THE MORE THINGS CHANGE, THE MORE THEY STAY THE SAME: THE STORY OF COMMUNAL LAND TENURE IN SOUTH AFRICA

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Philip Thomas more than once said: “History ends yesterday.”

1 Introduction

Through the ages land has always been a contentious issue.¹ Even from the earliest Roman times those in power interfered with land ownership.² In ancient times³ restrictions were placed, for example, on excessive luxury, whereas in the time of Justinian land tax was raised and unused land confiscated by the state.⁴ In the feudal era feudal lords disregarded their vassals and neglected their land in pursuit of their own pleasure.⁵ In England pastoralists were forced to become agriculturalists.⁶ Each country and each century have their own stories to tell.

South Africa is no exception. Land ownership is an emotional issue, especially in the context of its apartheid legacy. Land reform and stories of success and dismal failure

⁴ Kaser (n 3) 3.23.
⁵ Van den Bergh (n 1) 19-20; see also Berman “The Origins of Western Legal Science” 1977 Harvard LR 894 896.
⁶ Van den Bergh (n 1) 21-22.

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have added a further dimension to the issue. Within this context the history of communal land tenure in South Africa and its unique story also has to be told.

According to Letsoalo, the concept of “communal land tenure” had been misunderstood during the centuries, and legislative interference has corrupted this notion even further. Some described communal land tenure as land belonging to the community with a traditional leader as trustee of the land, while others define it as land belonging to a traditional leader who could allocate land – sometimes referred to as “chiefly tenure”;

or regard it as akin to feudalism. With regard to the traditional concept of “communal land tenure”, Letsoalo remarks that the traditional leader is seen as the ruler of the people and therefore also as the ruler of the land. He does not make decisions on his own but in consultation with the traditional council. On his marriage, a husband is allocated land for residential and agricultural purposes; he then owns the land “because the link between the land and the individual tribesman was stronger than the link between the land and the chief”. Widows may also be allocated land. Unallocated land was used for grazing. However, there is also another form of communal land tenure that is sometimes overlooked, namely that of the pastoralists of the Northern Cape, a form recognised in the decision in Alexkor Limited v The Richtersveld Community and Others.


Letsoalo (n 8) 18.


Letsoalo (n 8) 18-19.

Letsoalo (n 8) refers to “chief” as “he/him”.

In KwaZulu-Natal communities follow the practice of leasing their land to others for arable and grazing purposes: see Crookes & Lynne “Efficiency and equity gains in the rental market for arable land: Observations from a communal area of KwaZulu-Natal, South Africa” 2003 Development Southern Africa 579-593.

Letsoalo (n 8) 21-23. The land was allocated to a specific person and his family. It could be inherited, according to a saying quoted by Letsoalo: “Land belongs to a vast family of which many are dead, a few are living and countless numbers are still unborn” (21). This does not refer to ownership by the community, but by the family. The only way in which a person could lose the land was when they severed their ties to the community. He or she had full decision-making powers regarding the land, could erect fences and could allow others to plough the lands. See also Schapera A Handbook of Tswana Law and Custom (1970) 195-238; Comaroff & Roberts Rules and Processes The Cultural Logic of Dispute in an African Context (1981) 177.

There are many versions of South Africa’s land history and many perspectives to these histories. It is impossible to relate this history in full, even if one focuses only on the reform of land tenure. This contribution concerns communal land tenure in South Africa and the different stages of development it has undergone since colonial times. It does not pretend to be an exact history, but will provide a very brief overview of the story of the legislative interference with communal land tenure. It will do so in support of Thomas’ premise that legal history was written yesterday, is still being written today, and will be written tomorrow. The contribution consists of two main parts, namely the developments that preceded the new political dispensation in 1994, followed by the occurrences after 1994 as embodied in the tenure reform programme within the communal land context.

2 Developments prior to the constitutional dispensation

2.1 Initial contact

The initial history of communal land tenure, derived from the time when contact was first made between the settlers and indigenous communities, seems to centre on a lack of understanding of the different customs and values pertaining to land and their bearing on a sense of survival. When the early settlers in the Cape came into contact with the San and Khoi, who were hunter-gatherers and pastoralists with no specific territory, land disputes were settled by means of force. The colonial authorities did not understand the social and cultural structure of these communities. When the Khoi, for example,


19 It would be impossible to present a comprehensive study as it would span volumes. It is also to be observed that history is an interpretation of the facts as interpreted by someone else: the true story will never be known. See in this regard Du Plessis “Afrika en Rome: Regsgeskiedenis by die kruispad” 1992 De Jure 289-307; Oliver & Atmore Africa since 1800 (1981) 1 and, in general, Clark (ed) Cambridge History of Africa (1975-1989) Vols 1-8.

did not want to sell their cattle, the colonialists regarded it as an act of aggression and resorted to violence in retaliation by confiscating the Khoi’s cattle. As a result, the Khoi became impoverished, dependent on their new colonial masters, and were no longer able to live according to their tribal customs. Similarly, the San and Khoi resorted to violence to protect their water resources and hunting areas. That, too, was seen as an act of aggression against the colonial government. Eventually those members of the San and Khoi who could do so, fled the area, some to the Northern Cape.

When from the 1770s the new settler community in the Cape expanded its borders towards the east, they came into contact with the AmaXhosa. They lived in a tribal hierarchy which recognised the concept of communal land tenure. The settler-farmers who trekked northwards also came into contact with communities with similar forms of land tenure. Although individual land ownership was not encouraged in the Cape and long-term leases were granted by both the Dutch and the English, the concept of communal land tenure was foreign to the individualistic concept of land control or “freehold” known to the settlers.

### 2.2 Official interference before 1913

Power has always played a role in the history of communal land tenure. From the 1800s, the different colonial governments formally interfered with the institution of communal land tenure by way of legislation and sometimes indirectly so by way of propaganda. In the period before 1913, official interference with communal tenure was more prevalent in the Cape and Natal, while unofficial interference prevailed in the other areas in South Africa.

In 1883, in the Cape Colony, the Natives Laws and Customs (Thembuland) Commission proposed that everyone (outside the communal areas) should receive individual titles to land in order to ensure loyalty towards the Crown. By 1894, several people had already left their communal land to settle in towns and urban areas. The Cape Government did not follow the recommendations of the Commission and refused to grant ownership to black people in the so-called white areas. In an attempt to convince

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22 *Idem* (n 21) 32.
25 In the Cape, land was initially only given in loan to European farmers. In 1675 conditional land titles were granted and the *leeningplaats* (farm given in loan) system developed. In 1732, a fifteen-year quitrent was introduced. Freehold developed in 1743. In 1813, the British introduced perpetual quitrent and the use of freehold from 1862. See in this regard Carey, Miller & Pope (n 17) 3-15.
26 *Idem* 16. This also led to disputes as the AmaXhosa, eg, regarded free ranging cattle as cattle that could be claimed while white farmers considered such actions as theft. See in this regard Du Plessis (n 19) 300.
them to return to their areas of origin, the government promised them land with a secure form of tenure, namely quitrent and leasehold, which was foreign to communal land tenure. The Cape Government promulgated the Glen Grey Act of 1894 to achieve this objective.28

The traditional communities’ land was surveyed and registered in the Eastern Cape. They did not accept this system as they felt it restricted them to a specific piece of land.29 However, Simons30 is of the opinion that a better system had been introduced by formalising communal land tenure, resulting in women also obtaining land in their own names. On 12 August 1898, Proclamation 227 of the Cape provided for “one man, one lot”, with the effect that women could no longer obtain land in their own names. If they were destitute due to the demise of their husbands, their sons had to provide for them. Widows were only allowed a form of usufruct over the land. The moment the widow died, the land was transferred to the head of the family, who could be her son, a brother or an uncle of her deceased husband.31 In 1905 it was proclaimed that a widow or widows could remain on the land if the governor so decreed.32

The Governor of Natal was regarded as the trustee of all land in Natal and also as the Supreme Chief of the AmaZulu.33 In 1864, Governor Pine thought it unrealistic to allow tribes to reorganise themselves in the tribal areas.34 According to him, white farmers could not keep up with African farmers who, in his opinion, had “slave women” to work in the fields. The resistance built up in the settler community to Pine’s statements had no factual or moral basis, as Pine knew that the AmaZulu farmers did not produce for the market. However, he used the resistance as an excuse to divide land in such a manner that for every thirteen acres of land granted to a Zulu farmer, 6 000 acres were granted to a settler-farmer. Some of the farmers allowed the AmaZulu to remain on their farms in exchange for work and land – with the result that the AmaZulu became mere “share croppers” on their ancestral land.35

The Maroka tribe near ThabaNchu, who assisted the Free State Republic in the war against Mosjoesjoe, received land in ownership in 1885.36 Similarly, some communities

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28 See Haines & Cross (n 16) 74.
29 The following is based on Simons African Women Their Legal Status in South Africa (1968) 261-265.
30 Idem 261.
31 Simons (n 29) 261-262.
33 See in this regard Letsoalo (n 8) 33.
34 Several other laws were promulgated, eg, Natal Ord 2 of 1855 restricting landowners to housing only three black families on their farms. Similar restrictions were issued in the former Transvaal, namely by the Transvaal Squatters’ Law 21 of 1895 as amended by Law 11 of 1887; see also Letsoalo (n 8) 32 in this regard.
36 Seape (n 16) 93 95; see also Cross (n 20) 74, who states that “the Orange Free State permitted no individual tenure for Africans, except in the Thaba’Nchu district where individual holdings had been established before the area was incorporated into the Republic”.

who had assisted Paul Kruger were granted land in ownership in the late 1800s. After the Anglo-Boer War, in 1902, the British sold land to black communities without formal transfer so that the land remained Crown land. In 1905 in the Tshewu decision the Pretoria High Court held that everybody was entitled to buy land, which resulted in land being bought by black communities from impoverished white farmers.

The Cape Government did not concern itself too much about the Northern Cape in the period from 1820 to 1850. This resulted in the settlers taking the law into their own hands. That caused uprisings and land disputes. The San, Khoi, Koranna and Griqua communities lived in this area according to their own customary rules as pastoralists and hunters without the land being demarcated. Conflict arose when the Koranna came into contact with the white settlers in the Orange River area in 1862. Missionaries applied for titles to the land so to ensure that Koranna communities were not deprived of their land. However, the land was surveyed and in 1867 sold to the highest bidders. The Koranna communities could not compete. White farmers bought the land and forced the local communities further north. Some Xhosas obtained land title in the area but later sold their land to white farmers. By 1868 most of the Koranna had moved to the Prieska area.

In 1875, a land court was instituted to deal with land disputes in the area. Claims from the Griqua were ignored as they could not, because of their pastoralist way of life, prove that they had previously occupied the land. Consequently most of the Griqua lost their land. More white farmers settled in the region, a fact which led to a war which lasted from December 1878 to July 1879. However, the Griqua did not manage to reclaim their land.

When the Union was constituted in 1910, many Africans had lost their land or no longer lived within their traditional communities. Those who still lived in tribal areas either did so according to their own customs and practices or in terms of a land tenure system that was enforced officially.

2.3 The height of official interference: 1913 to 1991

During the period 1913 to 1991, several pieces of legislation were introduced to regulate communal land tenure in accordance with a government policy of segregation. The history of land in this period has been well documented from various points of view, and therefore only a few examples of official interference will be provided.

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37 1883 Volksraad Decision: see Letsoalo (n 8) 33-34.
38 Tshewu v Registrar of Deeds 1905 TS 130.
40 Jones (n 23) 5-7.
41 Ibid; Leggasick The Griqua, the Sotho-Tswana, and the Missionaries 1780-1840 the Politics of a Frontier Zone (1970) for a history of the Koranna.
42 Jones (n 23) 5-7; Davenport & Saunders (n 21) 149.
43 Various forms of protest had taken place since 1884: see in this regard Davenport & Saunders (n 21) 149.
44 See for example Carey, Miller & Pope (n 17) 16-42; Haines & Cross (n 16) 73-92.
The first serious interference came in 1913 with the introduction of the Black Land Act 27 of 1913. One of the reasons for the Act was to prevent black land ownership and to control communal land tenure, which was seen to be in conflict with individual land tenure. Black people were allowed to settle on or be in possession of land only in the so-called scheduled areas created in terms of the 1913 Act. Black people outside these areas had to “return” to their “land of origin”. This was extremely difficult as the ancestors of some of them had left their communities many decades ago with no subsequent contact. The Act resulted in thousands of people roaming South Africa to find a place to live. Misery, the death of children and cattle, and eventual impoverishment resulted. Essentially the scheduled areas consisted of stretches of communal land that were not large enough to ensure a sustainable livelihood for those occupying it.45

In 1936, the Development Trust and Land Act 18 of 1936 was introduced. One of its objectives was to provide more land for black settlement. It was envisaged that the Act would address the problem of squatting that had resulted from there being insufficient land in the scheduled areas. The Act also enabled the government to create a trust (the South African Development Trust – SADT) to buy additional land (so-called released areas) to enlarge the scheduled areas. Black settlement in these areas was possible, but ownership could not be vested. However, the land so acquired was still not enough to meet the demand.46

The Land Acts of 1913 and 1936 did not prescribe specific forms of land tenure. The practice developed that the then Minister of Black Affairs registered the land in his name. Accordingly, all communal land was endorsed in the Deeds Office as state land regardless of whether or not communities had any proof that they were indeed the owners of the land.47

In 1969, Proclamation R188 was issued in terms of section 25 of the Black Administration Act 25 of 1938.48 Supposedly it regulated communal tenure in a form that Government perceived to be true to its nature. This was achieved by providing for two types of tenure, namely quitrent on surveyed land, and a permission to occupy on unsurveyed communal land.49 Women could not acquire quitrent land except by way of inheritance and only if so decreed by an official.50 Usually permission to occupy was allocated by the community itself and a dedicated member of the community informed

45 See in this regard also Davenport & Saunders (n 21) 271.
46 Yawitch (n 16) 101-104.
49 These rights could not be transferred by way of a will: reg 53(5) read with s 23 of the Black Administration Act 38 of 1927. Succession was described in reg 35. The rules were supposed to be in accordance with the rules of the customary law of succession. Women were therefore excluded from inheritance: see in this regard Du Plessis “Status of black women pertaining to land” 1996 Obiter 127-138.
50 Reg 21(4) read with reg 37(1). The widow had to accept this allocation within three months of her husband’s death.
the relevant official (later the magistrate) of such allocation. The official (or magistrate) then entered the allocation in a land register.\(^{51}\) Permissions to occupy were granted to a head of a family, a category that could include females, either for residential or arable purposes.\(^{52}\) A widow, only if a head wife of a holder of a permission to occupy, could continue to occupy the land after her husband’s death or her remarriage; the permission to occupy was not re-issued but remained in the name of the deceased husband.\(^{53}\) The allocation of a permission to occupy was discredited in some areas as a reaction to the corruption of the traditional leaders (sometimes appointed by the Government) and officials.\(^{54}\)

The division of South Africa into so-called “independent and self-governing territories” took the interpretation of “communal land tenure” a step further and contributed to the increasing fragmentation of land.\(^{55}\) As for the independent (or national) states, Bophuthatswana and Venda passed their own legislation dealing with land allocation and land use in their rural areas.\(^{56}\) Proclamation R188 continued to be applied in the self-governing states.\(^{57}\) After 1991 some of the territories issued their own amending legislation regarding the administration of land.\(^{58}\) In large parts of rural KwaZulu, people ignored Proclamation R188 and applied customary law to determine the allocation of land.\(^{59}\)

So-called “coloured” rural areas were reserved for occupation by coloured persons in the Western Cape, the Northern Cape and the Free State. Although this landholding system is dealt with in more detail below,\(^{60}\) it is important to note here that the relevant land was held in trust by the Minister of Own Affairs: Coloureds (later the Minister of Land Affairs and Agriculture), under the Rural Areas Act (House of Representatives) 9 of 1987, promulgated by the House of Representatives.\(^{61}\)

From this exposition it should be clear that the racially based approach to land tenure in South Africa resulted in a fragmented, complex system that embodied numerous

\(^{51}\) Reg 47(3).

\(^{52}\) Reg 49(1)(b). In practice, however, it was mostly allocated to men.

\(^{53}\) Reg 53(1). The right lapsed if the land was not occupied or beneficially cultivated for a period of six to twelve months after the death of the registered holder: reg 53(2)(a)-(c).

\(^{54}\) See, eg, Claassens “Women, customary law and discrimination: The impact of the Communal Land Rights Act” 2005 Acta Juridica 42 at 73-74; Cross (n 20) 72-73.

\(^{55}\) For a history of legislation in the former independent and self-governing territories, see Du Plessis “Grendwet van die Nasionale State 21 van 1971. ‘n Historiese oorsig” 1990 Tydskrif vir Regswetenskap 84-107.

\(^{56}\) Bophuthatswana Land Control Act 39 of 1979; Venda Land Affairs Proclamation 45 of 1990.

\(^{57}\) Gazankulu; KwaZulu; QwaQwa; KwaNdebele; KaNgwane; Lebowa.


\(^{59}\) See also Cross (n 20) 71-73.

\(^{60}\) See 3 3.

\(^{61}\) Before 27 Apr 1994, persons belonging to the coloured group had their own parliamentary chamber, the House of Representatives. This Act was promulgated by the House of Representatives in the interest of its members. For more detail see Carey, Miller & Pope (n 17) 449-455; Badenhorst, Pienaar & Mostert Silberberg and Schoeman’s The Law of Property 5 ed (2006) 605-606.
forms of land control for different geographical areas at different times. Apart from tenure itself, existing land administration and governance systems contributed to the challenges for reform. Large portions of the country were either wholly unsurveyed or surveyed only informally by making use of a chain system, where a pre-measured chain was used to determine the size of a lot of land. Record-keeping was shoddy and in some areas wholly abandoned in the 1980s. Where records did exist, some data was lost due to political upheavals in which court buildings were destroyed. The legacy of official state interference during the period 1913 to 1991 necessitated an all-encompassing reform of land-related matters. It is within this context that preparatory work for the full-scale tenure reform was embarked on during the period from 1991 to 1994.

2.4 A step towards equality: 1991 to 1994

From 1991 to 1994, due to internal and external pressure, official interference was aimed mainly at reforming land measures by publishing a land policy and, in 1991, promulgating some legislation. Although the Abolition of Racially Based Land Measures Act repealed the Land Acts of 1913 and 1936 and other race-based legislation, it did not repeal the regulations and proclamations issued in terms of the Land Acts. Section 25 of the Black Administration Act, which provided for the President to issue proclamations with regard to black affairs, remained intact. Proclamation R188 and other subordinate legislation issued after 1913, as well as the land-related measures in the former homelands, also still applied.

The Upgrading of Land Tenure Rights Act, which is still relevant today, provided for the upgrading of inter alia the permission to occupy and of quitrent to ownership if these were conferred in respect of surveyed land. Provision was also made for the transfer of ownership of land to the community by way of tribal resolution. This was rarely implemented and as far as could be established may even have been abused.

3 A new political dispensation: Developments after 1994

3.1 Background

The discussion above has shown that two main categories of communal tenure were prevalent in South Africa, namely (a) communal tenure in the former national states and self-governing territories, which may be referred to as indigenous or customary

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62 Eg, in KwaZulu Natal, due to the non-application of Procl R188, which required areas to be surveyed.
63 Eg, the destruction of magistrates’ courts in the Eastern Cape.
64 White Paper (n 18).
66 Ss 19-20. A land title register may be compiled: s 24D(3).
communal tenure; and (b) communal tenure in the so-called “coloured” rural areas. The complex web of legislative measures that resulted from government interference has already been alluded to. Not surprisingly, a new, all-encompassing approach to land in South Africa was required. An overall land reform programme was embarked on under the Constitution of the Republic of South Africa, 1996, which provided for redistribution, tenure reform and restitution programmes. The Constitutional imperative for land reform was subsequently supported by the publication of a White Paper on South African Land Policy. One of the programmes, namely tenure reform, is aimed mainly at securing or upgrading insecure rights. Underlying this objective were the following points of departure:

- Rights should vest in the people who are the holders of land rights and not in institutions. This means, inevitably, that beneficiaries have a choice regarding their preferred form of tenure;
- In instances of group rights, the basic human rights of all members of the group must be protected, including the right to democratic decision-making processes and equality; and
- Systems of land administration which are popular and functional should continue.

Tenure reform faced two main challenges: (a) an immediate challenge to protect existing, de facto land rights; and (b) a long-term challenge to restructure land tenure in order to meet constitutional imperatives. Accordingly, a two-pronged approach was followed. On the one hand, legislation was promulgated to meet the immediate challenge to protect existing land rights for the duration of the tenure reform programme, while, on the other hand, a full-scale tenure reform programme was embarked on, mainly by way of promulgating new legislative measures. Not all of the measures related to or impacted on communal land as such, but then only those relating to communal land tenure will be discussed.

3 2 Indigenous communal tenure

3 2 1 Interim measures

Protecting existing de facto tenure was imperative in order to embark on and complete an overall tenure reform programme. Within this context, two legislative measures become relevant. On the one hand, the Upgrading of Land Tenure Rights Act, a measure employed prior to the new political dispensation and referred to earlier, still remained relevant. On the other hand, the Interim Protection of Informal Land Rights Act 31 of 1996 was specifically drafted to serve as a “holding system” for insecure rights.

The Upgrading of Land Tenure Rights Act coincided with the publication of the White Paper on Land Reform. As explained, depending on the nature of the right, the form of

68 S 25(5) provides for the redistribution of land, s 25(6) for tenure reform and s 25(7) for restitution.
69 (n 18).
tenure was either upgraded automatically or only after a prescribed procedure had been followed. Initially, when the Act was promulgated, the underlying idea was to promote individual ownership, especially within the township context. Since its commencement, the Act has been amended a number of times in an attempt to ensure security of a wider range of land control forms and not only individual ownership as such. The necessity for protecting *de facto* rights in the absence of tight monitoring systems and regulatory oversights in the former homelands was clear. The Interim Protection of Informal Land Rights Act was promulgated for this purpose. An “informal right” includes the use or occupation of, or access to land in terms of,

(a) any tribal, customary or indigenous law or practice of a tribe;
(b) the custom, usage or administrative practice in a particular area or community;
(c) the rights or interests in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established under an Act of Parliament;
(d) beneficial occupation\(^{73}\) of land for a continuous period of not less than five years prior to 31 December 1997; and
(e) the use or occupation of any erf as if the person is the holder of rights under Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, although that person is not formally recorded as such in a land rights register.

Protection lies in the fact that no person may be deprived of these rights without his or her consent.\(^ {74}\) Land rights held communally may be taken away in accordance with the customs of the particular community only.\(^ {75}\) Due to the complexity and slow pace of tenure reform, the application of this Act is extended on an annual basis.\(^ {76}\)

### 3 2 2 Overhauling the tenure security: The Communal Land Rights Act

Apart from the interim “holding system” that protected informal land rights Government proceeded with an overall tenure reform programme in which communal tenure was specifically earmarked. This process underwent rigorous developments which finally resulted in the rather controversial Communal Land Rights Act 11 of 2004.

(a) Background

Underlying motivations for the promulgation of the Communal Land Rights Act included, among others, the need to secure informal, insecure rights; to link secure rights with better administrative and governance systems; and to address gender equality

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\(^{71}\) See also Carey, Miller & Pope (n 17) 579; Van der Merwe & Pienaar “Land reform in South Africa” in Jackson & Wilde (eds) *The Reform of Property Law* (1997) 334 at 351-352.

\(^{72}\) S 1(a)(iii) of the Act.

\(^{73}\) This entails the occupation of land by a person openly, as if he or she is the owner of land, without force and without permission of the registered land owners: s 1(c).

\(^{74}\) S 2(1).

\(^{75}\) S 2(3).

\(^{76}\) See eg GN 98, *GG* 31843 of 6 Feb 2009.
within the communal tenure context. It was envisaged that these aims would ultimately result in a more modern system that would encourage economic investment and promote development in some of the poorest areas in the country.\(^7\)

The drafting of the Communal Land Rights Act and its passage through Parliament were cumbersome and contentious.\(^8\) In 1994 an effort was made to develop the Land Rights Bill, which aimed to upgrade customary rights by giving them statutory recognition without changing their essential customary character.\(^9\) The Bill proposed that beneficiaries would be given “protected land rights”, but that the Minister of Land Affairs would remain the nominal owner of the land. The holders of rights (being either individuals or groups) would control and manage their own rights. The registration of rights was not required.

However, the Land Rights Bill was shelved in May 1999, apparently because the role of traditional leaders had not been recognised satisfactorily.\(^10\) Some of the issues that the Legislature grappled with were whether land had to be transferred to traditional authorities or communities and, furthermore, where the decision-making powers would be located. When the August 2002 version of the Bill was gazetted, it proposed the transfer of registrable land rights to individuals, families and communities and divested tribal authorities of their land administration functions. This version of the Bill was vehemently opposed by traditional authorities,\(^11\) resulting in major re-drafting. Although the Communal Land Rights Act was passed in February 2004 and signed into law on 14 July 2004, it never commenced, as will be explained shortly.

(b) The Communal Land Rights Act 11 of 2004

(i) Securing of tenure

The Communal Land Rights Act is aimed at securing the tenure of communities and individuals by a two-stage process on the one hand, and by providing structures and entities to manage and control rights, on the other hand. The first stage entails a process in which insecure “old-order rights” are replaced, transformed or substituted by “new-order rights”. The second stage involves registering and recording these rights. An “old-order” right is any of the formal or informal, registered or unregistered rights alluded to above, resulting from pre-constitutional legislative measures and recognised by law, including customary law, practice or usage.\(^12\) Before an old-order right may be transformed, it is essential that a land rights inquiry is undertaken in order to determine what kind of right exists, who the holders are, how the right is exercised and what its scope is. The

\(^8\) One of the grounds on which the Act was constitutionally challenged, was indeed that the correct procedure had not been followed when it was adopted as law: see 3 above.
\(^10\) Kariuki (n 79) 10.
\(^11\) Mostert & Pienaar (n 77) 330.
\(^12\) S 1.
land rights enquirer thereafter compiles a report and submits it to the Minister of Rural Development and Land Reform. After considering all of the relevant elements, and in the light of the submitted report, the Minister exercises his or her determinational discretion under section 18 of the Act. Inevitably, the Minister has the final say as to what happens to a particular (old-order) right.

The second stage of securing tenure rights entails their registration. For this purpose an adapted registration system that fits into the existing system of title transfer through registration is employed. The registration of land rights follows the ministerial determination that took place under section 18 of the Act and depends on the preparation and approval of a communal general plan in terms of the Land Survey Act 8 of 1997. A communal land register also has to be opened in terms of the Deeds Registries Act 47 of 1937. Underpinning this particular approach to registration is the existence of clear, undisputed boundaries and concise survey data, elements that are seriously questioned by some commentators.

(ii) Role players

The Communal Land Rights Act specifically provides for land administration committees and land rights boards. A land administration committee represents the community and is responsible for, among other matters, the allocation and registration of land rights, establishing and keeping relevant registers, promoting and safeguarding the interests of the community, assisting in dispute resolution and liaising with the local authority, the land rights board and other relevant institutions. Decisions relating to the disposal of communal land have to be ratified by the land rights board. Although communities are generally empowered to establish land administration committees in a democratic fashion, where a community has a recognised traditional council, the powers and duties of a land administration committee may be exercised and performed by such a council. In this regard a traditional council must comply with section 22(4) and (5) covering the representation of vulnerable community members, including women, children, youths, the elderly and the disabled. The compilation and functions of land administration committees are contentious and form an integral part of the constitutionality challenge that will be addressed shortly.

Land rights boards function on a regional basis and are responsible for supervising the work of the land administration committee and for acting as an advisory channel. The

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83 These include among others all relevant laws relating to spatial planning, development and agriculture, as well as the old-order rights of all affected parties and the need for the promotion of gender equality: s 18(1)(e).
84 Mostert & Pienaar (n 77) 332.
85 S 6(b)(i).
86 S 6(b)(iii) read with s 1.
88 S 24.
89 Ss 21(1) and 22(2).
latter function works two ways, as the board advises the relevant communities on the one hand, and advises the Minister on the other.

(c) Constitutionality challenge

As soon as the Communal Land Rights Bill was published in a draft format, various aspects were criticised by academics and practitioners alike.\(^9\) The opposition continued while the Bill passed through Parliament until its constitutionality was challenged in October 2008. Aspects identified as being problematic were that the linking of a registration system with a land titling scheme that centred around individual title, was unsuited to traditional or communal lifestyles, as well as the fact that the Act did not acknowledge and reflect the “nested” system of land rights inherent in traditional customary communities. The employment of traditional councils to act as land administration committees was challenged for entrenching patriarchy and existing power relations. Other criticism focused on the nature and content of “new-order rights” and on the Minister of Rural Development and Land Reform’s sweeping powers in determining the outcome of “old-order rights” without guiding criteria.

The formal constitutional challenge was lodged in October 2008 in the Northern Gauteng High Court by the Kalkfontein, Makuleke, Makgobistad and Dixie communities.\(^9\) As far as procedural matters were concerned, they argued that the Act had been rushed through Parliament and that public hearings, as required by the Constitution, had not taken place. Substantive arguments centred on the role and function of traditional councils acting as land administration committees and on security of tenure for women. They argued that traditional councils are not democratically elected, yet have executive functions awarded to them by the Act. Consequently, within this context, the principles of democracy were seriously questioned. The communities also argued that the implementation of the Act, in its final form, would in fact make women’s tenure more insecure. This was linked to the composition of the land administration committee, on the one hand, and the employment of a traditional council to act as the land administration committee, on the other hand.

In October 2009, the North Gauteng High Court dealt in detail with the composition and role of the land administration committee, especially in instances where the traditional council fulfils this role. The Court elaborated on the practice and its implications, in general and for women in particular.\(^9\) It found that the Act infringed section 9 of the Constitution, dealing with equality, because some of the existing traditional councils had not been democratically elected and the interests of women, children, the elderly and the youth might not be represented in them.\(^9\) The Court further found that in relation to the communities concerned, it was possible under section 5(2) (dealing with the registration of new order rights), that the Minister could make a determination under section 18 that

\(^9\) Mostert & Pienaar (n 77) 320-321; Claassens & Cousins (n 87) 15-28, 67-69; Pienaar (n 87) 244-263.


\(^9\) Para [33] and further.

\(^9\) Para [42].
could place existing tenure at risk. In this light, section 2(1)(a), identifying the land to which the Act applied, was unconstitutional in so far as it concerned land already owned and securely held by communities. Various other sections of the Communal Land Rights Act were likewise found to be unconstitutional. However, not all of the sections listed as being unconstitutional were analysed in the judgement. Accordingly, the reason for their unconstitutionality is not clear.

Apart from those particular issues singled out in the judgement as being problematic and unconstitutional, objections have also been raised that the Act in its present form is not an embodiment of communal land rights and should for that reason alone be scrapped or amended.

On 11 May 2010, the Constitutional Court confirmed the order of the High Court. Essentially, it found the Act unconstitutional due to its incorrect tagging. Being a national Act that impacted also on provincial matters, more particularly on issues of customary law, Parliament should have followed the procedure set out in section 76 of the Constitution. Instead, it was tagged as a section-75 Act and therefore its passage through Parliament was incorrect. On this basis alone, the Act was found to be unconstitutional. Unfortunately the substantive matters, some of which were raised in the judgement of the High Court, were not at all canvassed in the Constitutional Court’s judgement. Arguments that the approach followed in the Act, as well as the institutions and bodies employed in securing title, were problematic and principally in direct conflict with Constitutional ideals of equality and tenure security, were thus not dealt with. As the Act had indeed been found to be unconstitutional without addressing the substantive matters alluded to above, it is possible that a similar Act may be drafted in future with a similar approach and content. Accordingly, the issue of constitutionality may again be raised in future.

94 Para [63].
95 See the court order: para [67].
96 S 2(1)(c) and (d) (scope of Act continued); s 2(2); (land designated by the Minister to which the Act applies); s 3 (juristic personality of community); s 4(2) (old-order rights deemed to be held by all spouses in marriage); s 5 (registration of communal land and new order rights); s 6 (transfer of communal land); s 9 (conversion of registered new order right into freehold ownership); s 18 (determination by the Minister); s 19(2) (requirements for community rules); s 20 (amendment of community rules); s 21 (establishment of land administration community); s 22 (composition of land administration committee); s 23 (term of office of land administration committee); s 24 (powers and duties of land administration committee); and s 39 (application of Act to other land reform beneficiaries).
97 Claassens & Cousins (n 87) 16-19.
98 Tongoane and Others v the Minister of Agriculture and Land Affairs and Others (case CCT 100/09) [2010] ZACC 10, per Ngcobo CJ. (The Department of Land Affairs and Agriculture had in the mean time been restructured and is now referred to as the Department of Rural Development and Land Reform.)
99 See paras [45]-[97].
100 Paras [111]-[112].
3.3 Coloured rural areas

In addition to the traditional communal areas referred to above, various rural coloured areas also existed when the new political dispensation dawned in South Africa. As already alluded to above, these areas, comprising about 18,000 square km, were held in trust for the communities by the Minister of Land Affairs and Agriculture. The Transformation of Rural Areas Act 74 of 1998 was subsequently promulgated to dismantle this holding system. The underlying idea of the Act is that the different communities should determine when and how the new dispensation in land holding should occur. Accordingly, change may be effected independently in the different areas. Two main categories of land are distinguished: trust land located in a township, and “the remainder”. When the Transformation of Rural Areas Act commenced, trust land situated in a township immediately vested in the relevant municipality. Land in “the remainder” is usually located outside townships and is used for grazing or agricultural production. This land may be transferred to an entity at any time prior to the expiry of the transitional period. An “entity” may be a municipality, a communal property association registered in terms of section 8 of the Communal Property Associations Act 28 of 1996, or another body or person approved by the Minister in general or in a particular case. Transfer of land is subject to the requirement that specific suitable provision is made relating to the “balance of security of tenure rights and protection of rights of use” of the residents collectively.

The procedure for the transformation of the “coloured” rural areas is subject to a timetable of which the commencement of the Transformation of Rural Areas Act and the transitional period as determined by the Minister, are two of the main markers. Timetables may differ from area to area since different dates may be determined for various board areas or portions of board areas. It is interesting to observe that most communities opted for communal ownership by way of community property associations

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101 See 2.3 above.
102 The main objective is thus similar to that of the Communal Land Rights Act, although the specific processes differ and a different kind of communal tenure prevails in the various areas.
103 S 10(2)(b).
104 S 2 of the Transformation of Rural Areas Act.
105 This would also include land vested in a municipality.
106 S 3(1)(a) of the Transformation of Rural Areas Act.
107 The Transformation of Rural Areas Act thus employs already existing mechanisms to effect the transformation.
108 Eg, for the whole area concerned.
109 S 1 of the Transformation of Rural Areas Act.
110 S 3(2) of the Transformation of Rural Areas Act.
112 The Minister determines each transitional period by way of publication of a notice in the Government Gazette.
113 Although this provision promotes the flexibility of the process, thereby enabling each community to determine its own tempo so to speak, it is extremely difficult to monitor the process, a fact which makes it difficult to track specific events.
and hardly any preference was shown for individual ownership. \textsuperscript{114} This is a clear indication that the “sense of community” is still very strong in these areas. This may well be a lesson from which the drafters of the Communal Land Rights Act may learn.

4 Conclusion

Communal tenure is embedded in many South Africans’ everyday existence. From the outset Government has been involved, directly or indirectly, in amending and interfering with communal tenure. The establishment of the former homelands and self-governing territories, linked with the race-based approach to land control, went a long way in adjusting and manipulating age-old concepts, thereby drastically distorting true elements of communal tenure. This legacy of apartheid, coupled with the characteristics of communal tenure and their dual dimension that entails some individual elements and some communal elements, pose interesting and difficult challenges for law reform. After 1994, a two-pronged approach to tenure reform was embarked on by protecting rights in the interim while overhauling tenure as a whole. The latest attempt to reform communal tenure, which resulted in the Communal Land Rights Act, has just been found to be unconstitutional by the Constitutional Court. Accordingly, after sixteen years of land tenure reform in South Africa, the Legislature is yet again forced back to the drawing board. The story of communal land tenure is indeed a never-ending story – a story of misunderstanding, of governmental interference and, recently, of constitutional challenge. What is happening today, has happened already, and will happen again in the future.