipal council member, interview February 2002). While there are not *saailande* in Pella, many other family or individual use rights, including small-scale mining, have yet to be studied.

### **Quote 8: Transformation: getting started**

*Question: How often does the Transformation committee meet? When did it start?*

*The committee was started in October 2000 and physically started to work in January this year. We had our first meeting 16 June. We had to start in January. We are currently six months behind in the process. We had only three meetings thus far [October 2001].*

*We have a monthly meeting. Our next date is on the 24<sup>th</sup>. We held a transformation meeting on the 25<sup>th</sup> where we planned around mining, communication, tourism and agriculture. Communication visited 12 households. Those people stayed there since I was a young boy and they still stay there. They compiled a report. As you come in Pella you will see two heads, Annakop. That is Meent land and was not established by the town, it is part of the old Meent. The first phase and introduction are completed. The reasons why we are six months behind are because we must still identify the consultants and technicians. It's being mooted. We had to wait. SPP is the facilitator. In keeping with our decision, he would have consulted from 1<sup>st</sup> September until we have completed the process. We did ask for an extension. The Minister of Agriculture is working on it. We asked for a 6 months extension. We are still waiting for a response. The municipality applied for it.*

*Source: TRC members, Pella. 17.10.2001*

In Pella there is considerable overlap between different community-based committees. Four of eight members in the *Meent* committee were also in the TRC. It is sometimes explained pragmatically as an outcome of a situation where not many people are willing to perform this kind of unpaid service (Sue Power, SPP) and it is said to facilitate coordination (TRC and *Meent* committee members, meeting 17.10.2001). Critics challenge the composition and claim that the committee members were appointed through non-democratic procedures, for instance at meetings with poor attendance and/or limited prior announcement (Mr April, DA Chairman, interview 22.11.2001). Apparently there was a struggle about the representation on the committee: because the Democratic Alliance got few representatives following the voting at the formative meeting, they chose to “walk out” and leave their places to others (Interview, Johannes Basson, March 2002). In Pella, at an early stage of fieldwork a group of participants (with a majority of committee members) in an exercise to map and discuss “stakeholders in land reform” presented a “neat”, official diagram. It emphasized the officially appointed committees, serving the community and providing links to government and the NGO facilitator. In a way this diagram represents the process as envisaged by government: Legislation and official notices describe the bodies and procedures; committees are appointed; the appointed facilitator and the district agricultural office facilitate and lead the process; local government at municipality and ward level follow the process and participate where necessary. Community meetings and finally referendums complete the democratic process. Then the Minister decides.

#### *5.3.2 TRANCRAA standstill: Komaggas*

In Komaggas, TRANCRAA is at a stand still due to social conflict. A powerful local group, a residents' association (*Inwonersvereniging*) is opposed to the process and

blocks, or is felt to block, the work of the Transformation Committee. The Transformation Committee established in 2000 has 8 members out which one is a woman. In addition two seats are left open for the *Inwonersvereniging* (IV). The IV was initially favourable to participating in the TRANCRAA process, but demanded a majority of the seats on the Transformation Committee, referring to an alleged majority support in the community (Interview, Benjamin Fortuin, TRC Chairman, 23.10.2001 and Ronnie Newmann, SPP, Nov. 2001). However, other groups rejected this demand. Various attempts had been made to get the process going, including several meetings between SPP staff and Komaggas stakeholders, and community meetings. TRC leader and SPP reported problems with very poor turnout for community meetings, due to discouragement by the *Inwonersvereniging*. The leader of the TRC at a district level TRANCRAA meeting asked, “*What can one do when +/- fifty percent boycott the Transformation process*” (“Group work”, Concordia, 11.02.2002). One SPP staff has commented that it is also a problem that the TRC leadership leans back and accepts the situation, that more active leadership, household visits and community meetings could break the standstill (Ronnie Newmann, SPP, Discussion, November 2001). People who are in favour of TRANCRAA stress the opportunity to clarify and strengthen community rights (interview, ANC executive committee, 23.10.01). Many see in the *Inwonervereniging* a general resistance to participate in broader processes of a New South Africa (Dialogue 2).

**Dialogue 2: *They will sit there, and everything will happen over their head***

**TRANCRAA?**

*I have attended a lot of meetings, and read a little bit of it, the Transformation, and think it is a good thing. Lot of people did not like that Transformation of Certain Rural Areas, but at the end of the day the old act was really an old apartheid act, that just keep us on one side, and there was no economic growth, also no economic empowerment to the people of Namaqualand. And we still, most of our people are still thinking, have got this tunnel vision, that it is our land, so nobody can come and do any thing on it. They even did not want development, because at the end of the day they did not want to be responsible for certain things. Most of the people did not want title deed on the land. It's actually 60:40 percent. 60 percent of the people want title deeds, and 40 percent did not want title deeds ...residence title deeds and things like that. They feel that the municipality will come and do things and that we will loose everything, but there will be new things, and we just can't plutter on like before. It is a fear of payment, a fear of loosing bass-skap over something. Unfortunately, we are sitting here and the whole country changes, and we are sitting here and did not want anything to change, but at the end of the day we cannot do anything about the changes.[..]*

**Conflict? How may you work it out? What will happen?**

*There are some people....I mean with the Transformation Act, it has been a conflict for a long time, before my time. .. The people that are against the Transformation, at the end of the day they will loose. Because, the country is busy with transformation, the whole Namaqualand is busy with transformation, and all of those people, within the Transformation Act, they voted in 1999 on the municipalities, so they are actually, at the end of the day, they are going to vote, and their political party was part of the Transformation Act, and they do these things within the Transformation Act. And we will just loose out, if we are not part of the Transformation Act. Those people, they actually did not want any transformation, they will sit there, and every thing will happen over their heads, all these things will still go on, like it's going on now: There is a new form of municipality. Title deeds are given to people, those who want title deeds. And people must pay their levies, I think, ...[..] it will be enforced, and they will just loose out. And they actually have the opportunity to be part of the Grond committee, Meent committee, they got every opportunity, I think the Meent Committee still stands open for them, but they just did not want to be part of the whole ongoing process, of trying to forge solutions and working for the development of the people.*

Source: Interview with Charles Bezuidenhout, Komaggas, Foreman at DeBeers, former Chairman of the Grond-komitee in Komaggas (13.11.2001)

On 7 March 2002, SPP and the Department of Land Affairs held a meeting with the Inwonersvereniging, presented in advance by SPP as possibly the last effort to get the organisation “onboard” and the process going. The lawyer used by the Inwonersvereniging participated in the meeting. The meeting may represent a turning-point, because the lawyer chose to support SPP and DLA stand-point and advise his client to participate in the Transformation process within the legal framework provided.

**5.4 Social dynamics and perceptions of rights**

Different stakeholders have different interests in land and the “new rights” on offer. In both Pella and Komaggas there are tensions or conflicts. Commonalities are that people strongly express a sense of ownership to their communal land. They refer to the status of ‘burger’ in the reserve; to be a burger has “traditionally” involved a set of rights:

residence, livestock keeping, irrigation (where applicable), sowing (where applicable) and business (Archer 1993). These rights were in many cases subject to the approval of the local council (*Raad*), which in different versions governed the reserves in the 20th century. People disagree on what is required to count as resident or *burger*. Many say that one has to be born at Pella/Komaggas. However, after probing most agree that immigrants (*inkomers* or *bywoners*) can achieve burger status. To achieve the status of *burger* or an immigrant would normally have to live in the reserve for a number of years and be approved by the *Raad* (it would also depend on an assessment of the person's behaviour and qualities, interview with Father Mallary, Roman-Catholic Church, Pella). In the "old times", immigrants could achieve status as burgers by applying to the *Raad* (reserve management board). Five years of residence was a normal requirement, but it would depend on behaviour as well. In a Pella workshop on rights and *inwoner*-status, three of four groups reported that rights to land is based on having burger status in Pella; a fourth group stated it to be a citizen right. Some people point at the curtailed nature of their old "rights" within the paternalist framework of church and government rule. People tell stories that illustrate the power of the Church to evict people who did not conform to the expected moral standards. Mr Lukas Basson, prominent farmer and committee-member, stated that people did not have 'rights' (*regte*), but 'privileges' (*vorregte*). Many people also stress the relative advantage living in the reserve. Access to land was one privilege, and another was relatively more secure residence. Outside, people experienced residence tied to employment at farms or on mines, so that losing a job also involved a forced removal (this was the case for some people losing jobs in the *Okiep Copper Company* towns of Okiep, Nababeep and Karolousberg in the Springbok region).

Current changes and negotiations of rights revolve around the status of *burger*, which is being challenged and modified by a range of different factors. However, the idea of a "reserve citizenship" has been and remains complemented by other notions and practices of rights. Family rights to sections of the commons are important. In Pella, the 'old' families had an unwritten agreement about dividing the *meent* between them (L. Basson, Quote 9, and interview March 2002). A prominent community member has suggested that the traditional pattern of family ownership could be the basis for future management (Interview, A. Ramon, March 2002). Lukas Basson found that such an arrangement would be "undemocratic". A small-scale miner (somewhat surprisingly) praised the Transformation Act for maintaining national ownership of minerals: it would in his view ensure equal rights to the minerals against the 'land-owning' families (N. van Nel, interview February 2002).

**Quote 9: If you're talking about old rights...**

*Question: Do they feel that old rights are being lost or are being changed today?*

*Yes, let me tell you how it really is. If you are talking about old rights that were there, that is not really so. For example, here is a place so 10 to 15 kilometers from Pella. Ten people lived there, a part of Pella, and that part belong to them simply because their grandfather or great grandfather lived there first or created something there first. The kids were born there, they got married there and thus they can claim total ownership. You who are a resident of Pella even, if you don't come from this town you have no right to that land, not to stay there or to farm there. That is the difference between the old rights they had and now with the transformation or the reforming of the municipality it exists like that. In the past I am not sure if we had rights, we had privileges but not rights. A corporal could those times evict you. But remember that times the Pella Meent was sort of the property of the church, so actually they could claim that right.*

*Source: Lukas Basson, meeting with TRC and Meent Committee members, 17.10.2001*

Tensions in Pella may be grouped in three:

- There is tension between “farmers” and non-farmers. It has to do with farmers’ opportunities to ‘emerge as commercial farmers’ in line with the current agricultural policy versus the rights of everyone to use the commons with a few sheep or goats to supplement their livelihoods (Dialogue 3).
- There is tension between those who participate in local government processes and those who feel, or choose to be, left out. It overlaps with the ANC-DA division in the community. It overlaps in a less manifest way with “racial” tension between “blacks” (termed by their opponents ‘Damarras’, who are said to dominate ANC and the current transformation process) and “coloured” (termed by the opponents “yellows”, and said to want to preserve privileges they enjoyed in the apartheid era).
- There is some tension around municipal and district municipal ownership and rights. Some stakeholders claim that the municipalities are not really willing to hand over land. A contested case is a 4X4 vehicle route for tourists run by the Namaqualand District Council. Some people in Pella are unhappy with neither being consulted nor receiving a share of the income. A meeting with officials of the District Council did confirm the impression that officials are reluctant to let go of responsibility and power, and do not recognise that the Transformation process may give new the negotiating power to the communities.

**Dialogue 3: It increases your self-worth...**

Poul:	<i>Do you agree with the view that the main purpose of land reform is to secure equality and people's livelihoods?</i>
Alexandra Beukes	<i>One hundred percent. Yes, because it increases your self-worth, or it brings back your confidence. For example it is one of our criteria, it does not matter if you have two sheep or two goats, you can now farm on a farm whereas before you had to keep your two sheep in your backyard. People who used to tend to someone else's cattle and receive maybe one sheep for it now also have access to farmland or to be a farmer.</i>
Poul	<i>...But then there is also some that would say that to create economic growth you have to support emergent black farmers or a group of</i>

	<i>commercial farmers...?</i>
Alexandra Beukes	<i>Yes. Maybe we have the advantage since we don't have commercial farmers, at the moment. We don't have big farmers. I may agree with it but it will be difficult to convey it to the community because we have a limitation on the amount of weight the farm can carry. People may feel why is this guy allowed to have a hundred cattle and another can only have fifty cattle. What divides are you erecting, I am only asking, if you reserve a farm only for commercial farming that is economically viable.</i>

*Source: Alexandra Beukes, Speaker, ANC, Pella. 17.10.2001*

In Pella, the “official” picture of cooperation within a united community suppresses tensions. In Komaggas, participants appear to be drawn into a polarised social situation where the *Inwonersvereniging* and the big division are exaggerated. Where in Pella the opposition to ANC and the transformation process is weak and disorganised, in Komaggas it is strong and organised. The multi-dimensional conflict dates back to political-religious divides originating in the fifties and described in the 1970s (Sharp 1977). During 2001, the term ‘*Taliban*’ emerged to name the opposition (Quote 10). Many people expressed a deep frustration with the division hampering most development efforts. A youth forum established to bridge the divide was losing members (down to eight in February 2002); the major wish for the future expressed by this group was “peace in Komaggas”.

**Quote 10: *Taliban has made some advances***

*Taliban has made some advances with their disinformation process. [...]...People are very sensitive about land and they use the issue, we feel that they are using this for personal gain...[.. They seek independence of all government, they actually seek self-governance, that's what they want, their own “homeland” - “tuisland” [...] ....Their supporters are very loyal, they turn out in big numbers. Then you get shocked, you think people have big support, you are taken aback, and you think you are going to loose the election. But when it comes to it, you see that there is a silent majority.. There is a power struggle, a struggle for positions. ... He is lurking in the background, in the darkness. He is not even in meetings. The points are not real issues. The fight for a homeland can never become a reality. But it is basically about power.*

*Source: Andy Pienaar, Advieskantoor, 04.02.2002*

**Text box 4: Perceived key features/views of resistance to TRANCRAA in Komaggas**

- Is associated with membership in the Calvinist Church
- Is associated with “Democratic Alliance” sympathies or membership (i.e., political opposition to ANC)
  - The TRANCRAA unrightfully takes as a starting point that Komaggas land belongs to the State
  - Regard Komaggas as different than “Act 9” areas because people hold private, group title to the land, granted in the mid nineteenth century by the Governor of the Cape Colony or Queen Elizabeth (ref. Quote 2, p 11 ). Any “transfer” back to the people is therefore not required
  - Komaggas residents have launched a land claim both to the communal land as currently defined and to lands to which they claim historical rights, and are likely to

win this claim

- Oppose private titling to residential plots, as it contradicts the group title, and could at any rate not be granted by the State
- Land rights should be restricted to ‘burgers’, born or approved residents of Komaggas
- *Inwonersvereniging* represent a majority of households, and should therefore, if participating at all, hold the majority on the Transformation Committee
- TRANCRAA is part of a municipal “takeover” and they are strongly opposed to the role and power of the new municipality of Nama-Khoi created after the 2000 demarcation process. The Nama-Khoi Municipality aims to get control of Komaggas land as a basis for extracting fees and taxes

*Source: Interview with Inwonersvereniging executive committee (October 2001) and households with IV sympathies, summarised by the author, so that each individual would not necessarily hold all views.*

Legal reform aiming at rights-based development fails or succeeds in interaction with the wider biophysical and social, economic and political environment. Perhaps the most central factor is people’s trust in that environment. While the Transformation Act shows that government acknowledges local ownership, in practice officials at district and municipal level do not consistently do so. ‘Trust’ involves people’s self-confidence as managers, entrepreneurs and citizens. And it involves their belief in the good intentions and capability of government. However, the self-confidence about local institutional capability, on one hand, and the trust in the authorities, on the other, do not necessarily ‘merge’. In Pella, people frequently express that they feel uncertain about their capabilities for self-management, given the tradition of paternalistic rule. The political speaker in Pella feels that building human and institutional capacity has so far been neglected in the land reform process (Alexandra Beukes, Political speaker, ANC, Pella. 17.10.2001). There is suspicion and uncertainty about the new municipalities and the intentions of government, yet people with sufficient trust in the intentions and opportunities in the TRANCRAA process have won and are driving the process. In Komaggas, members and leaders of the *Inwonersvereniging* opposing TRANCRAA appear to have a strong confidence in the capacity for self-governance, based on what they see as a tradition of deciding over community matters locally and protesting against oppression from outside.

### **5.5 Human rights and land**

Does the idea of “human rights” (*basise mense regte*) make any sense to people in Pella and Komaggas? And do they link it to land issues? “Rights to land” is an issue people have strong feelings about. It is also a cause around which it is easy to mobilise people for political rallies (Interview, Andy Pienaar, Advieskantoor, Komaggas). In some ninety interviews with local people and other stakeholders, about three fourths of the respondents do associate something with “human rights”. Yet, a well-informed politician said that he is uneasy with the human rights terminology, but holds many speeches about people’s constitutional rights. A few farmers also mention the Constitution. The right to free speech in the new South Africa is praised. However, what most people refer to is their “felt” rights to land as “burgers” in the former reserves. The main argument they

give is that land plays or may in future play a role in their livelihood. Another important argument is that human rights address the democratic process of taking decisions about and managing land (non-discrimination, transparent decision-making). In both Pella and Komaggas a significant minority belongs to the political opposition, and their members repeatedly complain about being discriminated against when local government considers applications, establishes community committees, provides jobs opportunities etc. Most people, also non-farmers, are concerned to maintain what has been their resident's right to use the common land. There is, however, a tension between the fundamental rights *justification* (everyone's right to make a living), and the principle of *operationalizing* the right. Central in making the rights operational is defining to whom it belongs, and how it is to be weighed against other people's rights. Local people say that the right to use the communal land is a resident's right. The notion of *burger* is used to describe the right-giving status. The current thrust by civil organisations supporting the communities is to stress a distinction between having rights as owner and exercising rights by using land. The latter shall be subject to application and approval according to adopted procedures and principles. It will be these procedures that determine how the small versus big farmer dilemma is solved.

**Quote 11: People know what their rights are...**

*Question: Have people's rights become clearer, stronger?*

*Yes, I will say yes. People have rights and people know what their rights are, like for example child abuse and abuse against women. People do come out and are more prominent regarding your rights as a woman, your rights as an individual, your right as tax payer for example. You have the right to make an impact, to give input on the financial flow of the municipality. The only shortcoming I can see is that we need the laws, the different laws, that it should be defined and explained to people because each of us interpret things differently.*

Source: Alexandra Beukes, Speaker ANC, Pella, 17.10.2001

## **6. REFLECTIONS ON HUMAN RIGHTS AND LAND TENURE REFORM IN NAMAQUALAND**

### **6.1 Are human rights dead or alive?**

'Human rights' are a way of thinking about people as the focal point in development: Who is the right-holder and how to strengthen him and her? International human rights require equal, non-discriminatory access to the empowering opportunity of owning property. In the property clause of the *Universal Declaration of Human Rights* we should not only see the protection of existing rights, but the commitment to equitably share that empowering potential. In an agrarian society - and with some qualifications - landlessness amounts to a violation of that right. 'Human rights' remind us about the difference between fundamental principles and incidental means: people's land rights are not tradable concessions ('*give up your land claim, and this development project will run smoothly*'). To stress the fundamental value of 'ownership' is not to enforce a particular, foreign notion of state property or individual title. Rather it may be to take seriously a wealth of local idioms and practices. One of the strengths of TRANCRAA is that it

protects existing use rights and provides resources to study and map family and individual rights, including resolving conflicts. TRANCRAA may therefore build on a diversity of rights to land in the former reserves, rather than assuming a simple, uniform and equitable *burger* right within the formal government trusteeship. Resisting '*the dead hand of human rights*' can be translated into a call for understanding complexity (Englund).

My first reading of the Namaqualand commons does not confirm Englund's and Baxi's worry that the human rights discourse dominates and excludes other perspectives. First, 'human rights' is still an abstract language that neither people nor politicians feel fully confident with. 'Human rights talk' is not a deafening discourse that has penetrated forcefully and ruled out other understandings of rights, but a thread in a broader web of meanings. Secondly, people second and interpret it to the extent that it catches their experience of rights. When human rights means something it is first of all the right to have access to land and the livelihood it offers. Secondly, it is the right to challenge unfair local politics of nepotism and favouritism. Not one of about ninety respondents mentioned any international 'human rights instrument'. A basic lesson for civic education is that the Constitution is nearer and more meaningful reference, and that one needs to explore the relevance of international statements for local debates and policy in a more concrete and constructive way than I have so far achieved. Englund warned that "*those who promote more 'civic education' as a response to people's alternative approaches to politics may themselves have a lesson to learn*". The danger – in research or extension – is not to speak about human rights, but to identify them with a neat and rigid list of principles and words that estrange. For Baxi the '*dead or alive?*' of human rights is determined by '*interactions of solidarity*':

*The cultural software of global human rights is not, of course, exhausted, though typified, by human rights norms and standards. There is more to global rights culture than can be exhausted by often, indeed all too often, lifeless human rights instruments. The kiss of life is given by interactions of solidarity (Baxi, 2002, 13, emphasis added).*

In Pella and Komaggas, rights talk is rooted in and emerging out of a history of struggle between people as insiders or outsiders, and between people and leaders, in a patriarchal and paternalistic system where church and state granted temporary privileges to some and excluded others. Today, local rights talk emerges in a contested protest against that history and efforts to create the kinds of development – for example investments, bank loans and joint ventures – that were ruled out in the past. Human rights based 'interactions of solidarity' must help people transcend their particular history of rights-violating dependency and grasp the particular opportunities they see today. Applying a human rights perspective poses a dilemma: on the one hand, human rights are holistically concerned with the right-holder's situation, the sum of rights fulfilment or rights violation. *The Declaration of the Right to Development* stresses that the rights of people and individuals are comprehensive and indivisible, and therefore calls for comprehensive, contextual analysis and effort. On the other hand, it is not reasonable to expect TRANCRAA to eliminate the violations associated with land and poverty, nor is it reasonable to criticize TRANCRAA on such terms. Still, on the basis of human rights

principles, legal reform is a tool to address the structural, silent violation that is poverty.

## **6.2 Poverty and rights-based development**

The *Transformation of Certain Rural Areas Act 94 of 1998* makes important steps towards Baxi's 'interactions of solidarity', but illustrates both potential and limits of a rights-based approach to land reform and rural development. TRANCRAA deals with tenure and governance of land with severely limited space and production potential. The mix of economic marginalisation and development opportunities that the partly globalised economy offers to them is not very attractive. Seventy percent of the people who have left school, young or old, are unemployed and in the liberalised economy people are currently, perhaps more than ever, "*surplus people*". What is the link between the civil-political rights talk and the socio-economic reality characterised by historical dispossession and current marginalisation - do human rights remain talk or do they contribute to transcending and transforming the inherited structure of skewed property and life opportunities? Compared to communities managing state-claimed common pool resources in other parts of the world, the communities of Namaqualand are in an enviable position that government that has offered to hand over ownership and management responsibility. At the same time this 'hand-over' appears a bitter pill with a sweet coating of words of ownership and self-government, because there are important constraints that legal reform does not address:

- The tenure reform does not address historical dispossession, whether before or after the constitutional 'cut-off date' of 1913, but accepts the territorial boundaries defined by previous legislation and the unjust and sometimes illegal encroachments they reflect. With an increased population and declining opportunities for formal sector employment, land area, climate and production potential create sharp constraints on household economic benefits. The tenure reform comes not with, but after, the redistribution of available farmland adjacent to the areas.
- While civil society organisations are experienced, committed and capable in facilitating land reform, the legal reform comes without a "package of support" for follow-up to the reform process itself. People are left with no commitments about future public support and do not feel confident that they can finance future decentralized management of the communal areas.
- The reform demands considerable unpaid work by community members, who also bear the brunt of the community conflicts that surface in the process.
- To make the, on household basis, meagre resources contribute significantly to economic development and livelihood security requires a strategy for innovative and diversified resource mobilization which is not visible
- The agricultural policy of supporting emerging black commercial farmers resonates with a minority of relatively wealthy livestock owners who are keen to emulate white landowners, but it also contributes to uncertainty over the equality of rights and the equity of resource benefits. The proponents do not appear to be able to explain how the strategy is possible within the constraints, other than vaguely suggesting that "emerging farmers" shall be granted land elsewhere.

Now, in a context of economic scarcity, do ‘rights to land’ matter or could TRANCRAA become a case of “democratisation of disempowerment”(p. 6)? I believe they matter, and that the best indication of that is people’s investment in the TRANCRAA process, the current mobilisation of stakeholder groups and the fact that people debate rights in the context of new enterprises. It is the pressures on the resources that make the contested rights and meanings important. Local and external actors must appropriate every stone, drop of water and rare plant or animal or site of scenic beauty – that is why land must be clearly and unambiguously ‘owned’ by community members. ‘Owned’ because it involves his or her right to a stream of benefits; ‘unambiguously’ owned, because only then will he or she be willing to divest her self of the right to manage and use the resource, whenever that gives an economic advantage. TRANCRAA may provide a link between human rights and the land scarcity, household poverty and human suffering. The mechanism through which TRANCRAA may work is Amartya Sen’s ‘effectiveness reason’, the free agency of people with both substantive and democratic rights. Baxi’s phrase about *putting human rights to work* captures the *potential* of the rights talk, but warns against a *pitfall* of confusing it with social change and development. We can see, criticise and suggest ‘with’ human rights, but not build.

*Although not radically ameliorative of here-and-now human suffering, international human rights standards do empower peoples' movements and conscientious policy-makers everywhere to interrogate practices of politics. That, to my mind, is an inestimable potential of human rights languages not readily available in the previous centuries. Human rights languages are perhaps all that we have to interrogate the barbarism of power, even when these remain inadequate to fully humanize the practices of politics of cruelty (Baxi 2002).*

Upendra Baxi talks about the hope and the hazard of human rights. The hope lies in a more “ethical” state and world order. The hazard, he says, lies in mystifying people’s needs and livelihoods and the way suffering is reproduced (p 5). Human rights declarations originate – and are often recited - a long way from where people make a living, or fail to do so. TRANCRAA is supposed to be a bridge, but legislation is a thin line between manifesto rights and socio-economic transformation. We may tremble at the long list of human rights commitments that apply to land (Text box 1: Why and how land is a human rights issue, p 4), but they reflect morally and legally binding commitments that go beyond the state and citizens of South Africa. These commitments call for a capacity to transcend the realm of legal rights and transform social and geographical structures and processes. Human rights make us sensitive to the limited scope of legal reforms that cannot address the structural violence of poverty nor ensure non-discriminatory and transparent local governance. Human rights are not very useful without political decisions, practical strategies of support and enterprise development. The implementation of TRANCRAA reflects this in the way people focus their debate on development options, such as an irrigation scheme in Pella. It is reflected in the process of stakeholder interaction, for example when Department of Agriculture and Surplus People Project pursue land use planning with communities. In the TRANCRAA process, the ‘*hand of human rights*’ is neither dead nor alive, but struggling. I see no danger of it becoming a dominant, oppressive discourse in Englund’s sense. The differences between

global and local perceptions can be negotiated and bridged with positive synergy. But the gap between the human rights discourse and the socio-economic constraints stressed by Baxi remains wide. Yet, it is the comprehensive human rights perspective on land that in itself enables us to argue how much a genuine rights-based development demands. We are reminded of Amartya Sen's "social correlates" – institutions, policy and governance (p 5); they are the enabling environment that land rights and other freedoms must be nurtured by to create the dynamics of development. Within the severe constraints of land shortage and extreme levels of unemployment, secure ownership to common land appears a necessary, though not sufficient, element in the process of democratisation and rural empowerment. Land rights as human rights become alive and have a legitimate future only if they are ingredients in economic development and democratisation.

We are rightfully shocked by the violence and other human rights violations in the land invasions in Zimbabwe. We should be in 'continuous shock' because of the protracted insecurity of tenure and the skewed distribution of land resources in the whole region. Because of that, we should also be highly interested in the business of peaceful, law-based land reform as a means, among other things, to prevent an escalation of the fast-track, rights-violating approach. The Transformation of Certain Rural Areas Act implemented in Namaqualand, South Africa during 2001-2002 is a case of such 'peaceful' reform. However, TRANCRAA eminently illustrates that land reform is hard, resource demanding work. When we apply a human rights perspective to the situation of people living in and off the Namaqualand commons, we see that a deep and comprehensive economic and democratic empowerment is needed to complement legal reform. The question then is whether we remain committed to a human rights perspective on land that calls for investments and effort on a completely different scale than the present, or whether we are content with selective applications to suit our own narrow objectives.

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