

The Interplay Between the Legal Regulation of Communal and Private Land Ownership in South Africa

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Abstract

South Africa has adopted a hybrid system of landholding: both communal and private ownership are practised. Private ownership entails ownership of land by a person or entity governed by common law and supported by documentary proof through registration in the Deeds Registry. In the communal ownership system, the land vests in a collective that includes ancestors and the yet-to-be-born. These two distinct property regimes create irreconcilable problems. The private ownership system assumes that property rights are absolute and exclusive, in contrast to the indigenous African model of ownership, which is based on the principle that everyone in the community has rights to land, but that individual rights are balanced against their obligations to the social group. Furthermore, private and communal landholding institutions each articulate distinct bundles of rights, requiring two distinct control and enforcement mechanisms. This article examines the dilution of customary forms of tenure through the adoption of Western values, arising from common law rights created by a parallel system, with legal rights on paper and unrecognised customary rights in practice. The article also examines whether the customary practice of landownership can exist on its own in the current circumstances.

Keywords

Communal interest, communal landownership, dilution, private landownership.

1. Introduction

Landownership was a contentious issue both before and after the 1996 constitutional dispensation. The struggle for control and ownership of land in the pre-colonial period left a political legacy of large, dominant states in Africa, including South Africa.¹ Linked to this struggle for control and ownership of land is the fact that South Africa adopted a hybrid system of landholding, allowing for both private and communal landownership. Private landownership entails ownership of land by a person or entity, governed by common law

1 Other African countries include Zimbabwe, Algeria and the Buganda Kingdom in Eastern Africa.

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and supported by documentary proof through title registration under the Deeds Registries Act.² Once the land is registered, the person or entity that owns it can use it as they deem fit.³ Ownership of land involves rights and responsibilities.⁴ These rights include the rights to occupy, use, lease, and sell the property, and to exclude others from the property. The responsibilities include compliance with national and local regulations and the rights of others.

The concept of private land ownership is generally foreign to the indigenous peoples of Africa.⁵ Indigenous people in this instance are distinct social and cultural groups that share collective ancestral ties to the land where they live and its natural resources. They are the original people of a region, often with a long history of inhabiting a specific area in Africa.⁶ For the purposes of this article, the term 'Africans' is used in a broader sense to refer to a sense of belonging among the indigenous peoples of Africa.⁷ This is because identities are a component of an individual's sense of belonging: economic, political and socio-cultural dimensions are present in philosophical perspectives, whether explicitly addressed or not.⁸

Land is communally managed in many parts of African society. In a communal landownership setup, land ownership vests in a group and is managed for the benefit of the family and community.⁹ Management of the property can be placed in the hands of an older son or a person deemed suitable. However, this does not mean that the eldest son takes ownership of the property. Regrettably, this African arrangement, allowing the eldest son to manage the property on behalf of the family, has been distorted in some quarters, resulting in some sons and men taking ownership of the property, as evidenced in *Bhe v Magistrates Khayelitsha*.¹⁰ The court in *Bhe v Magistrate, Khayelitsha*,¹¹ declared primogeniture unconstitutional without interrogating living law to understand and distinguish between the distorted version of land management, where man incorrectly took ownership of property, and true living law, where man only managed property on behalf of the family.

The term 'communal' describes the extent to which management of land and access can be used by community members.¹² It does not in any way entail ownership of property

2 47 of 1937.

3 Exercising this right of ownership is, however, limited for various reasons, such as limitations imposed by law and limitations imposed by the rights of others.

4 Mostert, H, Pope, A & Badenhorst, P *The Principles of the Law of Property in South Africa* (LexisNexis, South Africa 2010) 26.

5 Mailula, D 'Customary (Communal) Land Tenure in South Africa: Did Tongoane Overlook or Avoid the Core Issue?' (2011) 4 *Constitutional Court Review* 14.

6 Okoth-Ogendo, HWO 'The Nature of Land Rights Under Indigenous Law in Africa' in Claassens, A & Cousins, B (eds) *Land, Power and Custom* (University of Nairobi 2008) 96.

7 Seife, TK 'Being, Belonging and Becoming in Africa: A Postcolonial Rethinking' (2021) 43 *Strategic Review for Southern Africa* 261.

8 Ibid.

9 See Gehman, R *African Traditional Religion in Biblical Perspective* (East African 2005) 217 on the contextualised expression of the living dead.

10 2005 (1) SA 580 (CC).

11 Ibid.

12 Cousins, B & Claassens, A 'Communal Land Rights and Democracy in Post-apartheid South Africa' in Jones, P, Stokke, K & Nijhof, M (eds) *Democratising Development: The Politics of Socio-economic Rights in South Africa* (Martinus Nijhoff 2005) 255.

in the terms that the colonists used. It is therefore impractical to achieve convergence between communal and common-law forms of ownership because the two systems comprise different rights and obligations that are deliberately in clear contrast. The customary form of tenure has been diluted by the imposition of common-law values and standards that adopt a 'one-size-fits-all' approach to tenure security. This article therefore examines the dilution of customary forms of tenure, infused by the adoption of Western values, arising from common law rights created by a parallel system, with legal rights on paper and unrecognised customary rights in practice. Furthermore, the article examines whether customary landownership practices can exist under current circumstances. To achieve this, the article provides background on communal land tenure in South Africa and its distinctive characteristics, which differentiate it from the common-law private landownership system. A description of the colonial framework that strengthened private landownership, along with an analysis of the dual landownership systems and their parallel application, follows. The article also discusses legislative attempts to address communal land tenure in South Africa. The article concludes by making recommendations to address communal land tenure and to cater for its unique nature.

2. Background to communal land tenure in South Africa

Communal land tenure in South Africa can be understood in the context of the centuries-long history of land dispossession and state regulation, as well as the role of various local knowledge-holders.¹³ This history includes high-profile rebellions and 'hidden struggles that played a role in the history of land ownership.'¹⁴ Dispossession of land, though it initially occurred through conquest and trickery, later became a major state policy, supported by an array of laws passed by the colonial government.¹⁵ The Native Land Act laid the foundation for apartheid and territorial separation and stripped Africans of the right to own land outside designated reserves, thereby denying them their ancestral link to the land.¹⁶ Land dispossession of the indigenous people by white settlers created tenure insecurity, and this situation was exacerbated by the apartheid laws and policies that allowed for forced removal and the denial of economic independence for indigenous African people.

Communal land holding, as practised by indigenous black people before colonisation, was severely distorted by government-sponsored communal tenure, despite being different to private forms of ownership.¹⁷ This is evident from the Glen Grey Act;¹⁸ in the Cape Colony in the 19th century, the government attempted to replace customary law tenure

13 Local historians or community elders informed of the traditional history of the respective communities, including traditional authorities.

14 Beinardt, W & Bundy, C 'Hidden Struggles in Rural South Africa: Politics and Popular Movements in the Transkei and Eastern Cape, 1890-1930' (1988) 29 *Journal of African History* 67.

15 Rugege, S *Land Reform in South Africa: An Overview* (Cambridge University Press 2019) 73.

16 Act 27 of 1913. Cousins, B 'Land Reform in Post-Apartheid South Africa – A Disappointing Harvest' (2013) <<http://latr.org.za/news>> accessed 11 May 2023.

17 Wolpe, H 'Capitalism and Cheap Labour Power in South Africa: From Segregation to Apartheid' (1972) 1 *Economy and Society* 425, 456.

18 25 of 1894.

with private ownership.¹⁹ Before colonisation, indigenous people practised the most fundamental forms of land tenure, inextricably linked to their existence.²⁰ The introduction of Roman-Dutch law brought a new form of land registration into South African law, establishing individual ownership of land as the most recognised and protected form of ownership. This was done by bypassing the Land Survey Act²¹ and the Deeds Registries Act. As a result, Africans' land ownership was limited to 7 per cent, and later to 13 per cent, under the 1936 Native Trust and Land Act.²² This in effect meant that 80 per cent of the population (Africans) was confined to 13 per cent of the land, while less than 20 per cent of the population (whites) occupied over 80 per cent of the land.

Prior to colonisation, South Africa was not an undifferentiated and ungoverned area. Indigenous laws and practices regulated landholding, access, rights and obligations to land. Contrary to colonisers' claims that they discovered a largely unoccupied South Africa, a literature review reveals the opposite.²³ Records by historians Davenport and Hunt detail how the indigenous San people were almost exterminated by the advancing white farmers.²⁴ While other African traditional groups resisted the theft of their land, most lost it either through wars or agreements the consequences of which they could not comprehend.²⁵ Colonisers asserted that the way in which indigenous communities occupied and used land did not constitute a system that was worthy of recognition under state law.²⁶ This in effect means that the colonisers had no respect for pre-existing African indigenous property relations.²⁷ Private landownership was introduced only when conquest was complete, and this conquest was strengthened by introducing a Western registration system that is still not practised by indigenous black people in most parts of South Africa. The apartheid era of formalised racial segregation from 1948 to 1994 saw the most extreme measures of land dispossession and labour control.²⁸ The unique nature and distinctive characteristics of communal landownership practised by the indigenous African majority are discussed below.

3. Communal landownership and its distinctive characteristics

The distribution of property rights in land in a communal setup is based on family relations and the socio-political system (the area's socio-political history, from which alliances and hierarchical relationships between lineages are derived), so that social networks

19 This Act, for example, entitled married men to only one arable plot, and only one titleholder was allowed to graze livestock on commonage land.

20 See generally Clark, J *The Pre-history of Southern Africa* (1959). See also Maylam, P *A History of the African People of South Africa* (Penguin 1985).

21 9 of 1927.

22 Miller, C & Pope, A *Land Title in South Africa* (Juta 2010) 20.

23 Ibid at 16.

24 Davenport, R & Hunt, KS *The Right to the Land Document No. 17* (David Phillip 1974).

25 Ibid.

26 Okoth-Ogendo (note 6) at 101.

27 Van Staden, M 'Colonialism and Apartheid Stripped Black South Africans of Land and Labour Rights' (2024) *The Conversation* 2.

28 Ibid.

govern access to land.²⁹ This customary system is, by nature, procedural and governed by unwritten traditional rules, but the rights to and ownership of land are well known and accepted in the community. Although communal landownership systems may vary from one place to another, they share common values and objectives, as well as a shared history and identity. Various academic studies have demonstrated that communities practising communal landholding do not embrace private landownership because of the advantages of communal landholding.³⁰ Some of these advantages include communal land held for community use, with every adult member a potential landowner, and benefits accruing to both the community and the household.³¹ Another advantage is the less costly transfer method through inheritance by family members.

Communal landownership is often criticised because there are no title deeds to the land, resulting in a lack of collateral security to obtain loans for agricultural or other purposes.³² The criticism is in clear contrast to the nature of communal landholding, which is aimed at community or household benefits rather than individual commercial benefits, such as securing loans.³³ Communal landownership is aimed at the communal interest and its value goes beyond financial interests, unlike private landholding. It aims to sustain community and family relationships, but the system of title deeds is viewed by Africans as destabilising communal relations. It is important to note that a landholding system is accepted by Africans only if it reflects the cultural norms and values in the social organisation.³⁴ Colonial interpretation of customary forms of landownership is therefore a clear distortion of gender-defined roles to fit the colonial agenda, rather than a true reflection of living customary law.

Proof of ownership or occupation of land in communal areas, particularly in areas under traditional leadership, is done through Permission to Occupy (PTO) certificates. A PTO certificate is a legal document that grants an individual or an organisation the right to occupy and use a property for a specific period.³⁵ A PTO, as a landownership or occupation system in areas practising communal landownership, is imposed on indigenous Africans as it is derived from apartheid policies and provides only for permit-based rights, which can be cancelled at any time by the state and are also inadequate for accessing loans or

29 Berry, S *No Condition is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (University of Wisconsin Press 1993) 88.

30 Cousin & Claassens (note 12) at 258.

31 Wycliffe, A & Griffith-Charles, C 'Achieving Land Development Benefits on Customary/Communal Land' (2019) 3 *Land Use Policy* 127.

32 Claassens, A *It is Not Easy to Challenge a Chief: Lessons from Rakgwadi* (Research Report No 9: Programme for Land and Agrarian Studies 2001) 9.

33 Cross, C 'An alternate Legality: The Property Rights Question in Relation to South African Land Reform' (1992) 8 *South African Journal of Human Rights* 305-333.

34 Schapera, I *A Handbook of Tswana Law and Custom* (2nd edn, Oxford University Press 1955) 199.

35 Coggin T 'Judicial Marginalisation of Communal Land Tenure in South Africa: A Critique of CASAC v Ingonyama Trust' (2025) 69 *Journal of African Law* 325. See also *Twelve Apostles Church in Christ and Another v The Twelve Apostles Church in Christ and Others* [2017] ZAKZDHC 41 (unreported) (12 October 2017), where PTOs took on a new meaning through customary law and practice, one that, in practice, denoted a customary law right. In this case, a PTO certificate served as sufficient proof that the property belonged to the first respondent.

housing subsidies. The legal status of the PTO certificate is thus contested: one party may view the PTO as signifying an already-existing customary law right to the property, while a traditional authority may believe its 'ownership' of Trust land entitles it to convert the holding to a leasehold.³⁶ This contestation is further amplified by the PTO's origin as an apartheid-era legal instrument, intended to denote less-than-ownership rights.³⁷ Since the colonisers introduced the PTO system under the guise of strengthening communal land tenure and its economic viability, a closer analysis of this system reveals a contradiction with the purported objective. This clearly demonstrates that the colonisers did not intend to upgrade or strengthen the communal land tenure system. Tenure in land held by indigenous people under the Black Land Act and the Development Trust and Land Act was precarious and legally insecure and never enjoyed the same legal recognition and protection as tenure afforded to private landholding under the Deeds Registries Act.

Communal and private landownership institutions each articulate very different bundles of land rights, requiring two distinct control and enforcement regimes. A significant problem in land tenure in South Africa has always been the challenge of combining indigenous African landholding concepts with Western concepts of land registration in the Deeds Registry Office, as embodied and influenced by Roman-Dutch law.³⁸ For instance, an absolute and exclusive right to property, as practised by the Western system of landownership, contrasts with the African system of landholding, in which rights are shared and relative. Landownership in the African context is inclusive, not exclusive, and rights and obligations are held at multiple levels of social organisation, from the neighbourhood to the village and the larger community.³⁹ For indigenous Africans, land is not only the basis of their existence as communities but also the root of their spiritual and cultural values, which need to be protected and preserved. With regard to the enforcement of land rights, indigenous Africans pursued conflict-resolution mechanisms through customary authority figures and rarely had written documentation of their land rights, while colonisers had their property rights recorded in documents and their disputes heard in colonial courts.⁴⁰

Tenure security and equitable access to land are constitutional imperatives given effect to by the Constitution.⁴¹ The Communal Land Rights Act⁴² (CLARA) was enacted to provide a number of rural dwellers, who experienced insecure tenure due to previous discriminatory laws and practices, with secure title and comparable redress.⁴³ In enacting

36 Coggin *ibid* at 326.

37 *Ibid*.

38 Kepe, T 'The Problem of Defining "Community": Challenges for the Land Reform Programme in Rural South Africa' (1999) 16 *Development Southern Africa* 415.

39 Cousins, B 'Reforming Communal Land Tenure in South Africa: Why the Land Titling is Not the Answer: Critical Comments on the Communal Land Rights Bill' (2002) 3 *PLAAS Rural Status Report* 6.

40 Kalabamu, F 'Land Tenure and Management Reforms in East and Southern Africa: The Case of Botswana' (2000) 17 *Land Use Policy* 305. In this instance, colonial courts refers to the South African formal courts that apply the law as influenced by common law.

41 Section 25(5) of the Constitution of the Republic of South Africa, 1996.

42 11 of 2004.

43 Section 4(1) of the Communal Land Rights Act.

CLARA, the legislature intended to address tenure security over communal land and allow the passing of ownership and the conversion of 'old order rights' to 'new order rights'.⁴⁴ Through this transfer of title by CLARA, members are issued with a Deed of Communal Land Rights. CLARA was intended to provide secure tenure for holders of communal land and to establish a democratic land administration regime. The literature shows that the Act has failed to address communal land tenure because it adopted a wholly inappropriate method for communal land tenure reform, through the issuing of land titles to either groups or individuals, after ownership has been transferred to the state, without due regard to the lessons that could be drawn from the wider African perspective.

Unfortunately, communal landownership remains a form of second-class ownership that does not enjoy the same protection and recognition as private landownership.⁴⁵ The challenges for the recognition of landholding by the indigenous people of South Africa unfortunately continued. Moyo states that, at independence, most African countries inherited 'a dual, unequal and hierarchical system of land tenure in which freehold and leasehold land rights were treated as superior to customary land rights'.⁴⁶ This narrow view of tenure reform obscures opportunities for reforms that strengthen the land rights of people in communal areas and ensure that their land cannot be alienated or otherwise used without their consent, whether by the government or by third parties. This is still the position despite CLARA. The declaration of the Act's constitutional invalidity is not based on its intended objectives but on procedural aspects, which means the Act was not tested on whether it has the potential to address the security of tenure on communal land. The stated intention of the Act is to conform to section 25(6) of the Constitution.⁴⁷ At the core of the Act's intent is the transfer of communal land from the state to traditional communities. However, this article contends that CLARA is not capable of addressing communal land tenure issues. The Act has been criticised for disregarding and disrespecting occupiers' communal rights.

4. Colonial legal framework strengthening Western notions of landownership

To enable the dispossession of land belonging to the indigenous black people, the colonial government adopted a formalistic approach using laws and policies. The Black Land Act⁴⁸ regulated the areas where land occupation was restricted to black persons only. In urban areas, segregation was driven by the Native (Urban Areas) Act,⁴⁹ the Blacks (Urban Areas)

44 Cousins, B 'Characterising Communal Land Tenure: Nested Systems and Flexible Boundaries' in Claassens, A & Cousins, B *Land, Power and Custom* (Juta 2008) 112.

45 See *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) on the third aspect (substantive question on undermining security of tenure) that was dealt with by the Constitutional Court.

46 Moyo, S 'African Land Questions, Agrarian Transitions and the State: Contradictions of Neo-Liberal Land Reforms' (CODISERA Working Paper Series 2008) 59.

47 Section 25(6) provides that a person or community whose tenure of land is legally insecure because 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 equitable redress.

48 27 of 1913.

49 21 of 1923.

Consolidation Act⁵⁰ and the Black Communities Development Act.⁵¹ The Blacks Land Act was succeeded by the South African Development Trust and Land Act.⁵² This Act provided for 'released areas' also restricted to black people. The Group Areas Act,⁵³ dealt with the acquisition and alienation of occupational rights to land and provided for four independent nation-states and six self-governing territories.⁵⁴ The Group Areas Act was enacted soon after the National Party took power in 1948. The Act was used by the then National Party to exclude black people from areas demarcated for use by white people only. This removal also included black farmers who had survived under the Land Act in that they had a legally recognised form of ownership (title deeds) to the land.⁵⁵ The Prevention of Illegal Squatting Act,⁵⁶ amplified the Group Areas Act and other racially based land laws by allowing for the eviction of people who had no formal rights to land. The Act authorised the state and private landowners to evict inhabitants and demolish their homes without court orders. The Act also applied to people who initially lived on the land with the owner's consent but were evicted when that consent was withdrawn, and who were classified as illegal squatters liable for eviction under the Act. This resulted in the evictees being forced to move into crowded rural communities or to other vacant land. All these laws authorised the forced removal and eviction of black people from their land.⁵⁷

Due to poverty, unemployment and lack of access to healthcare as a direct result of landlessness amongst the indigenous African community, there was continued pressure on government for speedy land reform. The establishment of a new government and the ending of apartheid in 1994 led to the expectation that black people's hopes for land reform would be realised.

The land reform policies of the democratic government began with the Constitution, the Reconstruction and Development Programme (RDP), and a consultation process involving community dialogues and expert advice, most notably from the World Bank.⁵⁸ The history of land registration in South Africa dates back to 1652. This is the history of colonisation and expansion to the north, which determined the underlying principles of South Africa's land registration. The history originated with the place of Charles V of Holland in 1529, which provided that every sale or hypothecation of land, houses, or any immovable property must take place before a court of law.⁵⁹ This required that, after the court proceedings, a register of such transactions be kept.⁶⁰

50 25 of 1945.

51 4 of 1984.

52 18 of 1936.

53 41 of 1950.

54 Kwandebele, QwaQwa, KwaZulu-Natal and KaNgwane.

55 Hains, R & Cross, C 'An Historical Overview of Land Policy and Tenure in SA's Black Areas' in Cross, C & Hains, R (eds) *Towards Freehold: Options for Land and Development in South Africa's Black Rural Areas* (Juta 1988) 73-76.

56 52 of 1951.

57 Mostert, H 'Diversification of Land Rights and its Implications for a New Land Law in South Africa' in Cooke, E (ed) *Modern Studies in Property Law* (University of Cape Town 2003) 4.

58 Khanya College *The Land Reform Process in South Africa* (Khanya College 2000) 19.

59 Van der Walt, A & Kleyn, D 'Duplex Dominium: The History and Significance of the Concept of Divided Ownership' in Visser, D (ed) *Essays on the History of Law* (Juta 1989) 213.

60 Edict of 1560.

Importantly, the Development Trust and Land Act⁶¹ provided for occupation of land by indigenous people, the ownership of which vested in the Trust administered by the Governor General in his capacity as a trustee.⁶² The power to sell or lease the land was vested in the trustee, meaning that indigenous people did not have the same ownership rights and that their security of tenure was severely limited. The Bantu Areas Land Act⁶³ and the Township Regulations⁶⁴ provided for the conditions under which indigenous people could lawfully buy, hire, or occupy land allocated to a Trust. The Bantu Areas Land Regulations recognised two forms of land tenure as quitrent:⁶⁵ tenure of land and occupation of land through a PTO certificate.⁶⁶ Although quitrent title was defined as a 'title deed', this form of security of tenure, like the PTO certificate, did not confer on the holder the same ownership as a title deed holder under the Deeds Registries Act. The holder could not transfer or dispose of the land without the consent of the Bantu Affairs Commissioner.⁶⁷ A PTO under the Bantu Areas Land Regulations also did not grant the holder full ownership rights in the property.⁶⁸ A PTO meant that chiefs and headmen had the responsibility in their areas of jurisdiction to allocate land; agriculturists had to survey the boundaries of sites and fields, and the magistrates had to issue the PTO certificates. The practice of issuing PTOs and quitrent by the past government regime resulted in the decline of security of tenure of women in rural areas in that PTOs and quitrent could be issued only to men; this demonstrated a shift in the dynamics of power between men and women, in clear contrast with the pre-colonial communal system.

5. An analysis of the two conflicting landownership systems

South Africa, even after apartheid, still faces the continued legacy of colonial land legislation and policies. This is because the South African government has implemented individual land titling programmes and policies without sufficient legal protection and recognition of the longstanding communal land system practised by the indigenous African majority. This is despite all existing legislation and constitutional provisions that provide for security of communal tenure.

Section 25(6) of the Constitution entitles persons whose tenure of land is legally insecure due to past racially discriminatory laws or practices to tenure which is legally secure.⁶⁹

61 18 of 1936.

62 Section 6 of the Development Trust and Land Act.

63 Proclamation R188, GG 2486, 11 July 1969, made under s 25(1) of the Black Administration Act 38 of 1927 read with ss 21(1) and 48(1) of the Development Trust and Land Act 18 of 1936.

64 Regulations for the Administration and Control of Townships in Bantu Areas, Proclamation R293, GG 373, 16 November 1962, made pursuant to ss 6(2) and 25(1) of the Black Administration Act 38 of 1927 read with s 21 of the Development Trust and Land Act 18 of 1936.

65 Quitrent was originally a form of leasehold on state land, held by white settlers in the early colonial period. It was extended to black people in parts of the Eastern Cape and Natal in the 19th century, but in a highly restricted form. These restrictions were that the land was inalienable and could not be mortgaged.

66 Proclamation R188 of 1969.

67 Item 2(2) of the Bantu Areas Land Regulations.

68 Item 4 of the Bantu Areas Land Regulations.

69 Section 25(6) of the Constitution of the Republic of South Africa, 1996.

Section 25(9) of the Constitution requires parliament to enact legislation to provide for such tenure. In addition to the above constitutional provisions, the 1997 White Paper outlines the foundation to land tenure in the former homelands. This is where African indigenous land tenure was held in trust by the government, which issued permits to black people in the homelands. The White Paper stressed that land tenure should move towards rights and away from the permits that were in place during the apartheid era. The White Paper intended to achieve unification of the system of land rights and a move away from the inferior system for black people that was developed during apartheid. According to the White Paper, people should be allowed to choose the tenure system that is most practical and suitable for their circumstances, provided that the system adheres to the Constitution's commitment to human rights, dignity, and equality.⁷⁰ These can be communal ownership, individual ownership, or a combination of both, depending on the community's circumstances. Should this approach be adopted, the remaining challenge is the security of tenure in communal landownership compared with individual landownership. This takes into account that, in communal landownership, relationships among people are more important than an individual's ability to assert their own interest in the property against the world.⁷¹ According to Okoth-Ogendo, land rights systems practised by indigenous communities are reciprocal in nature because they create commitments that bind community members together and vest power in them over land.⁷²

Colonialism brought a real estate market, the common-law concept of ownership, property law and contract.⁷³ The colonial government perpetuated an individual title system that disregarded the communal landownership system, so the African majority's relationship with the land was not recognised, and land held under communal tenure was often declared *res nullius* because it was not 'owned' under common law. According to Okoth-Ogendo, one of the fallacies about indigenous law constructed by colonial and post-colonial administrations was that indigenous law did not confer property in land. It was therefore asserted that indigenous communities did not use and occupy land in a manner that would create a system of property worth recognising under state law.⁷⁴ This view stems from the Western notion that property exists only when exclusive rights of use, abuse, and disposition are vested in individuals, in contrast to communal usage, where land administration and natural resources are treated as a privilege rather than a property right.⁷⁵ As a result, land that was viewed as *res nullius* was converted into individual title, a system foreign to African indigenous landownership, thereby creating conflicts among indigenous African people.

70 See para 4.18 of the South African Land Policy White Paper (1997).

71 Du Plessis, E 'African Indigenous Land Rights in a Private Ownership Paradigm' (2011) 14(7) *Potchefstroom Electronic Law Journal* 6.

72 Okoth-Ogendo (note 6) at 99.

73 Du Plessis (note 71) at 6.

74 Okoth-Ogendo (note 6) at 95.

75 Ibid at 97.

Huggins and Clover state that 'the rights to exclude others from land is a key feature of statutory systems, whereas African customary arrangements tend to be more inclusive'.⁷⁶ As things stand, the South African deeds registration system does not allow for the registration of African indigenous land rights but rather classifies rights in terms of the common-law notion of 'ownership'. Amanor argues that titling programs have continued to marginalise the poor and undermine the informal land rights of the rural African majority by transferring customary land management to those with economic and political power.⁷⁷ This argument seems to refer to the control and authority that ordinary community members have over the land allocated to them, and to the powers and authority exercised by both the state and traditional leaders, in which community members act only as usufructuaries. In pre-colonial South Africa, security of tenure in communal land meant that land thus acquired could not be allocated to individuals who did not belong to the group, clan, or family.⁷⁸ The land could not be sold or leased and was passed in perpetuity within the family. The transfer of land by gift, inheritance, or gratuitous loan was allowed.⁷⁹ In the case of cash transfers, the amount would be minimal and could not be compared to the value of the land.⁸⁰ According to Ranchod, customary land management was seen as obstructing the development of secure land rights, thereby delaying economic emancipation.⁸¹

Furthermore, Ranchod argued that communal landownership fails to provide incentives for land investment and offers no basis for credit allocation. This view, however, seems to be in contrast with what the communal landownership system intends to achieve, where land is seen as more than a commodity. According to Clark and Luwaya, customary tenure systems are traditional, indigenous forms of ownership usually managed by a community trust overseen by a community leader, typically a traditional leader.⁸² Authors who argue that individuals who own land privately in the form of title deeds are better-placed than those practising an indigenous form of landownership base their argument on the fact that they have the option to sell their land rights, mortgage or even lease the land, as opposed to the limitations on customary land use rights such as limitations on selling, leasing or mortgaging.⁸³ This argument tends to promote the imposition of a private

76 Huggins, C & Clover, J 'Introduction' in Huggins, C & Clover, J (eds) *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa* (Institute for Security Studies 2005) 1.

77 Kojo, A *Land Governance in Africa: How Historical Context Has Shaped Key Contemporary Issues Relating to Policy on Land* (Mokoro 2012) 17.

78 *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* 2021 (8) BCLR 866 (KZP) para 136.

79 Ibid para 96.

80 Ibid para 98.

81 Ranchod, V *Land Reform in South Africa: A General Overview and Critique* (Masters Dissertation, University of KwaZulu-Natal, 2004) 35.

82 Clark, M & Luwaya, N 'Communal Land Tenure 1994-2017: Commissioned Report for High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an initiative of the Parliament of South Africa' (2017) <https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Tenure_Reform_LARC.pdf> accessed 10 September 2024.

83 Bennett, TW *Customary Law in South Africa* (Juta 2004) 375.

landownership system onto a communal landownership system without considering the range of factors involved, the unique nature of this landownership system, or the objective for which this system was adopted, even before colonisation. This is because the imposition of individual titling, rather than communal landownership, dilutes community identity and exposes low-income communities to even greater insecurity.

6. Dual application

The imposition of the dual tenure system by the colonial government enforced divisive ownership across racial lines with the implementation of the Glen Grey Act⁸⁴ and the Native Land Act.⁸⁵ Since then, the tenure reform debate has tended to focus narrowly on the merits, or otherwise, of converting informal traditional systems of communal rights into ‘modern’ formal systems through adjudication and individual titling.⁸⁶ Cousins and Claassens noted a practical challenge in how to recognise and secure land rights that are clearly distinct from ‘Western legal’ forms of private property, but are not simply ‘customary’, given the impacts of both colonial policies and past and present processes of rapid social change.⁸⁷ Du Plessis identified the main problem as the need to legally recognise and secure communal and private tenure rights equally.⁸⁸ In Cousins’ view, pre-colonial land tenure was both ‘communal’ and ‘individual’, and could be seen as ‘a system of complementary interests held simultaneously’.⁸⁹ In this system, according to Cousins, different interests in the same property could vest in different holders. The complementary interests are said to be dynamic and ever-changing.⁹⁰ In Kameri-Mbote’s view, although a measure of individual control over the broad interests that were embedded in land is recognised in African customary law, the paramount title to land is ‘perceived as vested above society and whatever rights any person had to the land were subordinate to the entire community interests’.⁹¹

The differences between statutory and customary tenure systems in South Africa are the main source of tenure insecurity. The colonisers, in justifying their approach, believed that custom was timeless and static, thereby failing to understand its changing and diverse nature.⁹²

84 25 of 1984.

85 Ngcukaitobi, T *The Land is Ours – South Africa’s First Black Lawyers and the Birth of Constitutionalism* (Penguin Random House 2018).

86 Adams, M, Cousins, B & Manona, S ‘Land Tenure and Economic Development in Rural South Africa: Constraints and Opportunities’ Working Paper 125, Overseas Development Institute (1999).

87 Cousins, B & Claassens, A ‘More than Simply “Socially Embedded”: Recognising the Distinctiveness of African Land Rights’ in Claassens, A & Cousins, B (eds) *Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act* (UCT Press 2009) 3.

88 Du Plessis (note 71) at 47.

89 Cousins (note 44) at 114.

90 Du Plessis (note 71) at 53.

91 Kameri-Mbote, P ‘The Land Has its Owners! Gender Issues in Land Tenure under Customary Law in Kenya’ International Environmental Law Research Centre (IELRC) Working Paper No. 9 of 2005, <<http://www.ielrc.org/content/w0509.pdf>> accessed 17 September 2024.

92 Berry, S ‘Debating the Land Question in Africa’ (2002) 44(4) *Comparative Studies in Society and History* 638-668.

This view is shared by Migot-Adholla,⁹³ as well as Potgieter and Heunis,⁹⁴ who add that, until recently, indigenous African land rights systems have been incorrectly presented by most foreign anthropologists, colonial administrators and nationalist idealists as static polar opposites to Western property rights. According to Mwangi, privatisation of land during colonial times resulted in a shrunken resource base and increased land insecurity among the African majority.⁹⁵ Proponents of individual landownership such as Harding advocated the idea that communally held land often leads to a 'tragedy of the commons' where open-access regimes lead to land degradation.⁹⁶ This view played into the hands of resource-grabbing post-colonial administrators, who could safely sustain the myth that landholding rights under customary tenure could not be legally recognised as more than occupancy and use rights.⁹⁷

According to this view, titling is not the remedy for land tenure and the economic factors associated with it. With this view, a robust reform tailored to the circumstances of each area, with sustained institutional, financial, and material support systems, is suggested. Therefore, the government's efforts to individualise the communal land tenure system violate the indigenous value system of communal landownership and are likely to enjoy less support among the African majority living on communal land. This is a mistake that the South African government made by imposing Western values, leading to the abandonment of indigenous religious identity, values and systems. To illustrate the inescapable contradictions between individual and communal land systems: an old and acceptable practice for punishing offenders in communal areas is to withdraw their right to use and access land allocated by the King or community leader; in the individual landownership system, the owner exercises an exclusive right to the property and can lose this right only through legally recognised Western methods such as sale and auction.

7. The Communal Land Rights Act attempts to address communal land tenure

The South African government introduced CLARA to upgrade the existing communal land tenure system into a secure and registrable form of land tenure and thus ensure a proper land administration system and attract investment in previously neglected communal areas. The problems that resulted from South African land tenure reform were the result of the lack of recognition of local knowledge systems by outsiders offering assistance to the African majority in communal areas. This is where the process of public participation by affected communities in decisions affecting their day-to-day lives becomes crucial.

93 Migot-Adholla, S, Hazell, P, Blarel, B & Place, F 'Indigenous Land Rights Systems in Sub-Saharan Africa: A Constraint on Productivity' (1991) 5(1) *The World Bank Economic Review* 155.

94 Potgieter, J & Heunis, C 'Consideration with Regard to Land Reform in the Free State: Land Use, Availability and Needs' (1995) 34(4) *Agrekon* 172.

95 Kamara, A 'The Dynamics of Land Use and Property Rights in Semi-Arid East Africa: Ethiopia Case Study' in Mwangi, E (ed) *Collective Action and Property Rights for Sustainable Rangeland Management* CAPRI Research Brief (Washington DC Capri, 2005).

96 Harding, G 'The Tragedy of the Commons' (1968) 162(3859) *Science* 1243.

97 Wily, L 'Customary Land Tenure in the Modern World. Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa' Brief 1 of 5, Rights and Resources Group (Washington DC 2012).

The question was whether the Act would conform to the constitutional mandate under which it was promulgated, namely, sections 25(5), (6), and (9) of the Constitution. Section 25(9) places a positive duty on the state to promulgate legislation to give effect to section 25(5) and (6). Since these three constitutional guarantees form CLARA's mandate, the expectation was that the Act's tenure provisions would conform to them. The Act attempted to ensure tenure security and redistribute state-owned land to its current occupiers. To be specific, the Act aimed to provide access to land and secure title for those living in rural areas, particularly on land vested in the Development Trust.⁹⁸

CLARA advocated for the transfer of land to rural communities, registered in the names of lawful owners and inhabitants. Land tenure, in this context, was directed at land users who already have access to land, but whose land rights and interests remain weak due to apartheid laws and practices, including apartheid laws and policies that created or deepened problematic power structures in communal land use systems. The South African government, therefore, with the introduction of CLARA, deemed it necessary to grant real legal recognition and protection to these insecure communal land rights.⁹⁹ CLARA aimed to provide equitable access to land to a community by forming Communal Property Associations (CPAs). CPAs were intended to ensure tenure security in communal areas, where members of a particular community can come together to establish an association as a juristic person, with the aim of acquiring land ownership to be registered in the association's name. This arrangement also had challenges. One of those challenges is the rules governing the formation of the association. Drafting the community rules became a prerequisite for the acquisition of juristic personality; the lawyers involved in this process were not always aware of the communities' tenure arrangements and therefore did not help secure them.¹⁰⁰

The criticisms levelled against CLARA became clear in the *Tongoane* case. CLARA provided for communities who can achieve tenure security without focusing on the difficulty of defining a community. Furthermore, CLARA grants the Minister of Land Affairs sweeping powers regarding the allocation of land or comparable redress to communities. This also includes his delegates. Despite the *Tongoane* judgment, the problem of securing indigenous land rights remains unresolved.¹⁰¹ The applicants in the case challenged the constitutionality of CLARA on the basis that the Act's introduction threatened their right to use and occupy the land as regulated under customary law.¹⁰² Put differently, the applicants argued that the provisions of CLARA undermine security of tenure in communal land. The communities were concerned that their indigenous law-based system of land administration would be replaced by a new system that would not fit their circumstances.

This would have an impact on the evolving indigenous law which had always regulated the use and occupation of land. Furthermore, the community was concerned

98 Davenport, R *South Africa: A Modern History* 4th ed (McMillan 1991) 176.

99 Van der Walt, A *Constitutional Property Law* 3rd ed (Juta 2011) 309.

100 Pienaar, G 'The Land Titling Debate in South Africa' (2006) 3 *Journal of South African Law* 442.

101 Du Plessis (note 71) at 46.

102 Cousins (note 44) at 31.

that their land would, because of the introduction of CLARA, be subjected to the control of traditional councils, which they considered as incapable of managing the land for the benefit of the communities. Therefore, community members feared that the provisions of CLARA would undermine the security of tenure they presently enjoyed on their land, and landowners feared they would be divested of their ownership. The government, despite challenging some of the applicants' claims, acknowledged that the land occupied by the communities was administered in accordance with indigenous law and that traditional leaders, particularly tribal authorities, play a role in administering communal land.¹⁰³ The applicants' main argument was that CLARA is inconsistent with section 25(6) of the Constitution and that it should therefore be declared invalid. CLARA was challenged for contravening the very constitutional requirement it seeks to fulfil, namely, to provide for the legal security of tenure of communal land.¹⁰⁴

Despite the applicant's important challenge to the introduction of CLARA, the court addressed only the procedural issues and did not consider the substantive aspects of the matter. The procedural issues related to, firstly, proper tagging and, secondly, Parliament's failure to facilitate public involvement in its law-making process. The court held that the tagging of Bills must be guided by the need to ensure that the provinces fully and effectively exercise their appropriate role in considering national legislation that substantially affects them.¹⁰⁵ Ngcobo CJ held that the inescapable conclusion was that various provisions of CLARA affect, in substantial measure, indigenous law and traditional leadership, both of which are areas of concurrent national and provincial competence.¹⁰⁶ Ngcobo CJ found that CLARA replaces the living indigenous law regime which regulates the occupation, use and administration of communal land.¹⁰⁷ Ngcobo CJ further found that CLARA replaces both the institutions that regulated these matters and their corresponding rules. He accordingly concluded that parliament followed an incorrect procedure in enacting CLARA.¹⁰⁸ Because these procedural requirements were not met, the Act was declared invalid.

Various authors have criticised the *Tongoane* judgment for failing to engage with the substantive issues raised by the applicants. Since the declaration of invalidity, there has been no new legislation or policy directly addressing communal land tenure in South Africa. A new Bill was circulated for comments in 2017 but has not yet been reintroduced to parliament. This means that, to date, the government has not passed constitutionally acceptable legislation to address the security of tenure in communal land ownership and give effect to section 25(6) of the Constitution.

8. Conclusion

Security of tenure is difficult for many rural community members to fully comprehend. The system amounts to the codification of customary law without any consultation with

103 Ibid at 39.

104 Ibid at 28.

105 Ibid at 60.

106 Ibid at 74.

107 Ibid at 75.

108 Ibid at 98.

community knowledge-holders in the decision-making process. The government needs to be intentional in addressing communal land tenure by making resources available to facilitate effective public participation by adopting ordinary indigenous processes of consulting affected communities. Legislation and policy frameworks that contain ambiguities about land ownership and management are frequently problematic. This is coupled with the legislature adopting norms and systems foreign to indigenous practices, leaving ordinary community members unable to understand and comply with them. The state's failure to enact effective legislation has turned the courts into sites of struggle for achieving land rights.¹⁰⁹ The government needs to strengthen institutions established to ensure that the rights to human dignity, equality and freedom of ordinary people are realised and given effect, as provided for in the South African Constitution. Individual titling is not a remedy for communal land tenure, given its unique nature. Therefore, communal landownership should be recognised on its own terms and measured according to its own norms and standards.¹¹⁰

How to cite:

Ntsoane, L.S. and Manthwa, A.T. 'The Interplay Between the Legal Regulation of Communal and Private Land Ownership in South Africa' (2026) 6 *Turf Law Journal* 1-16.

109 *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust Board* 2021 (8) BCLR 866 (KZP) 18.

110 See Wicomb, W 'Law as a Complex System: Facilitating Meaningful Engagement between State Law and Living Customary Law' (2010) Paper presented at the IASC international conference on the Complex Commons, Hyderabad, India, January 2011.