# AFRICAN CUSTOMARY LAND RIGHTS IN A PRIVATE OWNERSHIP PARADIGM

**Dr Elmien (WJ) du Plessis[1] & Gino Frantz[2]**

## Abstract

With the advent of constitutionalism in South Africa, customary law is elevated to a position where it now is recognized alongside legislation and the common law as one of the sources of law.

This is a major shift from the previous position, where customary law was only recognized in as far as it was easily ascertainable with sufficient certainty or codified, and then only applied when it was not in conflict with the common law.

Despite the constitutional imperatives for the recognition of customary law, and interpretation that is in conformity with the constitution (that includes the recognition of customary law), the courts seem reluctant to do so.

This paper will look at the South African courts' interpretation of ownership of land held in terms of customary law, and will aim at providing alternative interpretations to "ownership" of customary land.

## Keywords

Land rights; customary law; common law; interpretation

[1] BA (International Relations), LLB, LLD (US). Senior Lecturer, Department of Private Law, Faculty of Law, University of Johannesburg. Paper presented at the 14th Biennial Conference of the International Association for the Study of the Commons (IASC), Mt Fuji, Japan, 3 – 7 June 2013. Please note that this is a first draft. The final paper may be requested from the authors at elmiendp@uj.ac.za or gfrantz@uj.ac.za . Alternatively, it will be posted on http://ssrn.com/author=1522492

[2] BA (Law), LLB, LLM (US). Lecturer, Department of Private Law, Faculty of Law, University of Johannesburg.

## Introduction: Constitution sections 211, 39 and 8

The South African legal system is a hybrid system with both Roman-Dutch (civil) law and English Common Law[3] forming part of its common law. Common law stands alongside case law and legislation as sources recognised by the Constitution.[4] Customary law is placed on par with the common law and legislation as a source of law. In terms of section 211(3) of the Constitution, "[t]he courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law". Section 39(2) further provides that when the laws apply customary law, the "tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". A right in terms of customary law is also explicitly recognised in section 39(3).

The Constitutional Court[5] has emphasised on many occasions that custom and customary law should not be restricted to its pre-Constitutional codified meaning. The court therefore makes a distinction between "living" and "official" customary law, noting that the "living" customary law is the law recognised in the Constitution, while the "official" customary law is the law entrenched in legislation.[6] Living customary law will be the law that is actually observed by the people who create it, while official customary law is the rules created by the state (on the state's interpretation of customary law) in legislation and the court's interpretation of such legislation.[7]

Despite the Constitutional Court's emphasis and guidance in the matter, it seems as if the courts are not always able to re-think the meaning of customary law as a living law as opposed to a codified law. When the courts were able to do so, they often re-interpreted it in the light of the common law terminology and framework that they are familiar with.

What this paper seeks to achieve is to investigate the courts' interpretation of customary land rights. To start off, this paper will look at customary land right, both in terms of "living" customary law, but also how the codification and restrictive interpretation of pre-apartheid customary land law restricted the meaning of customary land rights.[8] Official customary law, written down, are precise and fixed,

[3] The "common law" terminology can be confusing. Roman-Dutch law is based on Roman law that implies that the history of South African law has a Roman law foundation, something South Africa shares with Western Europe. "Common law" as a term refers mostly to Roman-Dutch law as it was adapted and developed in South African case law and custom. "Common law" is usually distinguished from other sources of law such as legislation and customary law. Law, as developed in case law in England, is also referred to as "Common Law". This "Common Law" forms the basis of law in Anglo-American law and was hardly influenced by Roman law. The law of equity, however, plays a significant role in the English "Common Law". To make things somewhat more confusing, the South African common law was influenced by the English Common Law.

[4] Pienaar G "The methodology used to interpret customary land tenure" *PER* 2012(5) 3.

[5] The Constitutional Court of South Africa is the highest court on all matters. Until recently it was restricted to constitutional matters, but the Constitution Seventeenth Amendment Act 72 of 2013 broadened its jurisdiction to the highest court in all matters.

[6] See *Shilubana v Nwamitwa* 2009 2 SA 66 (CC); *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC).

[7] Bennett TW *Customary law in South Africa* (2004) 138.

[8] Woodman G "Legal pluralism in Africa: the implications of state recognition of customary laws illustrated from the field of law" in *Pluralism & Development* Mostert H & Bennett (eds) (2011) 35 46.

while the norms of custom (living customary law) are often unpredictable and open-ended.

## Customary land rights: living customary law and the influence of colonisation on customary law

In African indigenous law land tenure, land structures social relations.[9] Okoth-Ogendo describes it as an "inverted pyramid", where the tip is the family, the middle the clan lineage and the base the community.[10] It is group standing that provides access to land, and therefore social relations are more important than a relationship with the land itself.[11] It is not only concerned with present day social relations, but also a connection to the past,[12] as it is believed that the ancestors are attached to the land.[13] The fact that those that control the land have a transgenerational obligation to preserve the land also means that the ability to alienate the land to people outside the group is limited.[14]

The control of access to land should be viewed in the context of social relations.[15] Since traditional leaders derive their legitimacy from the founding fathers and are seen as a direct channel to communicate with the ancestors, they have certain powers with regard to the land.[16] They have power to allot the land,[17] to regulate the use of common resources and expropriate and confiscate land in certain circumstances. Such decisions are also not made collectively, but they are made with reference to the common values of each level of the pyramid as discussed above.[18]

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[9] Bennett TW *Customary law in South Africa* (2004) 381.

[10] Okoth-Ogendo HWO "The tragic African commons: A century of expropriation, suppression and subversion" Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 .

[11] Chanock Land, custom and social order (1985) (1985) 231.

[12] Okoth-Ogendo HWO "Some issues of theory in the study of tenure relations in African agriculture" 1989 Africa: Journal of the International African Institute 6 11.

[13] Okoth-Ogendo HWO "The tragic African commons: A century of expropriation, suppression and subversion" Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 .

[14] Okoth-Ogendo HWO "Some issues of theory in the study of tenure relations in African agriculture" 1989 Africa: Journal of the International African Institute 6 11.

[15] Bennett TW *Customary law in South Africa* (2004) 382.

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

[17] When the chief allots land, he not only allocates land to families, but also dedicates certain lands for grazing and agricultural use. Bennett TW *Customary law in South Africa* (2004) 383. See also Bennett's comments that this is not so prevelant today anymore, due to the scarcity of land and the fact that most people settle on land on a relatively permanent basis. Even though the scarcity of land means that the chief's role in allocating land is diminishing, he still plays an important role to confirm the transfer of land that takes place in practice. In doing so he has a duty to "act like a father" in making sure that the land is distributed fairly between households. The allocation of land was traditionally gratis, while today it is common to offer some form of payment as a thank-offering. Bennett TW *Customary law in South Africa* (2004) 384

[18] Okoth-Ogendo HWO "The tragic African commons: A century of expropriation, suppression and subversion" Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 .

Traditionally, the power to regulate the resources entails that the chief can decide when and how these resources may be used. When formulating the rules pertaining to access, he must exercise his discretion for the public good.[19] As an individual you also have certain rights and duties with regard to the land.[20] The rights in these lands can also be taken away.[21] Since land cannot be inherited rights are also lost at the death of the holder.[22]

In the 19th century, the colonial powers tried to, and in some instances succeeded, in breaking down the chiefly power, replacing it by (white) magistrates. The lack of recognition of African indigenous law in these formal structures helped play a role in undermining the chiefly powers.[23] The apartheid laws and structures broke chiefly power even further, often grouping people together that have no historical ties with the government, appointing traditional leaders that will advance the apartheid government's policies.[24] African indigenous systems of land tenure that was often "managed" by the chiefs were replaced by government regulations that only allowed

[19] Bennett TW *Customary law in South Africa* (2004) 385. This means that the chief must consider the people's welfare especially in connection with the environment. For instance: the killing of animals may be prohibited if the animal species border on extinction. Likewise, the burning of grass may be prohibited when it is dry. The problem with effective action at environmental protection is that there are no coherent policies due to the decentralised nature of the political setup; human needs are given priority over the environment and due to poverty and overpopulation in the modern state, environmental concerns are sometimes pushed to the back. See Bennett TW *Customary law in South Africa* (2004) 385. See also Delius "Contested terrain" 221.

[20] You have a right of avail,( Bennett TW *Customary law in South Africa* (2004) 388) that is, to receive land to build houses coupled with access to the commonage;( Bennett TW *Customary law in South Africa* (2004) 391) a right to residential sites and arable fields and grazing (Bennett TW *Customary law in South Africa* (2004) 398). The right of avail is restricted to the extent that access to land is dependent on an affiliation with the ward where the land is situated.( Bennett TW *Customary law in South Africa* (2004) 391.) It is possible to get access to land even if you are not a member of the ward, but there are stricter rules that regulate such access. The right to residential sites and arable fields usually implicate that a member of the community will have two plots – one for housing and one for farming. The holder of both these plots will have exclusive rights over the land and is protected from trespass, but are restricted to the extent that the uses of the plots are restricted to cultivation of crops for domestic consumption (Bennett TW *Customary law in South Africa* (2004) 392.) Commercial farming is generally not allowed. Residential houses normally include space for a garden where some crops are planted. See Bennett TW *Customary law in South Africa* (2004) 394. Members may also graze their stock on the commonage. As far as the commonage is concerned, no individual may claim exclusive use of the land (Bennett TW *Customary law in South Africa* (2004) 398). Again, access to the commonage is based on socially-defined membership that is reinforced and managed within the group based on the reciprocal obligations of the members in the social hierarchy (Okoth-Ogendo HWO "The tragic African commons: A century of expropriation, suppression and subversion" Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 ).

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

[22] Bennett TW *Customary law in South Africa* (2004) 402.

[23] Delius P "Contested terrain: land rights and chiefly power in historical perspective" in A Claassens & B Cousins (eds) in A Claassens & B Cousins (eds) *Land, Power & Custom* (UCT Press, Cape Town 2008) 221.

[24] Cousins B "The politics of communal tenure reform: A South African case study" in W Anseeuw & C Alden eds The struggle over land in Africa (HRC Press, Cape Town 2010) 62. Of course it was more complex than what is stated here. A more detailed historical account can be found in Du Plessis W and Pienaar J "The more things change, the more they stay the same: the story of communal land tenure in South Africa" 2010 *Fundamina* 73.

for quitrent (where annual rent was paid to the state) and permission to occupy granted by the state.[25]

## The influence of colonisation

Traditionally land could not be alienated by sale. Pre-colonial concepts of land were that it is god-given and cannot be appropriated. With colonialism came a real estate market, the common law concept of ownership, property law and contract. Since land is a scarce resource, individuals are more inclined to assert exclusive rights over the land. African customary law had limited scope to develop at its own pace and based on its own principles, as the colonial conquest introduced a market economy and African indigenous law, was at least officially and as far as property was concerned, replaced by common law.[26] Common law brought with it a new vocabulary that made it difficult, if not impossible, to interpret African indigenous law land tenure.[27] The concept of "ownership" is particularly problematic, as is the idea that *before* "ownership" all things were held in common with everybody having equal rights to the same thing,[28] or belonged to nobody. Bennett asserts that "[i]t is more likely that, before the concept of individual ownership emerged, only rights of use were protected".[29]

With the introduction of commerce, an exchange value had to be attached to a commodity, and in this context ownership provided the answer in securing the property.[30] With ownership came the idea of "absoluteness" that implied that one person could hold all the entitlements in a certain property, and dispose of it at free will.[31] This differs remarkably from the pre-colonial era where different interests in the same property could vest in different holders,[32] and where these interests are furthermore flexible and ever changing.[33]

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[25] Cousins B "The politics of communal tenure reform: A South African case study" in W Anseeuw & C Alden eds The struggle over land in Africa (HRC Press, Cape Town 2010) 56; Delius "Contested terrain" 225. One of the substantive objections to the Communal Land Rights Act 8 of 2004 was that it will re-enforce the apartheid boundaries and the apartheid system of land governance but chiefs that traditionally would not be seen as legitimate by the community.

[26] Bennett TW *Customary law in South Africa* (2004) 373.

[27] Bennett TW *Customary law in South Africa* (2004) 374.

[28] Bennett TW *Customary law in South Africa* (2004) 374.

[29] Bennett TW *Customary law in South Africa* (2004) 374.

[30] Bennett TW *Customary law in South Africa* (2004) 375.

[31] For a discussion of the concept "absolute ownership" in the African customary land tenure context, see Allot AN "Towards a definition of 'absolute ownership'" 1961 Journal of African Law 99 99; Simpson 1961 *Journal of African Law* 145. Allott discuss the problem in countries based on the English law that requires registration of title to land and the limited choice of title that can exist in respect of land. In the absence of an adequate vocabulary to describe and therefore register certain interests under customary law, the risk remains that such interests and the land in which such interests are held would be unowned.

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

[33] Allot AN "Towards a definition of 'absolute ownership'" 1961 Journal of African Law 99 100.

Colonialists assumed that such a language of ownership was universally applicable, and that the concept of "ownership" was only applicable to "civilized" societies. The colonizers also "assumed that land must have an owner, even where rights had never been defined". [34] The fact that "ownership" was a strange concept to indigenous groups meant that the government could appropriate this "unowned" land.[35] If a dispute arose between Africans about land, common law was used to fill the gaps instead of the courts developing African customary law to fill such gaps.[36] Some people attempted to overcome the problem of customary land tenure and the incompatibility with "ownership" by stating that land was "common to all people",[37] "communal", [38] or that communities as "corporate entities" make the decisions regarding access and use of land.[39]

Okoth-Ogendo regards the insistence to use common law concepts to explain and define African customary land tenure as "more than just an intellectual error" and part of the bigger design of the colonial authorities to justify expropriation of land, as land in this framework is regarded as "dead capital".[40] One of the consequences of this is that tenure insecurity is the reality in most areas of land held under African customary law as is evident in South Africa today.[41] This is not because African customary law property systems are inherently insecure, but rather due to a misinterpretation of this systems, that removes it from the social and institutional context in which they are defined, coupled with the application of customary law in a common law framework.[42]

## Court's interpretation of customary land tenure

### Richtersveld trilogy

The Richtersveld trilogy[43] dealt with a restitution of land rights claim. In terms of the Restitution of Land Rights Act[44] a person or a community that was disposed of a right in land by a racially discriminatory act or practice after 1913, could lodge a claim for the restitution of the land (or equitable redress). This case dealt with the question of whether the community had a right to land. The problem was that the community could not proof *common law ownership* after 1913, the cut-off date for restitution claims. To be able to succeed with their claims, they therefore had to show that they had a customary law (or aboriginal) title to the land that allowed the

[34] Chanock Land, custom and social order (1985) 232.
[35] Bennett TW *Customary law in South Africa* (2004) 375.
[36] Bennett TW *Customary law in South Africa* (2004) 377. See M Chanock Land, custom and social order (1985) 232 for a discussion of how this worked in practice.
[37] Bennett TW *Customary law in South Africa* (2004) 377.
[38] Bennett TW *Customary law in South Africa* (2004) 377.
[39] Okoth-Ogendo HWO "The nature of land rights" in A Claassens & B Cousins Land, Power & Custom (UCT Press, Cape Town 2008) 99.
[40] Okoth-Ogendo HWO "The nature of land rights" in A Claassens & B Cousins Land, Power & Custom (UCT Press, Cape Town 2008) 98.
[41] Okoth-Ogendo HWO "The nature of land rights" in A Claassens & B Cousins Land, Power & Custom (UCT Press, Cape Town 2008) 98.
[42] Okoth-Ogendo HWO "The nature of land rights" in A Claassens & B Cousins Land, Power & Custom (UCT Press, Cape Town 2008) 98.
[43] *Richtersveld Community v Alexcor Ltd* 2001 3 SA 1293 (LCC); *Richtersveld Community v Alexcor Ltd* 2003 6 SA 104 (SCA); *Alexcor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC).
[44] 22 of 1994.

exclusive and beneficial use of the land. One big obstacle was the fact that the British crown annexed the land by proclamation on 17 December 1847, but that the community was only physically removed in 1926.

In dealing with the questions, the first court (the Land Claims Court) considered whether the community had "ownership". The court went into great detail, looking at the historical reports and copies of formal title deeds to ascertain whether the community can be classified as "owners". It is clear from the historical exposition that the colonial powers did not recognised the communities rights in the land as "ownership", because the governments did not consider the people to be civilised enough to be the legal owner of land. The court finds that the land was therefore *terra nullius*.[45] The court recognises that this thinking cannot hold, but find that they had no rights of ownership in the land after annexation of the British government in 1847.[46] The court found that the community were a community for purposes of the Act, but rejected the land claim because the reason for the deprivation was the exploration and mining of diamonds, and not because of racially discriminatory legislation[47] The court also denied that they had a claim based on ownership, since no indigenous rights survived the annexation.

What was of interest of the Land Claim's Courts reasoning for purposes of this paper, it the court's interpretation of when indigenous title or a customary law interest will be recognised. The court states[48] that

> "What the plaintiffs refer to as indigenous title may, however, be a customary law interest, as referred to in the definition of "right in land". Such an interest, if recognised by customary law, would be a right in land for purposes of the Restitution Act, provided the customary law was applicable. The existence of the customary law interest must be raised in the pleadings, and it must be proved that the custom, on which it depends, has developed into applicable law. *Custom will only become law where consensus exists that the custom is normative. Otherwise, it will be overridden by the law of the land.* A court may take judicial notice of indigenous customary law only insofar as such law can be ascertained readily and with sufficient certainty. This Court will, for purposes of a restitution claim, have jurisdiction to determine whether a particular interest was recognised by applicable customary law. In this case it was not proved that, at the time of dispossession, there existed a custom which had become applicable law, in terms of which the State was obliged to recognise rights of the first plaintiff over the subject land."

For the Land Claims Court to recognised customary law interest in land, there must be consensus that the custom is standard or unified. If there is no consensus about the custom, then the common law rules of the land will take preference.[49]

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[45] *Richtersveld Community v Alexcor Ltd* 2001 3 SA 1293 (LCC) paras 37 – 41.
[46] *Richtersveld Community v Alexcor Ltd* 2001 3 SA 1293 (LCC) par 41.
[47] *Richtersveld Community v Alexcor Ltd* 2001 3 SA 1293 (LCC) par 114.
[48] *Richtersveld Community v Alexcor Ltd* 2001 3 SA 1293 (LCC) par 48.
[49] Woodman G "Legal pluralism in Africa: the implications of state recognition of customary laws illustrated from the field of law" in *Pluralism & Development* Mostert H & Bennett (eds) (2011) 35 at 43 speaks of the challenges of ascertaining customary law.

On appeal in the Supreme Court of Appeal, the Supreme Court of Appeal found that the community's claim should succeed, because the right the community had to the land was akin to common law ownership.[50]

> "The undisputed evidence in this case shows that at the time of annexation the Richtersveld people had enjoyed undisturbed and exclusive occupation of the subject land for a long period of time. The right was rooted in the traditional laws and custom of the Richtersveld people. The right inhered in the people inhabiting the Richtersveld as their common property, passing from generation to generation. The right was certain and reasonable. The inhabitants and strangers alike were aware of the right and respected and observed it.
>
> I accordingly conclude that at the time of annexation the Richtersveld people had a 'customary law interest' in the subject land within the definition of 'right in land' in the Act. The substantive content of the interest was a right to exclusive beneficial occupation and use, akin to that held under common law ownership."

The Supreme Court of Appeal was happy to find that it was dispossessed in terms of racially discriminatory practices. The practices were the denial of their customary law interest, and the acceptance that the land was Crown land.[51] In this, the court stated[52] that

> "Ignoring the fact that the Richtersveld was not *terra nullius*, State policy since the 1920s has consistently been to regard the Richtersveld as Corwn land and, while acknowledging their occupation and use of the land since before annexation, it has refused to recognise that the Richtersveld inhabitants have any rights in the land. For example, according to the minutes of the meeting of the Parliamentary Select Committee on Public Accounts on 3 April 1922 the Government's attitude was stated to be that the Richtersveld became Crown land upon annexation and, while the inhabitants' 'precarious occupation' was acknowledged, it was not accepted that they held any rights in land."

The acknowledgement of the Supreme Court of Appeal, a court traditionally seen as preserving the common law, is important. On the one hand the court recognises that the rights in the land are "rooted in the traditional laws and custom" and that it is a right in their "common property", passed on through generations. This right was respected by outsiders and the community self, and therefore was a right to beneficial occupation and use. This acknowledgment that these are rights was a big step into recognising customary land rights, even though stating that it is "akin to that held under common law ownership" implies that it will be approached from the common law ownership side, and not regarded as a system in its own right. This was expanded on in the Constitutional Court, where the court stated[53] that

> "[t]he nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference

[50] *Richtersveld Community v Alexcor Ltd* 2003 6 SA 104 (SCA) par 28 – 29.
[51] *Richtersveld Community v Alexcor Ltd* 2003 6 SA 104 (SCA) par 106.
[52] *Richtersveld Community v Alexcor Ltd* 2003 6 SA 104 (SCA) par 107.
[53] *Alexcor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) paras 50 – 51.

> to indigenous law. That is the law which governed its land rights. Those rights cannot be determined by reference to common law.
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> While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to the common law, but to the Constitution. […] It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. […] In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law."

The court hereby acknowledged indigenous (or customary) law as a source in its own right.

Customary law, however, comes with its own set of problems. Begin an oral tradition that changes over time and continues to evolve; it might be problematic to establish what the customary law is. The court acknowledges that writer and other authorities might help, but caution against the textbook and old authorities dealing with customary law "through the prism of legal conceptions that are foreign to it".[54] Unfortunately, the court only cautioned against the use of these methods of ascertaining customary law, and could not provide guidance on how to do it because it was not an issue in the case. The court did state that it will involve the study of the history of a particular community.[55] Based on this the court found that the land was "communally owned by the community".[56]

**Bakgatla**

The Constitutional Court's caution against the reliance on textbook authorities to ascertain what the rights are that a community hold, and that it should not be done "through the prism of legal conceptions that are foreign to it"[57] is not well understood by High Courts. In the Bakgatla case, the court dealt with an application to transfer an undivided one and half share of a farm under the control of a traditional authority of the Bakgatla Tribe to one village, the Bakgatla-Ba-Sesfilkile.[58] It was alleged by the applicants that the farm was bought for £800 during 1910 by 52 purchasers who raised the funds with cash and donations of livestock and was registered in the name of the Chief who held it in trust for the Tribe. The laws in existence at the time did not permit the Africans to own immovable property and the 52 purchasers approached the *Kgosi* (chief) to purchase the farm on their behalf. The applicants further alleged that they were the descendants of the purchasers and on this basis would be entitled to transfer.

The only evidence led by the applicants to establish their claim to the farm included a handwritten list of 52 names with amounts in pounds written next to them. The authenticity of the list was questioned by the court because the author of the list was

[54] *Alexcor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) paras 53 – 4.
[55] *Alexcor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) par 57.
[56] *Alexcor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) par 58. The court went on to find that these rights survived the British Annexation (par 69).
[57] *Alexcor Ltd v The Richtersveld Community* 2004 5 SA 469 (CC) paras 53 – 4.
[58] The Bakgatla Tribe is comprised of 32 sub-villages which includes the Bakgatla-Ba-Sesfilkile and the Bakgatla-Ba-Sesfilkile occupies the farm held in trust for the Bakgatla Tribe.

unknown. The affidavits made by the applicants were disregarded because the parties were not present at the 1910 purchase of the farm. The applicants' degrees of sanguinity were also not clearly stated creating doubt that they were entitled to have the farm transferred to their village.[59] The court found that the fact the applicants alleged that they were the descendants of the 52 purchasers was not enough to grant them the title to the farm.

Leeuw JP applied the definition of communal land of the now unconstitutional Communal Land Rights Act[60] and comes to the conclusion that the farm falls within the definition of section 1[61] of the Act read with sections 2(c)[62] and 5(2)(a)(ii).[63] The title deed has the farm registered in the name of the current *Kgosi* who holds the farm in trust for the whole community.[64] The *Kgosi* asserted that the farm is owned by the tribe as communal property and that all 32 villages "are joint and collective beneficiaries".[65] The court relies on the title deed which shows that the farm is registered in the name of the Kgosi. The Bakgatla tribe referred to in the title deed refers to the whole community and is inclusive of the Bakgatla-Ba-Sesfilkile.[66] The court dismissed the application. The applicants were not entitled to have the farm transferred into their name as an association.

The court relies mainly on the entry in the title deed to come to its conclusion. The evidence led by the applicants that would show a customary right in land is considered to be inadequate and the court fails to take cognisance of the manner in which evidence would be presented in a customary setting. Even if individual ownership is sought *in casu,* the evidence led by the community was indicative of a perception that the village had right in land based on customary law. The court's reliance on the title deed is indicative of the manner in which courts approach evidence when dealing with issues of customary tenure.

The difficulty of witnesses attesting to land rights is not a new one. Witnesses may have a personal interest in the outcome and may give evidence that is inaccurate because of such interest. The fact that witnesses are often required giving evidence of their customary interests in a way that is suitable for a court, may require such witnesses to phrase their personal knowledge differently. Lastly, the officer

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[59] *Bakhatla Basesfikile Community Development Association obo Descendents of Molefe Molemi and Others v Bakgatla ba Kgafela Tribal Authority and Others* (320/11) [2011] ZANWHC 66 par 33 – 34.

[60] 11 of 2004.

[61] Section 1 defines communal land as "land contemplated in section 2 which is, or is to be, occupied by members of a community subject to the rules or customs of that community".

[62] Section 2(c) relates to the application of the Act to "land acquired by or for a community whether registered in its name or not"

[63] Sction 5(2)(a)(ii) states "On the making of a determination by the Minister in terms of section 18, the ownership of communal land which is not State land but which is registered in the name of a traditional leader or traditional leadership whether recognised in terms of law or not vests in the community on whose behalf such land is held or in whose interest such registration was effected and such land remains subject to limitations and restrictions in relation to and rights or entitlement to such land".

[64] *Bakhatla Basesfikile Community Development Association obo Descendents of Molefe Molemi and Others v Bakgatla ba Kgafela Tribal Authority and Others* (320/11) [2011] ZANWHC 66 par 31.

[65] *Bakhatla Basesfikile Community Development Association obo Descendents of Molefe Molemi and Others v Bakgatla ba Kgafela Tribal Authority and Others* (320/11) [2011] ZANWHC 66 par 22.

[66] *Bakhatla Basesfikile Community Development Association obo Descendents of Molefe Molemi and Others v Bakgatla ba Kgafela Tribal Authority and Others* (320/11) [2011] ZANWHC 66 par 32.

interpreting the evidence does so from his own background, and concepts often get lost in translation especially in the context of land where there might not be translations for concepts such as "own" "ownership" etc.[67] Courts should also be careful once determining what customary law is, to restrict themselves to the previous court's interpretation. "Living" customary law, is after all, living, and continuously need to be re-assessed.[68]

**Two concepts of ownership in land: how do we harmonise them when they are in conflict?**

African customary land tenure characteristics are firstly that they are held as a transgenerational asset, secondly that they are managed on different levels of the social organisational structure and lastly that they are used in function-specific ways.[69] Access to and control of land depends on an individual's place in the social order of the community.

It was shown that the traditional African customary land tenure's natural development was stunted by the colonial ideological framework of private ownership that was perpetuated in the post-colonial governments. African customary land tenure was also interpreted in this framework, where the people's relationship with land was not recognised and land held under in terms of indigenous tenure was often declared *res nullius* due to it not being "owned" in the common law sense.[70] These lands were then converted into individualised private property, a system, as indicated above, foreign to African customary land tenure,[71] often managed by legislation or interpreted in the common law legal framework. It is by attempting to formalise rights in the common law legal framework that African customary land tenure is seen as insecure.

Bennett instead use the words "right" "power" and "interest" to describe African customary land tenure.[72] He bases this on Allott's analytical scheme that first seeks to identify the status of the interest holder,[73] secondly to look at the content of the interest[74] and lastly to look at the uses of particular land in order to determine what

[67] Woodman G "Legal pluralism in Africa: the implications of state recognition of customary laws illustrated from the field of law" in *Pluralism & Development* Mostert H & Bennett (eds) (2011) 44.
[68] Pope H "Indigenous-law land rights: Constitutional imperatives and proprietary paradoxes" in *Pluralism & Development* Mostert H & Bennett (eds) (2011).
[69] Okoth-Ogendo HWO "The tragic African commons: A century of expropriation, suppression and subversion" Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 .
[70] Okoth-Ogendo HWO "The tragic African commons: A century of expropriation, suppression and subversion" Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 .
[71] Okoth-Ogendo HWO "The tragic African commons: A century of expropriation, suppression and subversion" Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights, PLAAS, 1 - 4 August 2005 .
[72] Bennett TW *Customary law in South Africa* (2004) 380.
[73] Bennett TW *Customary law in South Africa* (2004) 380. People acquire interest in land by belonging to a political unit such as a family, ward or nation.
[74] Bennett TW *Customary law in South Africa* (2004) 380. One looks at the interest to determine what a holder may and may not do, and what limitations and affinities are contained in their interests. These interests are divided between "benefit" (the right to use and enjoy land) and "control" (the power to decide who may benefit).

rights and powers can be exercised over the land.[75] When one uses this scheme, it is possible for two or more interest holders to simultaneously exercise rights and powers on the same piece of land. "Allott's scheme", Bennett states "frees us from the ownership paradigm"[76] where tenure seems to be "a system of complementary interests held simultaneously".[77]

Okoth-Ogenda reconceptualises customary land rights systems by debunking the myth that customary land rights systems are necessarily "communal" in nature, that "ownership" is collective and that the community as an entity makes collective decisions about access and use of land.[78] He offers a different understanding of customary land right systems. For him, the social order (ie how people relate to each other rather than an individual to his property) creates "reciprocal rights and obligations that binds together, and vests power in the community members over land".[79] To determine who will be granted access to, or exercise control over, land and the resources, one needs to look at these rights and obligations and the performances that arise from them. This will leave only two distinct questions: who may have access to the land (and what type of access)[80] and who may control and manage the land resources, on behalf of those who have access to it?[81]

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

[76] Bennett TW *Customary law in South Africa* (2004) 381.

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

[78] Okoth-Ogendo HWO "The nature of land rights" in A Claassens & B Cousins Land, Power & Custom (UCT Press, Cape Town 2008) 100. See chapter 5 where Ben Cousins lists this as one of the problems with CLARA 132.

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

[80] See Cousin's comments and examples in Cousins "Characterising 'communal' tenure: nested systems and flexible boundaries" 122.

[81] Okoth-Ogendo HWO "The nature of land rights" in A Claassens & B Cousins Land, Power & Custom (UCT Press, Cape Town 2008) 100.

The often used term "communal" is also problematic.[82] Bennett[83] sums it up by stating that the popular use of the word "suggest that groups of people, who are closely bound together by common interests and values, share land for purposes of subsistence" rather than the more unobjectionable idea that all members of the community having equal claims to land, that "membership of a political community is the basis of an individual's entitlement to land" or that an individual is not free to dispose land at will.[84] The idea that land is farmed collectively and that the produce is then shared is erroneous.[85] The term is also confusing: on the one hand it can mean that a right is held by a group jointly (one property, inseparable title), while on the other hand it can mean that it is held by a group in common (one property, separate but same title in land). The latter term is only useful insofar as right to pasture and natural resources is concerned, but not as far as African indigenous tenure is concerned. [86]

If the courts want to understand customary land tenure they should start by recognising that central to the tenure question are the levels of authority involved with the complex decision-making in a community. The courts should also ask how national law and policy influence this decision-making process. The level the decision was made and the process of decision-making when it comes to land is central to people's rights in land.[87]

Pope[88] asserts that instead of trying to see where customary land law fits in with the common law rights, one should rather assess customary land tenure in terms of the Constitution. Abuse of power and the building of strong, equal communities will do more for fixing the indigenous-law system than trying to harmonise it with common law rights.

Customary law should further be understood in the context of membership of a social unit or community, as a legal system where rights in land is intertwined with marriage, death and family relationships. Once this is done, the focus will also move away from collective rights that a community has in land, and more towards the complex web of obligations that includes the control over property.[89]

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[82] Okoth-Ogendo HWO "The nature of land rights" in A Claassens & B Cousins Land, Power & Custom (UCT Press, Cape Town 2008) 99.
[83] Bennett TW *Customary law in South Africa* (2004) 377 – 378.
[84] Bennett TW *Customary law in South Africa* (2004) 378.
[85] Bennett TW *Customary law in South Africa* (2004) 378.
[86] Bennett TW *Customary law in South Africa* (2004) 378. Likewise the term "trust" was also used as an attempt to describe African indigenous tenure. This means that the bare title vests in the indigenous group, with the chief as the trustee, and "usufructuary" rights being granted to the individuals that enjoy beneficial occupation. The use of the word "trust" is also problematic, since the "usufructuary" rights granted to an individual do not amply describe the interest in African indigenous law, nor do these people have a remedy against the traditional leader as trustee, as they would have under trust law. Bennett TW *Customary law in South Africa* (2004) 379.
[87] Pope H "Indigenous-law land rights: Constitutional imperatives and proprietary paradoxes" in *Pluralism & Development* Mostert H & Bennett (eds) (2011) 320.
[88] Pope H "Indigenous-law land rights: Constitutional imperatives and proprietary paradoxes" in *Pluralism & Development* Mostert H & Bennett (eds) (2011) 322.
[89] Pope H "Indigenous-law land rights: Constitutional imperatives and proprietary paradoxes" in *Pluralism & Development* Mostert H & Bennett (eds) (2011) 324.

In doing so it a parallel system of protection of land might be necessary. This allow customary land tenure the flexibility to be what it is, and not be what common law might want it to be.

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